THE

ALL INDIA REPORTER

1925

DONATED
BY
SHRI AMAR NATH RAINA
(1910-1980)
Former Advocate General,
Jammu and Kashmir.

ALLAHABAD SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS
OF THE **ALLAHABAD HIGH COURT** REPORTED IN

(1) I. L. R. 47 ALLAHABAD (2) 23 ALLAHABAD LAW JOURNAL
(3) 6 LAW REPORTER, ALLAHABAD (4) 26 CRIMINAL LAW JOURNAL
(5) 85 to 90 INDIAN CASES

WITH

EXTRA JUDGMENTS

CITATION : A. I. R. 1925 ALLAHABAD

PRINTED AND PUBLISHED BY

V. V. CHITALEY, B.A., LL.B.,

AT THE "ALL INDIA REPORTER" PRESS,

NAGPUR, C. P.

1925

(All Rights Reserved.)

To

THE LEGAL PROFESSION

IN GRATEFUL RECOGNITION OF

THEIR WARM APPRECIATION AND SUPPORT

[redacted] UNIVERSITY
[redacted]
Acc. No. 17713
[redacted] Date [redacted] 1900
S102

ALLAHABAD HIGH COURT

1925

Chief Justice :

The Hon'ble Sir Edward Grimwood-Mears, *Kt.*, Bar-at-Law.

Puisne Judges :

The Hon'ble Sir Theodore Caro Piggott, *Kt.*, J.P., I.C.S.
" Mr. Cecil Walsh, K.C., Bar-at-Law, M.A. (Oxon), J.P
" " Benjamin Lindsay, J.P., I.C.S.
" " Louis Stuart, I.C.S., J.P., C.I.E.
" Dr. Shah Muhammad Sulaiman, M.A., LL.D., Bar-at-Law.
" Rai Bahadur Pandit Kanhaiya Lal, M.A., LL.B.,
" Mr. Alfred Edward Ryves, B.A., Bar-at-Law.
" Rai Bahadur Lal Gopal Mukerji, B.A., LL.B.,
" Mr. Sidney Reginald Daniels, B.A., I.C.S., Bar-at-Law.
" " Guy Pusonby Boys, Bar-at-Law.
" Rai Bahadur Lalit Mohan Banerji, M.A., LL.B. (*Offg.*)
" Mr. Earnest Horatio Ashworth, I.C.S. (*Offg.*)
" " Barjor Jamshedji Dalal, B.A., I.C.S., Bar-at-Law.

EDITORIAL COMMITTEE

DEWAN BAHADUR G. S. RAO, *Ex-Judge, High Court, Bombay.*
DR. SUDISH CHANDRA ROY, M.A., LL.B., Ph.D., *Bar-at-law, Calcutta.*
RAO BAHADUR V. R. PANDIT, *Bar-at-law, Nagpur.*
MR. E. VINAYAKA RAO, B.A., B.L., *Vakil, High Court, Madras. Editor, Journal Section.*
MR. V. V. CHITALEY, B.A., LL.B., *High Court Vakil, Nagpur.*

EDITORIAL STAFF

MR. S. G. GADGIL, B.A., LL.B., *High Court Vakil, Bombay.*
MR. G. B JOSHI, B.A., LL.B., *Pleader, Nagpur.*
MR. D. D. DATAR, B. Sc., LL.B., *Nagpur.*
MR. S. APPU RAO, B.A., B.L., *Nagpur.*

REPORTERS

Privy Council

(1) Dr. A. Majid, LL. D., *Bar-at-Law, London.*

Allahabad

(2) Mr. Saila Nath Mukerji, B.A., B.L., *Vakil, High Court, Allahabad.*

Bombay

(3) Mr. B. K. Desai, M.A., LL.B., *Advocate, High Court, Bombay.*
(4) Mr. S. C. Joshi, M.A., LL.B., *Advocate, High Court, Bombay.*
(5) Mr. B. D. Mehta, B.A., LL.B., *Vakil, High Court, Bombay.*

Calcutta

(6) Mr. Pramatha Nath Banerjee, M.A., B.L., *Vakil, High Court, Calcutta.*
(7) Mr. Narain Chandra Kar, B.L., *Vakil, High Court, Calcutta.*

Lahore

(8) Mr. Amolak Ram Kapur, B.A., (Hons.), LL.B., *Vakil, High Court, Lahore.*
(9) Mr. Kedar Nath Chopra, B.Sc., LL.B., *Vakil, High Court, Lahore.*

Madras

(10) Mr. P. R. Srinivasa Aiyangar, M.A., B.L., *Vakil, High Court, Madras.*
(11) Mr. N. Srinivasa Iyengar, M.A., B.L., *Vakil, High Court, Madras.*

Nagpur

(12) Mr. M. Bhawani Shankar Niyogi, M.A., LL.M., *Advocate, High Court, Nagpur.*
(13) Mr. K. V. Deoskar, B.A., B.L., *High Court Pleader, Nagpur.*

Oudh

(14) Mr. Surendra Nath Roy, M.A., LL.B., *Vakil, Lucknow.*

Patna

(15) Mr. Subal Chandra Muzumdar, M.A., B.L., *Vakil, High Court, Patna.*
(16) Mr. Laxmidhar Mahanty, B.A., B.L., *Vakil, Circuit Court, Cuttack.*

Rangoon

(17) Mr. A. J. Robertson, *Bar-at-Law, Rangoon.*

Sind

(18) Mr. P. K. Vaswani, LL.B., *Bar-at-Law, Karachi.*
(19) Mr. Kishinchand Wadhumal, B.A., LL.B., *Pleader, Karachi.*

THE ALL INDIA REPORTER
1925

ALLAHABAD HIGH COURT
NOMINAL INDEX

(478 Cases)

Absence of Star denotes Cases of Provincial or Small Importance.
★ Indicates Cases of Great Importance.
★★ Indicate Cases of Very Great Importance.

A

Abbas Ali Khan, Md. v. Sahu Gokul Chand 52
*Abdul Karim v. Ram Kishore 327
Abdullah Khan, Md. v. Kundan 817
Abdul Majid v. Ala Bux 376
Abdul Qaiyum Khan v. Emperor 99
Abdul Rab Md. v. Khodaija Bibi 457
*Abdul Rahim Khan v. Ram Bharos Ojha 6
**Abdul Rahman v. Abdul Rahman 380 F. B.
*Abdul Wahad v. Emperor 223
Abdul Wahid v. Hatim Ali 554
Abhainandan Prasad v. Bhagwan Datt Pathak 765
Abhainandan Prasad v. Pashpat Nath Pande 449
Aishah, Mt. v. Abdul Ghani 95
*Ajudhia Prasad v. Emperor 664
*Akbar Ali v. Raja Bahadur 670
*Ali Hammad v. Ghurpattar Singh 454
Amar Singh v. Mt. Ram Dei 802
*Ambika Prasad v. Madho Prasad 621
Ameraj Singh v. Emperor 306
Amir v. Emperor 498
Amir Haidar v. Ali Ahmad 424
*Amjad Khan v. Shafiuddin Khan 203
Ammar v. Govind 465
*Anantoo v. Ramrup Tiwari 692
*Anrudh Singh v. Mt. Rupa Kunwar 601
Azimuddin v. Emperor 307
**Aziz Banu v. Md. Ibrahim Husain 720
Azmatullah Khan v. Ahmad Ali 379

B

Babu Ram v. Banke Behari Lal 426
*Babu Ram v. Emperor 396
Badri Das v. Hoshiar Singh 288
*Badri Prasad v. G. I. P. Railway 144
*Bahadur v. Moti Chand 580
**Bahadur Lal v. Kamleshar Nath F. B. 624
Bahal Kuar v. Narain Singh 184
Bahoru v. Emperor 769
Baijnath Das v. Balmakund 137
**Baijnath Kedia v. Emperor F. B. 195
Baijnath Pandan v. Estate of E. C Dennet 400
Bakha Singh v. Ram Narain 133
Balaram Das-Fakir Chand v. G. I. P. Ry. 562
*Baldeo v. Bhagwan Misir 241
Baldeo Ram v. Kunkun Ram 808
Banarsi Das v. Municipal Board of Amroha 234
Bansidhar v. Dulhatia 483
Banwari Lal v. Municipal Board of Cawnpore 276
Basanti v. Emperor 245
Bechan Teli v. Emperor 614
**Bechu Pande v. Mt. Dulhma 8
Begg Sutherland & Co., *in re.* 535
Bengal-N. W. Ry. v. Manorath Bhagat-Dhiam Ram 172
Bhagwana v. Shib Sametri Prasad 199
Bhagwan Das v. Allan Khan 28
Bhagwan Das v. Emperor 218
Bhagwan Das v. Saddiq Ahmad 318
Bhagwan Das v. Suraj Prasad 146
Bhagwati Singh v. Gurcharan Dube 96
Bhagwat Prasad Misra v. Baldeo Prasad Misra 593
*Bhakta Shiromani v. Seetal Nath 680
Bhikki Mal v. Raghubir Singh 811
*Bhimmi v. Pershadi 392
Bhola v. Emperor 62
Bhola Singh v. Banwari 59
Bhup Narain Rai v. Radha Krishna 193

Bhuta, Mt. v. Bisheshar Singh 432
Bikramjit Rai v. Darshan Das 141
*Bilas Singh v. Emperor 737
*Bindraban v. Ram Narain 330
Birj Lal v. Mahomed Ibrahim 824
*Bisesar Ram-Dassi Ram v. Har Kishen-Pahlad Rai 412
Bishen Sahai v. Chhotey Lal 119
Bishnath Singh v. Basdeo Singh 171
*Bishunath Rai v. Jodhi Rai 120
Budhan v. Emperor 694
*Budh Sagar v. Bishun Sahai 366

75 C

*Chander Sen v. Mohar Singh 538
Charan Singh v. Emperor 798
*Chhotey Lal v. Emperor 220
Chittar Singh v. Emperor 303
**Chunni Lal v. Sheo Charan Lal 787
*Chunni Lal-Kalyan Das, *in re.* 287
**Chunni Lal-Kalyan Das, *in the matter of* 469

82 D

Dalip v. Khazan Singh 362
Dalmir Singh v. Joti Prasad 698
*Dannu Singh v. Emperor 227
Darbari Lal v. Emperor 591
*Daud Khan v. Emperor 673
Daulat v. Sankatha Prasad 324
*Daulat Ram v. Kanhaiya Lal 419
Daya Nand v. Emperor 298
*Dayaram v. Ram Narain Pandey 623
Daya Ram v. Sita Ram 206
Debi Charan v. Raghubir 674
Debigir Tapdhari v. Emperor 322
Dhanukdhari Mani v. Mt. Piari 481
Dhum Singh v. Emperor 448
Dhunde Chaudhri v. Municipal Board 699
Dikshit and Co. v. Mathura Prasad 71
*Din Dayal v. Emperor 443
Dipchand v. Mahomed Khalil 584
*Dip Narain Rai v. Lachhman Upadhiya 479
*Dip Narain Singh v. Jag Mohan Ahir 576
Dulli v. Emperor 305
Dungar v. Jahangir 775
Durga Prasad v. Gangadin 502
Durga Prasad-Badri Prasad v. B.B. and C. I. Ry. 780
Durga Ram v. Har Kishen Dass 564
*Dwarka Das v. Mahomed Ashfaqullah 117
Dwarka Dhish v. Keshav Prasad Singh 266

109 E

East Indian Railway v. Brij Kishore 675
E. I. Ry. Co. v. Fazal Elahi 273
——— v. Jit Mal-Kallo Mal 280
——— v. Tota Ram-Pirbhu Dayal 384
*Emperor v. Autar 315
——— v. Chanda 126
——— v. Kutroo 434
——— v. Madho Singh 318
——— v. Mahadeo 388
——— v. Raghunath Venaik 165
——— v. Ram Din 292
*——— v. Sital Prasad 313

121 F

Fakhruddin Mahomed Shah v. Rahimullah Shah 458
Fakir Muhammad v. Brij Narain Mahrotra 785
Faqir Mahomed v. Bhaggu Khan 244
Faqir Ullah v. Hikmat Ullah 569
Fateh Chand v. Emperor 606
Fateh Lal v. Sher Singh 264
Fateh Singh v. Gopal Narain Singh **F B 637
Fazal Husain v. Fazaluddin 291

129 G

Gajadhar Pande v. Jadubir Pande 180
*Gajadhar Singh v. Hari Singh 421
Gajendra Singh v. Durga Kumari **F B 503
*Gajraj Singh v. Emperor 537
*Gajraj Singh v. Ram Anjore Singh 668
Ganesha v. Emperor 4
Ganeshi Lal v. Nobin Chandra Bose 36
*Ganeshi Lal Harnarain v. Debi Das 267
*Ganesh Prasad v. Bhagelu Ram 773
*Ganesh Rai v. Bhushi Rai 69
Ganga v. Mahmud-un-nissa Begam 761
Ganga Chamar v. Bindesari Rai 615
Ganga Devi v. Ram Prasad 551
*Gangajee v. Sat Narain Lal 572
Ganga Prasad v. Mt. Kishni 466
Ganga Ram v. Lachman Singh 176
*Gaya Prasad v. Mathu Lal-Budha Lal 202
Ghasi v. Mt. Bharto 53
*Ghumna v. Ram Chandra Rao 437
Ghuria v. Baneswar 30
Girdhari Lal v. Khare Prasad 795
Girdhari Lal v. Zorawar Singh 57
Gobind v. Ammar 194
Gokul Prasad v. Debi Prasad 311
Gopal Das v. Banmali Lal 85
*Gopi Koeri v. Mt. Raj Roop Koer 190
Gopi Nath v. Ram Nath 356
G. I. P. Ry. v. Radhay Mal Manni Lal 656
Gudri Singh v. Parsotam Das 395
Gulab v. Emperor 667

Gulab Deb v. Vaish Motor Company 570
Gulab Rai v. Sundar Lal 243
Gulab Singh v. Emperor 751
Gulzari Lal v. Har Prasad 97
Gupta Nand Bharthi v. Hari Shankar 39

164 H

*Hafiz Nehal Ahmad v. Ramji Das 620
Haji Ali v. Emperor 678
**Haji Sheikh Bodha v. Sukhram Singh F B 1
*Hakim Ullah v. Karim Bux 393
*Harakh Chand v. Ganga Prasad 371
Harbaksh Singh v. Dal Bahadur Singh 155
*Harbans Singh v. Rajinder Kuar 277
Har Bhajan Lal v. Har Charan Lal 539
**Harihar Prasad v. Ram Daur 17
Harish Chandra v. Mt. Kastola Kunwar 68
*Har Narain v. Emperor 239
Har Prasad v. Gulzari Lal 651
**Har Prasad v. Keval 26
Har Sarup v. Emperor 753
Hazari v. Ram Dular 702
Hazari Lal v. Abbas Mirza 360
*Hazari Lal v. Ram Lal 813
Hira Lal-Umrao Singh v. Sri Ram-Brij Mohan Lal 102
Hirdey Narain Rai v. Jagadish Narain 125
Hulasi v, Narain Das 822
*Husain Baksh v. Mahfuzul Haq 559

185 I

Imdad Hussain v. Mirza Haidar Beg 135
*Imtiaz-un-nissa v. Chuttan Lal 236
Iqbal Ahmad v. Suraj Bali 210
Ishwar Datt v. Mahesh Datt 747
*Ishwari Prasad v. Babunandan Shukul 495
*Ishwar Prasad v. Bishunath Prasad Singh 567

191 J

*Jagannath Prasad v. Jado Rai 352
Jagat Narain Dube v. Nageshar Prasad Tiwari 663
Jagat Pande v. Sarawan Pande 404
Jageshwar Prasad v. Suraj Bali Singh 16
Jagmohan Agrahri v. Prag Ahir 618
*Jaideo Prasad v. Ghasi 646
Jai Mangal Chand v. Ganpat Chand 541
Jai Singh v. Chiranji Lal 703
Jambu Das v. Jai Prakash 47
**Janki Das-Gobind Ram v. Secy. of State 10
Jaswant Rao v. Kashi Nath Rao 253
Jaunpur Sugar Factory Ltd., *in the matter of* 658
Jhabba Lal v. Debi Ram 679
*Jhandu Lal-Mithu Lal v. Mt. Wilayati Begum 442
Jhau Lal v. Emperor 310
Jhunni Lal v. Natha 594
*Jodha Singh v. Gokaran Das 622
Jokhu Singh v. Chunnoo Lal 218
*Jumna Das v. Kunwar Bai 447
Jwala Prasad v. Irshad Muhammad Khan 50
Jwala Prasad v. Sheikh Chuttan 328

212 K

Kachauri Mal-Kalyan Mal v. Wali Mahomed-Abdul Latif 154
*Kali Charan Singh v. Bageshra Kunwari 585
Kalika Singh v. Ram Lal Singh 378
Kalka v. Emperor 291
Kallu Mal-Dhakkan Lal v. Bhawani Das-Rekhali Das 742
Kalyan Rai v. Jagannath 130
Kamoda Singh v. Ramchand 719
*Kandhai Lal v. Debi Prasad 399
*Kandhaiya Singh v. Kundan 486
Kanhai v. Amrit 499
**Kanhaiya Lal v. Mt. Gaura 19
Kanhaiya Lal v. Niranjan Lal 367
Kaniz Fatima, Mt. v. Imamuddin 704
Kanji Mall v. Durga Prasad 555
Karan Singh v. Ram Sahai 246
Karimullah Sheikh v. Gudar Koeri 56
Kashi Nath v. Emperor 518
Kehar Singh v. Jahangir Singh 487
Kewal v. Tufail Ahmad 592
*Kharak Singh v. Laccham Singh 293
Kharbar v. Abdul Raoof 815
Khazan Singh v. Umrao Singh 44
Khem Singh v. Raghubir Singh 578
**Khub Lal v. Bishambhar Sahai 103
Khudayar Khan v. Rahat Khan 446
*King v. King 237
Kirtarath Gir v. Muthara Prasad Ram 72
*Kishori Lal v. Emperor 409
*Kishori Mohan v. Chhanga Lal 187
Kishun Ahir v. Saran Ahir 553
Kuber Upadhia v. Ramakar Dat Upadhia 351
Kulsum Bibi v. Mahomed Ismail 677
Kumli, Mt. v. Emperor 73

245 L

Lachhman Dass-Narain Dass, *in the matter of* 115
*Lachhman Prasad-Babu Ram, *in the matter of* 385

*Lachman Prasad v. Munia 759
Lachmi v. Ram Bahadur 275
Lachmi Narain v. Mooli 571
Lahori v. Emperor 647
**Laijam Singh v. Emperor 405
Lakhan Singh v. Lal Singh 205
Lakshmi Chand v. Lila Dhar 745
*Lalji v. Emperor 308
Lalla Babu v. Lal Bahadur 565
*Lallu Singh v. Raghunandan 794
*Lalman v. Fazal Muhammad Khan 200
Lalman v. Kalka Prasad 213
Lodai Ram v. Sukhdeo Koeri 776

260 M

Madho Dass v. Maharajah of Benares 252
Madho Lal v. Banarsi Das 98
Madhori Saran v. Parbati 552
Mahadeo Prasad v. Anandi Lal 60
Mahadeo Prasad v. Basant Lal 746
Mahadeo Prasad v. Sooraj Prasad 682
Mahadeo Rai v. Jan Muhammad 341
*Mahatab-un-nissa, Mt. v. Rifaqat Ullah 474
Mahfuz Ali v. Radha Kishen 297
*Mahipal Singh v. Athal Singh 5
Mahip Narain Pandey v. Mannu Singh 546
Mahomed Akbar v. Emperor 283
——Habibullah v. Tikam Chand 276
——Hasan v. Emperor 175
——Hashim v. Radha Kishun 687
——Husain v. Emperor 295
*——Ibrahim v. Mt. Altafan 24
——Naqi v. Hargu Lal 164
Makhan Lal v. Sohan Lal 331
Makhan Lal-Ram Sarup, *in the matter of* 298
Makhan Lal v. Kanhaiya Lal 688
Malik v. Emperor 282
Malkhan Singh v. Emperor 226
Manga v. Changa Mal 131
*Manki Kunwar v. Kundan Kunwar 375
*Manni Lal v. Radhey Gopalji 602
Manohar v. Mangal Das 800
Maqsud Ali v. Abdullah 342
Mata Din v. Anand Madho 812
Mathura Das v. Ramraj Singh 240
*Mazhar Ali, Mahomed v. Mt. Bijja Begum 652
*Mohan Lal v. Bhuteshwar 142
*Mohan Singh v. Emperor 413
Motilal v. Bishambhar Nath 431
Motilal v. Emperor 540
Motilal v. Yar Mahomed 275
Moti Ram v. Emperor 410
Mukha v. Mitter Sen 336
*Mulay v. Balgovind 456
Mulchand v. Rajdhar 735
*Mumtaz-ud-Daula v. James R. R. Skinner 263
Muneshar Tewari v. Ram Narain Tewari 820
Munno Devi v. Municipal Board, Agra 415
Munshi Ram v. Bhagwant 697
Murari Lal v. E. V. David 241
Murlidhar v. Mahboob Khan 644
Musaddi Lal v. Chhotu 198
*Muzaffar Husain v. Mahomed Yaqub 289

308 N

Nadir Husain v. Sadiq Husain 361
Nagar v. Khase 440
*Nagina Rai v. Sangam Rai 67
Nand Ram Singh v. Hari Saran Das 100
Nanhe Lal v. Emperor 301
*Nanhe Mal v. Jamil-Ur-Rahman 316
*Narain v. Jagan 42
Narain Das v. Bankim Chandra Deb 194
*Narain Das v. Chiranji Lal 364
Narain Dutt Tiwari v. Rudra Dutt Bhatt 654
Narain Singh v. Emperor 129
Narain Singh v. Gajraj 345
Nathji v. Languria 272
*Nathu v. Ram Sarup 335
Nathu Mal v. Emperor 309
*Naunihal Singh v. A. G. Skinner 707
Nehal Singh v. Jagannath Das 743
Net Singh v. Receiver, Gajraj's Estate 467
Niadar v. Ramji Lal 549
Nihal Singh v. Chanda Kunwar 358
Nihora Khan v. Mathura Khan 78
Nur Bibi, Mt. v. Ali Ahmad 550

330 O

Oon Mahomed v. Bint Zohra 645

331 P

Panchaiti Akhara v. Beni Bahadur Singh 587
**Parbhu Dayal Singh v. Tirbhuwan Singh 425
Parbhu Lal v. Chattar 557
**Parmanand Pandit v. Mata Din Rai 427
Parsiddhan Rai v. Dhaneshar Rai 818
Peare Lal v. Jhabba Lal 66
Peerji Mohib Ali Shah v. Ram Chander 796
*Phool Singh v. Gobind Koer 37
Pita v. Emperor 285
Pitam Lal v. Balwant Singh 556

Prag v. Bhagwan Din 734
*Prem Narain v. Jagdamba Sahai 762
Puran v. Khiali Ram 701

344 Q

Qurban Ali v. Sh. Majid Husain 63

345 R

*Rafat-un-nissa, Begam v. Husaini Begam 215
Rafiq v. Shankar Lal 718
**Raggha v. Emperor F. B. 627
Raghubir Saran Das v. Ram Das 348
Raghunandan Prasad v. Emperor 290
Raghunath Prasad Singh v. Lachhmi Narain Singh 394
Raghunath Singh v. Mahabir Prasad 439
Raghunath Upadia v. Emperor 311
Raghuraj Singh v. Sham Dei 51
Raja Babu v. Balmukund 214
Raja Devi v. Mahomed Yaqub 411
Rajai Singh v. Randhir Singh 643
*Rajaram Dhar Dube v. Jadunandan Dhar Dube 758
*Rajrup Kunwar v. Gopi 261
Ram Adhar v. Bhagwan Singh 209
Ram Adhin v. Ram Bharose 182
Ram Autar v. Emperor 478
*Ram Badan Singh v. Ram Pargash Singh 123
*Ram Baran Chaube v. Bhagwati Pandey 804
Ram Baran Singh v. Mufassil Bank, Ltd. 206
*Ram Brichh Singh v. Chhakauri Singh 748
*Ram Charan v. Lal Bihari Varma 752
Ram Charan Das v. Emperor 544
*Ram Charan Sahu v. Salik Ram Sahu 662
Ram Dulare v. Sahdeo 189
Rameshwar v. Govind Prasad 473
Rameshwar Prasad, *in the matter of* F. B. 501
Ram Ganesh Rai v. Rup Narain Rai 34
*Ram Ghulam v. Ram Chandra 325
*Ram Ghulam Singh v. Emperor 401
*Ram Gopal-Mool Chand v. Income-tax Commissioner 403
Ram Jatan Tiwari v. Radha Kishun Tiwari 15
*Ram Kishen v. Baldeo Koeri 247
Ram Lal v. Md. Amir Mustafa Khan 700
Ram Lal v. Municipal Board, Budaun 251
*Ram Narain v. Nihal Singh 488
Ram Nath v. Emperor 230
*Ram Prasad v. Emperor 250
Ram Prasad v. Rajjan 128
Ram Prasad Singh v. Babu Lal Sonar 417
Ram Prasad Singh v. Jagtamba Prasad Singh 547
Ram Prasad Singh v. Janki Prasad Singh 93
Ram Prasad Singh v. Nepal Singh 420
Ram Rekha v. Ram Sunder Dube 295
*Ramrup Goshain v. Ramdhari Bhagat 683
Ramrup Pande v. Sarju Pande 786
*Ram Saran v. Seo Pratab Singh 605
*Ram Sarup v. Arya Samaj, Dhampur 337
**Ram Sarup v. Gaya Prasad F B 610
Ram Sarup v. Gaya Prasad 810
Ram Sarup v. Mt. Kataula 211
Ram Sarup Chaube v. Ram Dular Pande 736
*Ram Sewak v. Emperor 313
Ram Sukh v. Emperor 299
Ram Sunder Misra v. Jai Karan Singh 271
**Ram Ugrah Singh v. Benares Hindu University 253
*Ramzan Baksh v. Mahomed Ishaq 436
*Ramzani v. Emperor 319
Ranjit Singh v. Ramman Singh 781
*Ratni Bai v. Ghasi Ram 344
Ravi Chander Sahai v. Sunder Singh 640
*Ravi Nandan Prasad v. Jagar Nath Sahu 459
Roshan Lal v. Bashir Ahmed 138
*Rudrapal Singh v. Matabadal Singh 484
Rudra Prasad Pandey v. Mathura Prasad Pandey 566
*Rudra Pratab Singh v. Sarda Mahesh Prasad Singh 588
*Rudra Pratab Singh v. Sharda Mahesh Prasad Singh 471

412 S

Sagar Singh v. Sri Ram 491
Sagwa v. Bhagwan Das 119
*Sakalraj Dube v. Mt. Jadu Rani 58
*Salamat Ali v. Guj Kumar Chand 574
Saliman, Mt. v. Abdul Aziz 777
Samir Khan v. Basi Ram 821
Sanokhan v. Emperor 472
Sant Lal v. Beni Prasad 340
*Santu v. Abhai Nandan Prasad 32
Sanwal Das v. Ali Madhi 174
Sanwalia v. Nathi Lal 561
Sarju Prasad v. Bhagwati Prasad 542

*Sarju Prasad v. Mangal Singh 339
*Sarvi Begam v. Ram Chander Sarup 778
*Sat Narain Sahu v. Bindesri Prasad 453
Shagun Chand v. Asa Ram 807
Sham Devi, Mt. v. Bhagwant Dayal 353
*Shankar Sahi v. Baichu Ram 333
Sheobodh Ram Teli v. Shiva Prasad 293
Sheodarshan Singh v. Beni Choudhari 492
Sheopujan Misra v. Mangu Rai 324
Shiam Lal v. Koerpal 179
——— v. Mool Chand 672
——— v. Radha Ballabh 770
*——— Joti Prasad v. Dhanpat Rai 768
Shiam Sundar Ram v. Ram Het 130
Shib Charan Das v. Kharka 346
**Shib Deo Misra v. Ram Prasad 79
Shib Ram v. Faqira 705
*Shiva Nath Prasad v. Tulshi Ram 801
Shyam Lal v. Badri 31
*Shyam Lal Shah, *in the matter of* 648
Siddiq Ali v. Chanda 49
*Sikandar Singh v. Bachchu Pande 54
*Sital Prosad v. Dukhi Lal 40
Sital Rai v. Ram Khelawan Pande 543
*Sitaram v. Peare 558
*Sita Ram v. Beni Prasad 221
Skinner, A. G. v. Mukarram Ali Khan 77
*Sri Newas v. E. I. Ry. Co. 823
Sukhai v. Emperor 676
Sukhdeo v. Ram Newaz 65
Sukurwa v. Nazir Ahmad 121
Sultan v. Hardhiyan 548
Sundar Bibi v. Rajendra Narain Singh 389
Sundar Rai v. Suraj Bali Rai 783
Sunder Khatik v. Mahadeo Pande 282
Surajpal Singh v. Saheb Singh 323
Surja v. Joti Prasad 681
*Swarath Ram-Ram Saran v. Ram Ballabh 595

462 **T**

*Tawassul Husain v. Wajid Ali 140
Tej Singh v. Mitter Sen 784
Thakur Prasad v. Gulab Kunwar 563
Tufail Ahmad v. Emperor 301
*Tula Ram v. Bhup Singh 691
*Tully v. Emperor 185
Tulshi Ram v. Daya Ram 604

469 **U**

Umar Daraz v. Sri Ram Das 355
*Umrao Singh v. Pirthi 369
*Union Bank, Allahabad, *in the matter of* 519

472 **V**

*Vakil, A, *in the matter of* F B 641
**Vakil, *in the matter of* F B 247

474 **W**

*Wajid Ali Khan v. Puran Singh 108

475 **Z**

Zabar Singh v. Ram Sarup 477
Zahur Hasan, Syed v. Mt. Shaker Banoo 29
Zorawar Singh v. Bhagwan Singh 590

478

THE

ALL INDIA REPORTER

1925 ALLAHABAD

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables :—

TABLE No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II.—This Table shows serially the pages of all NON-I. L. R. JOURNALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER 1925, with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES for 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 47 ALLAHABAD.

Column No. 2 denotes corresponding references of the All INDIA REPORTER,

I. L. R. 47 Allahabad=All India Reporter.

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R		
1	1925	*A*	57	55	1924	*A*	795	94	1925	*A*	71	158	1925	*PC*	55
2	1924	"	785	57	1925	"	276	98	"	"	137	165	"	"	33
7	"	"	865	59	"	"	305	100	"	"	108	169	"	*A*	26
8	"	"	875	63	"	"	275	114	"	"	129	172	"	"	17
10	"	"	790	64	"	"	290	118	"	"	121	179	"	"	154
13	"	"	792	66	"	"	138	121	"	"	458	181	"	"	182
17	"	"	884	68	"	"	115	122	"	"	180	186	"	"	155
31	1925	"	1	73	"	"	133	127	"	"	19	205	"	"	165
39	"	"	223	78	1924	"	612	136	"	"	273	217	"	"	146
44	"	"	187	86	1925	"	117	140	"	"	267	234	"	"	10
50	"	"	237	89	"	"	119	147	"	"	285	243	"	"	24
53	"	"	16	90	"	"	60	151	"	*PC*	36	250	"	*PC*	63

I. L. R. 47 Allahabad=All India Reporter.—(*Concld.*)

ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.			ILR	A. I. R.		
263	1925	*A*	221	385	1925	*PC*	176	555	1925	*A*	426	770	1925	*A*	683
267	"	"	175	389	"	*A*	454	557	"	"	565	778	"	"	546
268	"	"	230	391	"	"	371	561	"	"	486	780	"	"	543
276	"	"	185	403	"	"	375	563	"	"	495	782	"	"	570
280	"	"	303	405	"	"	309	572	"	"	442	784	"	"	595
284	"	"	299	409	"	"	318	575	"	"	434	795	"	*PC*	264
287	"	"	307	411	"	"	280	579	"	"	401	803	"	*A*	707
288	"	"	283	412	"	"	288	582	"	"	427	823	"	"	720
291	"	"	241	416	"	"	421	589	"	"	580	849	"	"	549
294	"	"	215	421	"	"	327	597	"	"	555	850	"	"	778
298	"	"	195	424	"	"	358	600	"	"	420	853	"	"	768
304	"	"	236	427	"	"	385	604	"	"	651	855	"	"	540
306	"	"	315	430	"	"	261	606	"	"	396	859	"	"	762
310	"	"	501	434	"	"	259	611	"	"	388	864	1926	"	29
313	"	"	277	450	"	"	355	616	"	"	465	867	1925	"	759
319	"	"	466	452	"	"	618	619	"	"	437	872	"	"	547
320	"	"	378	456	"	"	271	623	"	"	412	873	"	"	802
322	"	"	293	459	"	*PC*	169	625	"	"	487	878	"	"	773
324	"	"	361	462	"	*A*	419	626	"	"	584	881	"	"	552
327	"	"	366	466	"	"	479	629	"	"	498	883	"	*PC*	272
330	"	"	360	470	"	"	449	631	"	"	385	900	"	*A*	652
332	"	"	293	479	"	"	459	635	"	"	424	904	"	"	615
335	"	"	263	490	"	"	339	637	"	"	508	910	"	"	747
338	"	"	325	493	"	"	681	667	"	"	394	913	"	"	691
341	"	"	614	494	"	"	446	669	"	"	519	915	"	"	677
342	"	"	337	496	"	"	389	703	"	*PC*	204	916	"	"	566
348	"	"	346	501	"	"	602	715	"	*A*	535	917	"	"	807
351	"	"	367	505	"	"	483	722	"	"	537	920	"	"	561
353	"	"	644	509	"	"	436	724	"	"	562	921	"	"	558
355	"	"	324	511	"	"	478	728	"	"	379	923	1926	"	179
357	"	"	351	513	"	"	380	729	"	"	641	925	1925	"	569
359	"	"	620	533	"	"	291	733	"	"	694	926	"	"	734
361	"	"	364	534	"	"	376	738	"	"	411	929	"	"	585
365	"	"	578	538	"	"	280	741	"	"	431	932	"	"	783
368	"	"	469	541	"	"	341	743	"	"	404	934	"	"	737
372	"	"	287	543	"	"	588	745	"	"	400	944	"	"	559
374	"	"	356	546	"	"	622	746	"	"	813	948	"	"	654
377	"	"	247	549	"	"	656	751	"	"	804				
381	"	"	333	552	"	"	499	756	"	"	787	952	"	"	467

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

23 Allahabad Law Journal=All India Reporter.

ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.			ALJ)	A. I. R.		
1	1925	*A*	195	133	1925	*A*	283	261	1925	*PC*	105	444	1925	*A*	426
5	"	"	301	136	"	"	307	273	"	"	118	447	"	"	491
8	"	"	299	137	"	"	301	283	"	*A*	449	449	"	"	465
10	"	"	295	138	"	"	361	291	"	"	421	451	"	"	537
12	"	"	263	141	"	"	366	296	"	"	412	453	"	"	546
14	"	"	303	144	"	"	360	297	"	"	419	455	"	"	498
18	"	"	250	145	"	"	293	300	"	"	443	457	"	"	518
20	"	"	298	148	"	"	322	304	"	"	392	458	"	"	588
21	"	"	311	149	"	"	297	307	"	"	427	461	"	"	486
23	"	"	276	151	"	"	371	314	"	*PC*	1	463	"	"	565
25	"	"	315	161	1924	*PC*	226	329	"	*A*	483	467	"	"	471
28	"	"	277	168	"	"	247	332	"	"	479	469	"	"	641
32	"	"	308	172	"	"	213	336	"	"	487	473	"	"	519
34	"	"	293	176	1925	"	33	337	"	"	389	501	"	"	555
35	"	"	306	179	"	"	36	342	"	"	436	503	"	"	549
37	"	"	337	183	"	*A*	375	344	"	"	602	505	"	"	584
40	"	"	298	185	"	"	309	349	"	"	442	507	"	"	694
41	"	"	316	187	"	"	311	352	"	"	401	512	"	"	547
43	"	"	310	189	"	"	318	356	"	"	396	513	"	"	604
44	"	"	351	191	"	"	289	361	"	"	415	515	"	"	544
46	"	"	325	193	"	"	288	364	"	"	434	518	"	"	556
49	"	"	346	196	"	"	327	368	"	"	420	519	"	"	553
51	"	"	384	198	"	"	355	373	"	"	542	521	"	"	543
52	"	"	367	200	"	"	275	376	"	"	437	523	"	"	570
55	"	"	324	201	"	"	358	379	"	"	385	525	"	"	558
56	"	"	364	204	"	"	333	385	"	"	380	527	"	"	569
59	"	"	344	207	"	"	261	398	"	"	656	529	"	"	615
62	"	"	313	209	"	"	618	401	"	"	439	534	"	"	552
63	"	"	287	212	"	"	280	404	"	"	424	536	"	"	564
65	"	"	469	215	"	"	291	405	"	"	622	537	"	*PC*	139
68	"	"	319	216	"	"	376	409	"	"	580	548	"	"	146
73	"	"	318	219	"	"	253	417	"	"	388	555	"	"	155
76	1924	*PC*	144	231	"	"	341	421	"	"	478	558	"	*A*	551
85	1925	"	18	233	"	"	459	422	"	"	394	560	"	"	561
97	"	"	93	242	"	"	345	424	"	"	499	561	"	"	503
104	"	*A*	324	244	"	"	454	428	"	"	457	585	"	"	677
105	"	*PC*	83	246	"	"	335	430	"	"	411	587	"	"	647
109	"	"	80	248	"	"	340	433	"	"	473	589	"	*PC*	132
113	"	"	91	249	"	"	362	435	"	"	379	601	"	*A*	683
115	"	"	63	251	"	"	271	436	"	"	448	608	"	"	658
125	"	*A*	247	253	"	"	282	438	"	"	400	615	1926	"	179
129	"	"	356	254	"	"	339	440	"	"	404	617	1925	"	559
131	"	"	313	257	"	"	331	442	"	"	431	621	"	"	813

23 Allahabad Law Journal=All India Reporter—(*Concld.*)

ALJ	A. I. R.			ALJ	A. I. R.			ALJ	A. I. R.			ALJ	A. I. R.		
625	1925	*A*	595	751	1925	*PC*	97	874	1926	*A*	82	941	1925	*A*	637
634	"	*PC*	176	755	"	*A*	590	877	"	"	157	946	1926	"	35
636	"	"	130	757	"	"	768	878	"	"	145	948	"	"	17
639	"	"	170	760	"	"	778	880	"	"	65	950	1925	"	770
643	"	"	168	763	"	"	762	882	"	"	89	956	1926	"	30
645	"	*A*	562	768	"	"	720	885	"	"	70	961	"	"	161
648	"	"	467	790	"	"	798	888	"	"	20	965	"	"	113
653	"	"	585	792	1926	"	29	889	"	"	47	975	1925	"	735
655	"	"	539	795	1925	"	759	891	"	"	55	977	1926	"	93
656	"	"	566	799	"	*PC*	196	894	1925	"	591	981	"	"	1
657	"	"	654	803	"	"	211	896	1926	"	142	990	"	"	57
662	"	*PC*	181	806	"	"	188	897	"	"	27	993	"	"	169
667	"	"	184	815	"	"	203	900	"	"	155	997	"	"	202
674	"	*A*	804	817	"	*A*	773	901	"	"	36	1000	1925	*PC*	204
679	"	"	540	821	"	"	627	909	"	"	79	1010	"	"	244
682	"	"	680	836	"	"	802	915	"	"	67	1016	"	"	298
685	"	"	535	841	"	"	652	917	"	"	48	1027	1926	*A*	168
691	"	"	707	845	"	"	737	924	"	"	33	1029	"	"	50
709	"	*PC*	45	853	"	"	734	926	"	"	44	1037	"	"	147
712	"	"	42	856	"	"	783	927	"	"	136	1045	1925	*PC*	257
717	"	"	34	858	"	"	807	929	"	"	122	1051	1926	*A*	178
719	1926	*A*	22	861	"	"	811	932	"	"	43	1053	"	"	144
725	1925	"	787	862	"	"	747	934	"	"	101	1054	"	"	165
736	"	"	785	865	"	"	801	935	"	"	152	1056	"	"	159
739	"	*PC*	55	867	"	"	691	938	"	"	128	1059	"	"	172
746	"	"	49	869	1926	"	75								

Law Reporter, 6 Allahabad (P. C.)=All India Reporter.

LRPC)	A. I. R			LRPC)	A. I. R.			LRPC)	A. I. R.			LRPC)	A. I. R.		
Civil				57	1925	*PC*	75	119	1925	*PC*	146	180	1925	*PC*	244
				64	"	"	91	125	"	"	168	185	"	"	261
1	1925	*PC*	18	66	"	"	83	126	"	"	169	190	"	"	267
12	1924	"	213	70	"	"	80	128	"	"	174	195	"	"	272
17	"	"	221	73	"	"	11	129	"	"	161	206	"	"	226
23	1925	"	34	82	"	"	105	138	"	"	176	209	"	"	236
25	"	"	63	92	"	"	38	140	"	"	97				
34	"	"	36	97	"	"	118	143	"	"	49	**Criminal**			
38	"	"	45	106	"	"	124	147	"	"	188	1	1925	*PC*	1
41	1924	"	226	109	"	"	122	154	"	"	211	16	"	"	52
47	1925	"	33	111	"	"	93	157	"	"	196	**Revenue**			
50	"	"	55	117	"	"	155	160	"	"	216				
55	"	"	101					169	"	"	249	1	1924	*PC*	247

Law Reporter, 6 Allahabad (Civil)=All India Reporter.

LRA	A. I. R.			LRA	A. I. R.			LRA	A. I. R.			LRA	A. I. R.		
1	1925	*A*	19	167	1925	*A*	324	295	1925	*A*	662	399	1926	*A*	75
7	"	"	26	169	"	"	346	296	"	"	663	403	1925	"	641
9	1924	"	530	171	"	"	344	297	"	"	426	405	"	"	759
14	1925	"	253	174	"	"	298	299	"	"	672	409	"	"	802
15	1924	"	752	175	"	"	263	300	"	"	645	412	"	"	773
16	1925	"	237	178	"	"	351	301	"	"	340	414	"	"	780
19	"	"	361	180	"	"	325	302	"	"	247	415	"	"	564
22	"	"	458	182	"	"	417	303	"	"	483	416	"	"	487
24	"	"	172	184	"	"	454	305	"	"	427	417	"	"	762
26	"	"	266	186	"	"	648	310	"	"	442	420	1926	"	41
28	"	"	179	191	"	"	380	313	"	"	593	422	1925	"	699
29	"	"	206	198	"	"	469	314	"	"	643	423	"	"	556
33	"	"	184	201	"	"	339	317	"	"	554	424	"	"	777
36	"	"	328	204	"	"	287	319	"	"	704	425	"	"	519
39	"	"	108	206	"	"	261	320*a*	"	"	563	448	"	"	652
50	"	"	17	208	"	"	356	320*b*	"	"	502	451	"	"	747
55	"	"	24	210	"	"	453	321	"	"	471	453	1926	"	136
59	"	"	273	212	"	"	280	323	"	"	548	454	1925	"	552
62	"	"	272	214	"	"	333	325	"	"	385	455	"	"	457
63	"	"	264	217	"	"	432	329	"	"	550	457	"	"	734
67	1924	"	599	218	"	"	403	331	"	"	437	459	"	"	566
72	1925	"	10	219	"	"	399	333	"	"	535	460	1926	"	18
79	"	"	267	221	"	"	601	336	"	"	491	463	1925	"	549
85	"	"	288	222	"	"	488	337	"	"	542	464	"	"	551
87	"	"	352	225	"	"	492	339	"	"	394	465	"	"	595
89	"	"	146	229	"	"	459	340	"	"	562	472	"	"	658
101	"	"	171	237	"	"	421	343	"	"	379	478	"	"	569
103	"	"	276	241	"	"	484	344	"	"	557	479	1926	"	119
104	"	"	323	243	"	"	447	345	"	"	412	481	"	"	85
106	"	"	241	244	"	"	247	346	"	"	555	482	1925	"	553
108	"	"	275	247	"	"	367	347	"	"	651	483	"	"	783
109	"	"	221	249	"	"	572	348	"	"	705	485	"	"	691
112	"	"	342	252	"	"	576	350	"	"	404	486	"	"	539
115	"	"	345	254	"	"	698	352*a*	"	"	547	487	1926	"	179
117	"	"	369	256	"	"	362	352*b*	"	"	683	488	"	"	36
121	"	"	336	258	"	"	602	357	"	"	424	495	"	"	64
122	"	"	348	264	"	"	324	359	"	"	588	496	"	"	136
126	"	"	360	265	"	"	499	361	"	"	431	500	1925	"	811
127	"	"	330	267	"	"	440	362	"	"	787	501	1926	"	82
128	"	"	295	269	"	"	446	371	"	"	795	503	1925	"	558
131	"	"	293	270	"	"	271	372	"	"	804	505	1926	"	48
133	"	"	297	271	"	"	234	375	"	"	742	511	"	"	157
135	"	"	215	273	"	"	682	377	"	"	785	512	"	"	166
139	"	"	353	274	"	"	700	379	"	"	813	513	1925	"	559
143	"	"	276	275	"	"	456	382	"	"	411	516	1926	"	145
145	"	"	474	277	"	"	587	384	"	"	822	518	"	"	89
150	"	"	378	278	"	"	594	385	"	"	546	519	1925	"	675
152	"	"	252	280	"	"	384	386	"	"	768	521	1926	"	70
153	"	"	236	281	"	"	719	388	"	"	778	523	1925	"	801
155	"	"	466	282	"	"	703	390	"	"	570	525	1926	"	155
156	"	"	541	283	"	"	681	391	"	"	400	526	1925	"	467
157	"	"	395	284	"	"	692	393	"	"	808	529	"	"	680
158	"	"	393	287	"	"	687	395	"	"	823	530	1926	"	68
159	"	"	364	289	"	"	565	396	"	"	604	532	"	"	142
162	"	"	277	291	"	"	495	397	1926	"	29				

Law Reporter, 6 Allahabad (Civil)=All India Reporter.—(*Concld.*)

(LRA)	AIR			(LRA)	AIR.			(LRA)	AIR.			(LRA)	A.I.R.		
533	1926	*A*	134	564	1926	*A*	164	586	1926	*A*	142	606	1926	*A*	71
535	"	"	67	565	"	"	101	587	"	"	128	610	"	"	124
537	"	"	79	567	"	"	152	589	"	"	111	614	"	"	156
541	"	"	90	569	"	"	50	591	1925	"	624	615	"	"	146
545	"	"	201	575	"	"	55	595	1926	"	177	617	"	"	181
547	1925	"	770	578	"	"	122	596	"	"	172	625	"	"	173
553	1926	"	161	580	"	"	35	597	"	"	158	628	"	"	171
555	"	"	17	582	"	"	93	598	"	"	46				
557	"	"	1	585	1925	"	735	601	1925	"	610	630	"	"	21

Law Reporter, 6 Allahabad (Criminal)=All India Reporter.

(LRA)	AIR.			(LRA)	AIR.			(LRA)	AIR.			(LRA)	A.I.R.		
1	1925	*A*	165	58	1925	*A*	313	105	1925	*A*	392	159	1926	*A*	33
10	"	"	305	60	"	"	311	107	"	"	415	161	1925	"	627
14	"	"	239	62	"	"	295	109	"	"	419	173	1926	"	147
16	"	"	292	63	"	"	307	112	1926	"	204	179	"	"	27
17	"	"	285	64	"	"	301	113	1925	"	753	181	"	"	57
20	"	"	226	65	"	"	195	119	"	"	537	183	1925	"	614
21	"	"	282	68	"	"	315	121	"	"	396	185	"	"	670
22	"	"	251	70	"	"	306	124	"	"	434	188	1926	"	159
23	"	"	175	71	"	"	472	127	"	"	498	190	"	"	157
25	"	"	230	73	"	"	405	129	"	"	694	193	"	"	165
31	"	"	291	79	"	"	667	132	"	"	540	194	"	"	176
33	"	"	185	80	"	"	614	135	"	"	591	196	"	"	143
39	"	"	290	81	"	"	664	137	1926	"	22	198	1925	"	473
41	"	"	299	85	"	"	620	143	1925	"	448	200	"	"	673
43	"	"	409	86	"	"	310	144	"	"	518	202	1926	"	178
44	"	"	410	87	"	"	640	145	"	"	654	203	"	"	188
45	"	"	250	89	"	"	606	148	"	"	751	205	"	"	187
47	"	"	477	94	"	"	316	150	"	"	798	208	"	"	167
49	"	"	413	95	"	"	308	152	"	"	647	209	"	"	189
53	"	"	301	97	"	"	319	153	1926	"	30	213	"	"	21
55	"	"	298	101	"	"	318	156	"	"	44				
57	"	"	283	104	"	"	592	157	1925	"	676	216	"	"	193

26 Cr. L. J. & 85 to 90 Indian Cases=All India Reporter.

CrLJ & I.C	A. I. R.	Cr LJ & I. C.	A. I. R.	CrLJ & I. C	A. I. R.	CrLJ & I. C.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **1925 Lahore.**

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1925, ALLAHABAD Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including INDIAN LAW REPORTS.

N. B.—Column No. 1 denots pages of the ALL INDIA REPORTER, 1925 ALLAHABAD
Column No. 2 denotes corresponding references of other Reports, JOURNALS AND PERIODICALS.

A. I. R. 1925 Allahabad=Other Journals.

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
1 F B	22	*A L J*	857	34	5	*L R A Civ*	542	65	82	*I C*	326
	5	*L R A Civ*	775		80	*I C*	944	66	5	*L R A Civ*	668
	83	*I C*	5	36	78	*I C*	1024		82	*I C*	604
	47	*All*	31	37	5	*L R A Rev*	141	67	81	*I C*	737
4	5	*L R A Cr*	175		80	*I C*	399	68	5	*L R A Civ*	657
	25	*Cr L J*	800	39	78	*I C*	1016		80	*I C*	743
	81	*I C*	320	40	80	*I C*	409	69	82	*I C*	324
5	80	*I C*	446	42	5	*L R A Civ*	632		46	*All*	903
6	22	*A L J*	825		80	*I C*	728	71	22	*A L J*	883
	5	*L R A Civ*	596	44	5	*L R A Civ*	609		5	*L R A Civ*	722
	83	*I C*	1033		92	*I C*	335		82	*I C*	21
8	5	*L R A Civ*	661	47	5	*L R A Civ*	671		47	*All*	94
	80	*I C*	4		82	*I C*	344	72	81	*I C*	741
10	22	*A L J*	1020	49	80	*I C*	732		46	*All*	924
	6	*L R A Civ*	72	50	46	*All*	512	73	5	*L R A Cr*	187
	85	*I C*	114		83	*I C*	245		25	*Cr L J*	1249
	47	*All*	234	51	5	*L R A Civ*	685		82	*I C*	257
15	5	*L R A Rev*	239		81	*I C*	870	77	5	*L R A Civ*	607
16	5	*L R A Rev*	253	52	5	*L R A Civ*	688		92	*I C*	330
	83	*I C*	249		86	*I C*	398	78	5	*L R A Civ*	689
	47	*All*	53	53	80	*I C*	911		81	*I C*	758
17	22	*A L J*	1012	54	5	*L R A Civ*	663	79	46	*All*	637
	82	*I C*	1032		82	*I C*	307		22	*A L J*	690
	6	*L R A Civ*	50	56	5	*L R A Civ*	686		87	*I C*	938
	47	*All*	172		82	*I C*	306	85	75	*I C*	1004
19	22	*A L J*	890	57	5	*L R A Civ*	608	93	80	*I C*	899
	83	*I C*	147		80	*I C*	649	95	80	*I C*	916
	6	*L R A Civ*	1		47	*All*	1	96	5	*L R A Civ*	647
	47	*All*	127	58	5	*L R A Civ*	615		92	*I C*	332
24	22	*A L J*	1045		80	*I C*	950	97	5	*L R A Rev*	260
	83	*I C*	27	59	5	*L R A Civ*	670		85	*I C*	99
	6	*L R A Civ*	55		82	*I C*	350	98	5	*L R A Civ*	582
	47	*All*	243	60	22	*A L J*	887		82	*I C*	73
26	22	*A L J*	1009		5	*L R A Civ*	749				
	83	*I C*	163		47	*All*	90	99	25	*Cr L J*	628
	6	*L R A Civ*	7		92	*I C*	348		81	*I C*	116
	47	*All*	169	62	22	*A L J*	1028	100	5	*L R A Rev*	235
28	78	*I C*	649		5	*L R A Cr*	156		82	*I C*	296
29	78	*I C*	189		84	*I C*	860	102	5	*L R A Civ*	642
30	5	*L R A Rev*	251		26	*Cr L J*	380		86	*I C*	656
	83	*I C*	202	63	82	*I C*	289	103	22	*A L J*	919
31	75	*I C*	784		23	*A L J*	115		5	*L R A Civ*	649
32	81	*I C*	297	65	5	*L R A Civ*	727		82	*I C*	219

A. I. R. 1925 Allahabad=Other Journals—(*Contd.*)

A. I. R.	Other Journals			A. I. R.	Other Journals			A. I. R.	Other Journals		
108	22	*A L J*	994	140	87	*I C*	795	184	84	*I C*	822
	6	*L R A Civ*	39	141	22	*A L J*	1033	185	21	*A L J*	1075
	47	*All*	100		5	*L R A Civ*	747		6	*L R A Cr*	33
	85	*I C*	66		82	*I C*	26		85	*I C*	130
115	22	*A L J*	913	142	5	*L R A Civ*	709		47	*All*	276
	47	*All*	68		83	*I C*	1		26	*Cr L J*	450
	5	*L R A Civ*	640	144	22	*A L J*	897	187	5	*L R A Civ*	753
	84	*I C*	207		5	*L R A Civ*	665		82	*I C*	1030
117	22	*A L J*	928		80	*I C*	725		47	*All*	44
	5	*L R A Civ*	744	146	22	*A L J*	1060	189	83	*I C*	188
	80	*I C*	722		6	*L R A Civ*	89	190	78	*I C*	191
	47	*All*	86		84	*I C*	1031	193	5	*L R A Rev*	211
119(1)	22	*A L J*	911		47	*All*	217		78	*I C*	277
	5	*L R A Civ*	712	154	22	*A L J*	1031	194(1)	46	*All*	912
	47	*All*	89		5	*L R A Civ*	756		85	*I C*	396
	85	*I C*	270		85	*I C*	341	194(2)	5	*L R A Rev*	138
119(2)	82	*I C*	385		47	*All*	179		78	*I C*	628
120	5	*L R A Civ*	690	155	22	*A L J*	1029	195	23	*A L J*	1
	82	*I C*	180		47	*All*	186	**F B**	6	*L R A Cr*	65
121	22	*A L J*	900		88	*I C*	255		86	*I C*	55
	82	*I C*	1026	164	5	*L R A Civ*	694		47	*All*	298
	47	*All*	118		82	*I C*	1011		26	*Cr L J*	679
123(1)	82	*I C*	332	165	22	*A L J*	1049	198	5	*LRA Rev*	171
123(2)	5	*L R A Civ*	629		6	*L R A Cr*	1		78	*I C*	349
	80	*I C*	947		47	*All*	205	199	5	*LRA Civ*	294
125	22	*A L J*	909		85	*I C*	823		78	*I C*	651
	82	*I C*	317		26	*Cr L J*	599	200	5	*LRA Rev*	132
126	5	*L R A Cr*	161	171	82	*I C*	1037		78	*I C*	115
	85	*I C*	150		6	*L R A Civ*	101	202	5	*L R A Civ*	319
	26	*Cr L J*	470	172	22	*A L J*	1035		78	*I C*	1050
129	22	*A L J*	1005		6	*L R A Civ*	24	203	78	*I C*	215
	5	*L R A Cr*	153		84	*I C*	794	205	5	*L R A Civ*	293
	47	*All*	114	174	22	*A L J*	1018		78	*I C*	652
	26	*Cr L J*	446		5	*L R A Civ*	718	206(1)	5	*L R A Civ*	317
	85	*I C*	62		85	*I C*	330		79	*I C*	394
130(1)	78	*I C*	1033	175	22	*A L J*	1095	206(2)	6	*L R A Civ*	29
130(2)	5	*L R A Civ*	648		6	*L R A Cr*	23		83	*I C*	142
	81	*I C*	1029		85	*I C*	159	209	5	*L R A Civ*	644
131	22	*A L J*	977		47	*All*	267		85	*I C*	580
	5	*L R A Civ*	732		26	*Cr L J*	479	210	82	*I C*	651
	81	*I C*	1038	176	5	*L R A Civ*	736	211	5	*L R A Civ*	723
133	22	*A L J*	905		85	*I C*	633		83	*I C*	227
	5	*L R A Civ*	681	179	22	*A L J*	1039	213	5	*L R A Civ*	729
	80	*I C*	935		6	*L R A Civ*	28		81	*I C*	1041
	47	*All*	73		85	*I C*	390	214	5	*L R A Civ*	692
135	82	*I C*	196	180	22	*A L J*	980		83	*I C*	323
137	22	*A L J*	881		5	*L R A Civ*	780	215	22	*A L J*	1112
	5	*L R A Civ*	773		47	*All*	122		6	*L R A Civ*	135
	82	*I C*	321		85	*I C*	31		84	*I C*	786
	47	*All*	98	182	22	*A L J*	1041		47	*All*	294
138	22	*A L J*	902		5	*L R A Civ*	740	218(1)	5	*L R A Civ*	784
	5	*L R A Civ*	636		85	*I C*	27		83	*I C*	133
	82	*I C*	330		47	*All*	181	218(2)	22	*A L J*	1103
	47	*All*	66	184	22	*A L J*	1038		84	*I C*	719
140	5	*L R A Civ*	695		6	*L R A Civ*	33				

A. I. R. 1925 Allahabad=Other Journals—(*Contd.*)

A.I.R	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
218(2)	26	*Cr L J*	367	247(2)	26	*Cr L J*	776	280	23	*A L J*	212
220	5	*L R A Cr*	199	**FB**	47	*All*	377		6	*L R A Civ*	212
	85	*I C*	722	250	23	*A L J*	18		47	*All*	538
	26	*Cr L J*	578		6	*L R A Cr*	45		86	*I C*	862
221	22	*A L J*	1097		86	*I C*	282	282(1)	23	*A L J*	253
	6	*L R A Civ*	109		26	*Cr L J*	746		87	*I C*	796
	84	*I C*	790	251	26	*Cr L J*	295	282(2)	6	*L R A Cr*	21
	47	*All*	263		84	*I C*	439		86	*I C*	458
223	5	*L R A Cr*	193		6	*L R A Cr*	22		26	*Cr L J*	810
	47	*All*	39	252	6	*L R A Civ*	152	283	23	*A L J*	133
226	22	*A L J*	1102		84	*I C*	521		6	*L R A Cr*	57
	6	*L R A Cr*	20	253(1)	6	*L R A Civ*	14		85	*I C*	378
	84	*I C*	711		86	*I C*	208		47	*All*	288
	26	*Cr L J*	359	253(2)	23	*A L J*	219		26	*Cr L J*	538
227	5	*L R A Cr*	201		86	*I C*	695	285	47	*All*	147
	85	*I C*	643		47	*All*	434		6	*L R A Cr*	17
	26	*Cr L J*	547	261	23	*A L J*	207		85	*I C*	719
230	22	*A L J*	1106		6	*L R A Civ*	206		26	*Cr L J*	575
	6	*L R A Cr*	25		87	*I C*	44	287	23	*A L J*	63
	84	*I C*	714		47	*All*	430		6	*L R A Civ*	204
	26	*Cr L J*	362	263	23	*A L J*	12		86	*I C*	95
	47	*All*	268		6	*L R A Civ*	175		47	*All*	372
234	5	*L R A Civ*	818		86	*I C*	161	288	6	*L R A Civ*	85
	6	*L R A Civ*	271		47	*All*	335		23	*A L J*	193
	85	*I C*	761	264	6	*L R A Civ*	63		86	*I C*	761
236	22	*A L J*	1119		85	*I C*	660		47	*All*	412
	6	*L R A Civ*	153	266	6	*L R A Civ*	26	289	23	*A L J*	191
	84	*I C*	746		85	*I C*	557		26	*Cr L J*	869
	47	*All*	304	267	47	*All*	140		86	*I C*	805
237	6	*L R A Civ*	16		6	*L R A Civ*	79		47	*All*	411
	83	*I C*	167		85	*I C*	470	290	47	*All*	64
	47	*All*	50	271	23	*A L J*	251		6	*L R A Cr*	39
239	22	*A L J*	1100		6	*L R A Civ*	270		85	*I C*	730
	6	*L R A Cr*	14		87	*I C*	174		26	*Cr L J*	586
	84	*I C*	706		47	*All*	456	291(1)	6	*L R A Cr*	31
	26	*Cr L J*	354	272	6	*L R A Civ*	62		86	*I C*	36
240	5	*L R A Civ*	755		85	*I C*	548		26	*Cr L J*	660
	86	*I C*	323	273	47	*All*	136	291(2)	23	*A L J*	215
241(1)	78	*I C*	595		6	*L R A Civ*	59		86	*I C*	957
241(2)	22	*A L J*	1116		85	*I C*	474		47	*All*	533
	6	*L R A Civ*	106	275(1)	47	*All*	63	292	6	*L R A Cr*	16
	84	*I C*	739		6	*L R A Civ*	108		85	*I C*	942
	47	*All*	291		85	*I C*	756		26	*Cr L J*	654
243	5	*L R A Civ*	528	275(2)	23	*A L J*	200	293(1)	23	*A L J*	34
	86	*I C*	295		86	*I C*	781		86	*I C*	23
244	5	*L R A Rev*	111	276(1)	23	*A L J*	23		47	*All*	322
	79	*I C*	371		6	*L R A Civ*	143	293(2)	23	*A L J*	145
245	25	*Cr L J*	651		86	*I C*	293		6	*L R A Civ*	131
	81	*I C*	139	276(2)	47	*All*	57		47	*All*	332
246	83	*I C*	231		6	*L R A Civ*	103		86	*I C*	869
247(1)	6	*L R A Civ*	302		85	*I C*	746	295(1)	23	*A L J*	10
	86	*I C*	704	277	23	*A L J*	28		6	*L R A Cr*	62
247(2)	23	*A L J*	125		6	*L R A Civ*	162		26	*Cr L J*	796
F B	6	*L R A Civ*	244		85	*I C*	1047		86	*I C*	428
	86	*I C*	408		47	*All*	313	295(2)	6	*L R A Civ*	128

A. I. R. 1925 Allahabad=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
295(2)	36	*I C*	834	311(1)	86	*I C*	809	330	85	*I C*	449
297	23	*A L J*	149	311(2)	23	*A L J*	21	331	23	*A L J*	257
	6	*L R A Civ*	133		6	*L R A Cr*	60		87	*I C*	665
	85	*I C*	477		86	*I C*	284	333	3	*A L J*	204
298(1)	23	*A L J*	40		26	*Cr L J*	748		6	*L R A Civ*	214
	6	*L R A Civ*	174	313(1)	23	*A L J*	62		47	*All*	381
	86	*I C*	27		86	*I C*	217		86	*I C*	769
298(2)	23	*A L J*	20		26	*Cr L J*	729	335	23	*A L J*	246
	6	*L R A Cr*	55	313(2)	23	*A L J*	131		47	*All*	427
	86	*I C*	224		6	*L R A Cr*	58		87	*I C*	700
	26	*Cr L J*	736		26	*Cr L J*	542	336	6	*L R A Civ*	121
299	23	*A L J*	8		85	*I C*	382		86	*I C*	786
	6	*L R A Cr*	41	315	47	*All*	306	337	23	*A L J*	37
	86	*I C*	64		23	*A L J*	25		86	*I C*	255
	47	*All*	284		6	*L R A Cr*	68		47	*All*	342
	26	*Cr L J*	688		86	*I C*	52	339	23	*A L J*	254
301(1)	23	*A L J*	137		26	*Cr L J*	676		6	*L R A Civ*	201
	6	*L R A Cr*	64	316	23	*A L J*	41		87	*I C*	294
	86	*I C*	832		86	*I C*	59		47	*All*	490
	26	*Cr L J*	896		6	*L R A Cr*	94	340	23	*A L J*	248
301(2)	86	*I C*	222		26	*Cr L J*	683		6	*L R A Civ*	301
	23	*A L J*	5	318(1)	23	*A L J*	73		87	*I C*	985
	6	*L R A Cr*	53		86	*I C*	79	341	23	*A L J*	231
	26	*Cr L J*	734		26	*Cr L J*	703		85	*I C*	1
303	23	*A L J*	14		6	*L R A Cr*	101		47	*All*	541
	85	*I C*	650	318(2)	23	*A L J*	189	342	6	*L R A Civ*	112
	47	*All*	280		26	*Cr L J*	865	344	23	*A L J*	59
	26	*Cr L J*	554		86	*I C*	801		6	*L R A Civ*	171
305	47	*All*	59		47	*All*	409		86	*I C*	105
	6	*L R A Cr*	10	319	23	*A L J*	68	345	23	*A L J*	242
	85	*I C*	714		86	*I C*	45		6	*L R A Civ*	115
	26	*Cr L J*	570		26	*Cr L J*	669		86	*I C*	728
306	23	*A L J*	35		6	*L R A Cr*	97	346	23	*A L J*	49
	6	*L R A Cr*	70	322	23	*A L J*	148		6	*L R A Civ*	169
	86	*I C*	287		86	*I C*	973		86	*I C*	174
	26	*Cr L J*	751		26	*Cr L J*	909		47	*All*	348
307	47	*All*	287	323	6	*L R A Civ*	104	348	6	*L R A Civ*	122
	23	*A L J*	136		85	*I C*	749		85	*I C*	608
	6	*L R A Cr*	63	324(1)	23	*A L J*	104	351	23	*A L J*	44
	86	*I C*	480		6	*L R A Civ*	264		6	*L R A Civ*	178
	26	*Cr L J*	832		86	*I C*	130		86	*I C*	86
308	23	*A L J*	32	324(2)	23	*A L J*	55		47	*All*	357
	86	*I C*	350		6	*L R A Civ*	167	352	6	*L R A Civ*	87
	6	*L R A Cr*	95		86	*I C*	91		85	*I C*	963
	26	*Cr L J*	766		47	*All*	355	353	6	*L R A Civ*	139
309	23	*A L J*	185	325	23	*A L J*	46		85	*I C*	584
	26	*Cr L J*	872		6	*L R A Civ*	180	355	23	*A L J*	198
	86	*I C*	808		86	*I C*	177		87	*I C*	55
	47	*All*	405		47	*All*	338		47	*All*	450
310	23	*A L J*	43	327	23	*A L J*	196	356	23	*A L J*	129
	6	*L R A Cr*	86		86	*I C*	837		6	*L R A Civ*	208
	86	*I C*	219		47	*All*	421		86	*I C*	585
	26	*Cr L J*	731	328	6	*L R A Civ*	36		47	*All*	374
311(1)	23	*A L J*	187		85	*I C*	161	358	23	*A L J*	201
	26	*Cr L J*	873	330	6	*L R A Civ*	127		86	*I C*	741

A. I R. 1925 Allahabad=Other Journals—(*Contd.*)

A.I R.	Other Journals			A I.R.	Other Journals			A.I R.	Other Journals		
358	47	*All*	424	388	47	*All*	611	413	6	*L R A Cr*	49
360	23	*A L J*	144		26	*Cr L J*	1107		26	*Cr L J*	551
	6	*L R A Civ*	126	389	23	*A L J*	337		85	*I C*	647
	86	*I C*	595		86	*I C*	684	415	23	*A L J*	361
	47	*All*	330		47	*All*	496		6	*L R A Cr*	107
361	23	*A L J*	138	392	23	*A L J*	304		88	*I C*	191
	6	*L R A Civ*	19		6	*L R A Cr*	105		26	*Cr L J*	1103
	86	*I C*	589		26	*Cr L J*	963	417	6	*L R A Civ*	182
	47	*All*	324		87	*I C*	419		86	*I C*	849
362	23	*A L J*	249	393	6	*L R A Civ*	158	419	23	*A L J*	297
	6	*L R A Civ*	256		86	*I C*	788		6	*L R A Cr*	109
	87	*I C*	340	394	23	*A L J*	422		26	*Cr L J*	961
364	23	*A L J*	56		6	*L R A Civ*	339		87	*I C*	417
	6	*L R A Civ*	150		88	*I C*	271		47	*All*	462
	86	*I C*	168		47	*All*	667	420	23	*A L J*	368
	47	*All*	361	395	6	*L R A Civ*	157		88	*I C*	290
366	23	*A L J*	141		86	*I C*	917		47	*All*	600
	86	*I C*	554	396	23	*A L J*	356	421	23	*A L J*	291
	47	*All*	327		6	*L R A Cr*	121		6	*L R A Civ*	237
367	23	*A L J*	52		87	*I C*	523		47	*All*	416
	6	*L R A Civ*	247		47	*All*	606		87	*I C*	647
	86	*I C*	98		26	*Cr L J*	987	424	23	*A L J*	404
	47	*All*	351	399	6	*L R A Civ*	219		6	*L R A Civ*	357
369	6	*L R A Civ*	117		87	*I C*	778		88	*I C*	234
	86	*I C*	445	400	23	*A L J*	438		47	*All*	635
371	23	*A L J*	151		6	*L R A Civ*	391	425	85	*I C*	788
	86	*I C*	922		88	*I C*	78	426	23	*A L J*	444
	47	*All*	391		47	*All*	745		6	*L R A Civ*	297
375	23	*A L J*	183	401	23	*A L J*	352		87	*I C*	211
	87	*I C*	121		87	*I C*	514		47	*All*	555
	47	*All*	403		47	*All*	579	427	23	*A L J*	307
376	23	*A L J*	216		26	*Cr L J*	978		6	*L R A Civ*	305
	86	*I C*	1055	403	6	*L R A Civ*	218		87	*I C*	477
	47	*All*	534		87	*I C*	797		47	*All*	582
378	47	*All*	320	404	23	*A L J*	440	431	23	*A L J*	442
	6	*L R A Civ*	150		6	*L R A Civ*	350		6	*L R A Civ*	361
	87	*I C*	92		88	*I C*	76		88	*I C*	95
379	23	*A L J*	435		47	*All*	743		47	*All*	741
	6	*L R A Civ*	343	405	6	*L R A Cr*	73	432	6	*L R A Civ*	217
	88	*I C*	581		86	*I C*	817		87	*I C*	564
	47	*All*	728		26	*Cr L J*	881	434	23	*A L J*	364
380	23	*A L J*	385	409	6	*L R A Cr*	43		6	*L R A Cr*	124
F B	6	*L R A Civ*	191		26	*Cr L J*	597		88	*I C*	280
	87	*I C*	51	410	6	*L R A Cr*	44		47	*All*	575
	47	*All*	513		26	*Cr L J*	566		26	*Cr L J*	1112
384	23	*A L J*	51		85	*I C*	710	436	23	*A L J*	342
	6	*L R A Civ*	280	411	23	*A L J*	430		87	*I C*	484
	86	*I C*	162		6	*L R A Civ*	382		47	*All*	509
385	23	*A L J*	379		88	*I C*	109	437	23	*A L J*	376
	6	*L R A Civ*	325		47	*All*	738		6	*L R A Civ*	331
	88	*I C*	216	412	23	*A L J*	296		88	*I C*	411
	47	*All*	631		6	*L R A Civ*	345		47	*All*	619
388	23	*A L J*	417		87	*I C*	370	439	23	*A L J*	401
	88	*I C*	275		47	*All*	623		87	*I C*	558
								440	6	*L R A Civ*	267

A. I. R. 1925 Allahabad=Other Journals.—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
440	86	*I C*	893	472	6	*L R A Cr*	71	502	88	*I C*	202
442	23	*A L J*	349		26	*Cr L J*	594	503	23	*A L J*	561
	6	*L R A Civ*	310		85	*I C*	818	**FB**	88	*I C*	768
	87	*I C*	488	473	23	*A L J*	433		47	*All*	637
	47	*All*	572		26	*Cr L J*	970	518	23	*A L J*	457
443	23	*A L J*	300		87	*I C*	426		88	*I C*	5
	87	*I C*	517		6	*L R A Cr*	198		6	*L R A Cr*	144
	26	*Cr L J*	981	474	6	*L R A Civ*	145		26	*Cr L J*	1061
446	6	*L R A Civ*	269		85	*I C*	459	519	23	*A L J*	473
	87	*I C*	415	477	6	*L R A Cr*	47		6	*L R A Civ*	425
	47	*All*	494		26	*Cr L J*	582		88	*I C*	785
447	6	*L R A Civ*	243		85	*I C*	726		47	*All*	669
	87	*I C*	440	478	23	*A L J*	421	535	23	*A L J*	685
448	23	*A L J*	436		87	*I C*	846		6	*L R A Civ*	333
	88	*I C*	1		47	*All*	511		88	*I C*	239
	6	*L R A Cr*	143		26	*Cr L J*	1022		47	*All*	715
	26	*Cr L J*	1057	479	23	*A L J*	332	537	23	*A L J*	451
449	23	*A L J*	283		47	*All*	466		6	*L R A Cr*	119
	87	*I C*	298		87	*I C*	799		88	*I C*	600
	47	*All*	470	481	86	*I C*	180		26	*Cr L J*	1176
453	6	*L R A Civ*	210	483	23	*A L J*	329		47	*All*	722
	87	*I C*	787		6	*L R A Civ*	303	538	85	*I C*	700
454	23	*A L J*	244		87	*I C*	235	539	23	*A L J*	655
	6	*L R A Oiv*	184		47	*All*	505		6	*L R A Civ*	486
	85	*I C*	578	484	6	*L R A Civ*	241		88	*I C*	908
	47	*All*	389		85	*I C*	480	540	23	*A L J*	679
456	6	*L R A Civ*	275	486	23	*A L J*	461		6	*L R A Cr*	132
	87	*I C*	349		47	*All*	561		88	*I C*	1049
457	23	*A L J*	428		87	*I C*	257		47	*All*	855
	6	*L R A Civ*	455	487	23	*A L J*	336		26	*Cr L J*	1273
	88	*I C*	165		6	*L R A Civ*	416	541	6	*L R A Civ*	156
458	47	*All*	121		88	*I C*	761		86	*I C*	942
	6	*L R A Civ*	22		47	*All*	625	542	23	*A L J*	373
	85	*I C*	502	488	6	*L R A Civ*	222		6	*L R A Civ*	337
459	23	*A L J*	233		87	*I C*	804		88	*I C*	297
	6	*L R A Civ*	229	491	23	*A L J*	447	543	23	*A L J*	521
	87	*I C*	278		6	*L R A Civ*	336		88	*I C*	431
	47	*All*	479		88	*I C*	136		47	*All*	780
465	23	*A L J*	449	492	6	*L R A Civ*	225	544	23	*A L J*	515
	88	*I C*	247		87	*I C*	585		88	*I C*	358
	47	*All*	616	495	6	*L R A Civ*	291		26	*Cr L J*	1126
466	47	*All*	319		88	*I C*	193	546	23	*A L J*	453
	6	*L R A Civ*	155		47	*All*	563		6	*L R A Civ*	385
	87	*I C*	175	498	23	*A L J*	455		88	*I C*	130
467	23	*A L J*	648		6	*L R A Cr*	127		47	*All*	778
	6	*L R A Civ*	526		87	*I C*	927	547	23	*A L J*	512
	89	*I C*	488		26	*Cr L J*	1039		6	*L R A Civ*	352
	47	*All*	952		47	*All*	629		88	*I C*	420
469	47	*All*	368	499	23	*A L J*	424		47	*All*	872
	23	*A L J*	65		6	*L R A Civ*	265	548	6	*L R A Civ*	323
	6	*L R A Civ*	198		87	*I C*	162		88	*I C*	294
	86	*I C*	189		47	*All*	552	549	23	*A L J*	503
471	23	*A L J*	467	501 **FB**	47	*All*	310		88	*I C*	944
	6	*L R A Civ*	321		86	*I C*	1027		6	*L R A Civ*	463
	88	*I C*	200	502	6	*L R A Civ*	320		47	*All*	849

A. I. R. 1925 Allahabad=Other Journals—(*Contd.*)

A I R	Other Journals			A.I.R.	Other Journals			A.I R.	Other Journals		
550	6	*L R A Civ*	329	569	47	*All*	925	606	6	*L R A Cr*	89
	88	*I C*	408	570	23	*A L J*	523		26	*Cr L J*	937
551	23	*A L J*	558		6	*L R A Civ*	390		86	*I C*	1001
	88	*I C*	393		88	*I C*	429	610	6	*L R A Civ*	601
	6	*L R A Civ*	464		47	*All*	782	**F B**	90	*I C*	180
552	23	*A L J*	534	571	85	*I C*	537		24	*A L J*	56
	6	*L R A Civ*	454	572	6	*L R A Civ*	249	614	47	*All*	341
	88	*I C*	653		87	*I C*	205		6	*L R A Cr*	80
	47	*All*	881	574	85	*I C*	209		26	*Cr L J*	905
553	23	*A L J*	519	576	6	*L R A Civ*	**252**		86	*I C*	969
	88	*I C*	433		87	*I C*	**15**		6	*L R A Cr*	183
	6	*L R A Civ*	482	578	47	*All*	365	615	23	*A L J*	529
554	6	*L R A Civ*	317		86	*I C*	1048		88	*I C*	684
	88	*I C*	434	580	23	*A L J*	409		47	*All*	904
555	23	*A L J*	501		88	*I C*	224	618	47	*All*	452
	6	*L R A Civ*	346		47	*All*	589		23	*A L J*	209
	88	*I C*	438	584	23	*A L J*	505		87	*I C*	27
	47	*All*	597		88	*I C*	162	620	47	*All*	359
556	23	*A L J*	518		47	*All*	626		6	*L R A Cr*	85
	6	*L R A Civ*	423	585	23	*A L J*	653		87	*I C*	608
	88	*I C*	396		89	*I C*	374		26	*Cr L J*	1008
557	6	*L R A Civ*	344		47	*All*	929	621	85	*I C*	868
	88	*I C*	398	587	6	*L R A Civ*	277	622	47	*All*	546
558	23	*A L J*	525		87	*I C*	262		23	*A L J*	405
	88	*I C*	611	588	23	*A L J*	458		87	*I C*	225
	6	*L R A Civ*	503		6	*L R A Civ*	359	623	85	*I C*	563
	47	*All*	921		87	*I C*	322	624	6	*L R A Civ*	591
559	23	*A L J*	617		47	*All*	543	**F B**	90	*I C*	988
	88	*I C*	972	590	23	*A L J*	755		24	*A L J*	52
	6	*L R A Civ*	513		89	*I C*	427	627	23	*A L J*	821
	47	*All*	944	591	6	*L R A Cr*	135	**F B**	6	*L R A Cr*	161
561	23	*A L J*	560		89	*I C*	146		89	*I C*	903
	88	*I C*	504		23	*A L J*	894		26	*Cr L J*	1431
	47	*All*	920		26	*Cr L J*	1282	627	89	*I C*	1013
562	23	*A L J*	645	592	6	*L R A Cr*	104	**F B**	23	*A L J*	941
	6	*L R A Civ*	340		88	*I C*	357	640	6	*L R A Cr*	87
	88	*I C*	559		26	*Cr L J*	1125		26	*Cr L J*	960
	47	*All*	724	593	6	*L R A Civ*	313		87	*I C*	112
563	6	*L R A Civ*	320		87	*I C*	679	641	23	*A L J*	469
	87	*I C*	662	594	6	*L R A Civ*	278	**F B**	6	*L R A Civ*	403
564	23	*A L J*	536		87	*I C*	287		26	*Cr L J*	1091
	6	*L R A Civ*	415	595	23	*A L J*	625		88	*I C*	179
	88	*I C*	440		6	*L R A Civ*	465		47	*All*	729
565	23	*A L J*	463		89	*I C*	27	643	6	*L R A Civ*	314
	6	*L R A Civ*	289		47	*All*	784		87	*I C*	30
	87	*I C*	569	601	6	*L R A Civ*	221	644	47	*All*	353
	47	*All*	557		87	*I C*	118		26	*Cr L J*	624
566	23	*A L J*	656	602	47	*All*	501		85	*I C*	848
	6	*L R A Civ*	459		23	*A L J*	344	645	6	*L R A Civ*	300
	89	*I C*	173		6	*L R A Civ*	258		87	*I C*	414
	47	*All*	916		87	*I C*	190	646	87	*I C*	745
567	85	*I C*	627	604	23	*A L J*	513	647	23	*A L J*	587
569	23	*A L J*	527		6	*L R A Civ*	396		6	*L R A Cr*	152
	88	*I C*	661		88	*I C*	448		89	*I C*	260
	6	*L R A Civ*	478	605	85	*I C*	586		26	*Cr L J*	1316

A. I. R. 1925 Allahabad =Other Journals—(*Contd*).

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
648	6	*L R A Civ*	186	681	6	*L R A Civ*	283	737	89	*I C*	630
	86	*I C*	729		87	*I C*	445		47	*All*	934
651	47	*All*	604	682	6	*L R A Civ*	273	742	6	*L R A Civ*	375
	6	*L R A Civ*	347		85	*I C*	704		88	*I C*	383
	88	*I C*	265	683	23	*A L J*	601	743	88	*I C*	613
652	23	*A L J*	841		6	*L R A Civ*	352	745	87	*I C*	182
	6	*L R A Civ*	448		89	*I C*	40	746	87	*I C*	444
	89	*I C*	364		47	*All*	770	747	23	*A L J*	862
	47	*All*	900	687	6	*L R A Civ*	287		6	*L R A Civ*	451
654	23	*A L J*	657		87	*I C*	620		89	*I C*	114
	6	*L R A Cr*	145	688	86	*I C*	305		47	*All*	910
	89	*I C*	520	691	23	*A L J*	867	748	86	*I C*	929
	26	*Cr L J*	1284		6	*L R A Civ*	485	751	6	*L R A Cr*	148
	47	*All*	948		89	*I C*	214		26	*Cr L J*	1233
656	47	*All*	549		47	*All*	913		88	*I C*	849
	23	*A L J*	398	692	6	*L R A Civ*	284	752	85	*I C*	676
	87	*I C*	579		87	*I C*	315	753	6	*L R A Cr*	113
658	23	*A L J*	608	694	23	*A L J*	507		26	*Cr L J*	1320
	6	*L R A Civ*	472		6	*L R A Cr*	129		89	*I C*	264
	89	*I C*	438		26	*Cr L J*	1130	758	88	*I C*	539
662	6	*L R A Civ*	295		88	*I C*	362	759	23	*A L J*	795
	87	*I C*	426		47	*All*	733		6	*L R A Civ*	405
663	6	*L R A Civ*	296	697	87	*I C*	782		89	*I C*	639
	88	*I C*	132	698	6	*L R A Civ*	254		47	*All*	867
664	6	*L R A Cr*	81		85	*I C*	550	761	87	*I C*	789
	26	*Cr L J*	997	699	6	*L R A Civ*	422	762	23	*A L J*	763
	87	*I C*	597		88	*I C*	899		6	*L R A Civ*	417
667	6	*L R A Cr*	79	700	6	*L R A Civ*	274		89	*I C*	621
	26	*Cr L J*	923		85	*I C*	849		47	*All*	859
	86	*I C*	987	701	86	*I C*	400	765	88	*I C*	298
668	87	*I C*	59	702	86	*I C*	329	768	23	*A L J*	757
670	6	*L R A Cr*	185	703	6	*L R A Civ*	282		6	*L R A Civ*	386
	91	*I C*	34		87	*I C*	641		88	*I C*	493
	27	*Cr L J*	2	704	6	*L R A Civ*	319		47	*All*	853
672	6	*L R A Civ*	299		87	*I C*	756	769	26	*Cr L J*	1018
	87	*I C*	177	705	6	*L R A Civ*	348		87	*I C*	842
673	6	*L R A Cr*	200		89	*I C*	103	770	6	*L R A Civ*	547
	91	*I C*	49	707	23	*A L J*	691		88	*I C*	822
	27	*Cr L J*	17		47	*All*	803		23	*A L J*	950
674	86	*I C*	330		92	*I C*	63	773	23	*A L J*	817
675	6	*L R A Civ*	519	718	87	*I C*	749		6	*L R A Civ*	412
	89	*I C*	497	719	6	*L R A Civ*	281		89	*I C*	350
676	6	*L R A Cr*	157		87	*I C*	434		47	*All*	878
	88	*I C*	844	720	23	*A L J*	768	775	87	*I C*	698
	26	*Cr L J*	1218		89	*I C*	690	776	88	*I C*	540
677	23	*A L J*	585		47	*All*	823	777	6	*L R A Civ*	424
	89	*I C*	186	734	23	*A L J*	853	778	23	*A L J*	760
	47	*All*	915		6	*L R A Civ*	457		6	*L R A Civ*	388
678	26	*Cr L J*	560		88	*I C*	888		88	*I C*	500
	85	*I C*	656		47	*All*	926		47	*All*	850
679	85	*I C*	575	735	88	*I C*	544	780	6	*L R A Civ*	414
680	23	*A L J*	682		23	*A L J*	975		87	*I C*	763
	6	*L R A Civ*	529		6	*L R A Civ*	585	781	87	*I C*	654
	88	*I C*	1018	736	87	*I C*	439	783	23	*A L J*	856
681	47	*All*	493	737	23	*A L J*	845		6	*L R A Civ*	483

A. I. R. 1925 Allahabad=Other Journals—(*Concld.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
783	88	*I C*	1013	800	87	*I C*	351	811	23	*A L J*	861
	47	*All*	932	801	23	*A L J*	865		6	*L R A Civ*	500
784	87	*I C*	719		6	*L R A Civ*	523	812	88	*I C*	915
785	23	*A L J*	736		89	*I C*	480	813	87	*I C*	590
	6	*L R A Civ*	377	802	23	*A L J*	856		23	*A L J*	621
	88	*I C*	444		6	*L R A Civ*	409		6	*L R A Civ*	379
786	87	*I C*	668		89	*I C*	415		88	*I C*	422
787	23	*A L J*	725		47	*All*	873		47	*All*	746
	6	*L R A Civ*	362	804	23	*A L J*	674	815	86	*I C*	872
	89	*I C*	122		6	*L R A Civ*	372	817	87	*I C*	197
	47	*All*	756		89	*I C*	295	818	86	*I C*	1033
794	85	*I C*	690		47	*All*	751	820	86	*I C*	852
795	6	*L R A Civ*	371	807	23	*A L J*	858	821	87	*I C*	659
	88	*I C*	530		89	*I C*	97	822	6	*L R A Civ*	384
796	87	*I C*	64		47	*All*	917		89	*I C*	483
798	23	*A L J*	790	808	6	*L R A Civ*	393	823	6	*L R A Civ*	395
	6	*L R A Cr*	150		88	*I C*	586		88	*I C*	575
	26	*Cr L J*	1254								
	88	*I C*	998	810	88	*I C*	447	824	87	*I C*	713

THE

ALL INDIA REPORTER

1925 ALLAHABAD

I. L. R. ALPHABETICAL INDEX

of cases reported in

I. L. R. 47 ALLAHABAD

WITH REFERENCES TO THE PAGES OF

The All India Reporter

[203 Cases]

Names of parties.	I. L. R. pp.		A. I. pp
Abdul Karim v. Ram Kishore	421	1925 A	327
Abdur Rahman v. Abdur Rahman	F B 513	" "	380
Abhainandan Prasad v. Pashpat Nath Pande ...	470	" "	449
Ali Hammad v. Ghurpattar Singh	389	" "	454
Amar Singh v. Ram Dei	873	" "	802
Amir Haidar v. Ali Ahmad	635	" "	424
Ammar v. Govind	616	" "	465
Aziz Bano v. Muhammad Ibrahim Husain ...	823	" "	720
Azmat-ullah Khan v. Ahmad Ali	728	" "	379
Babu Ram v. Banke Bihari Lal	555	1925 A	426
Badri Das v. Hoshiar Singh	412	" "	288
Bahadur v. Raja Moti Chand	589	" "	580
Baijnath Das v. Balmakund	98	" "	137
Baijnath Pandan v. The Estate of E. C. Dennet ...	745	" "	400
Bakha Singh v. Ram Narain Singh	73	" "	133
Baldeo Prasad v. Ram Autar Kurmi	7	1924 "	865
Balram Das-Fakir Chand v. G. I. P. Railway Co. ...	724	1925 "	562
Bansidhar v. Dulhatia	505	" "	483
Basanti Bai v. Nanhe Mal	864	1926 "	29
Begg Sutherland and Co., Ltd., *in the matter of* ...	715	1925 "	535
Bhagwan Das Marwari v. Suraj Prasad Singh ...	217	" "	146
Bhikhi Mal v. Debi Sahai	923	1926 "	179
Bihari Lal v. Shiva Narain	17	1924 "	884
Bilas Singh v. Emperor	934	1925 "	737
Bisesar Ram-Dassi Ram v. Har Kishan-Pahlad Rai ...	623	" "	412
Bishan Sahai v Chhote Lal	89	" "	119
Buddhu v. Sheo Charan	8	1924 "	875
Budh Sagar v. Bishan Sahai	327	1925 "	366

Names of parties		I.L.R. pp.	A.I.R. pp.
Chunni Lal v. Sheo Charan Lal Lalman	...	756	1925 A 787
Chunni Lal-Kalyan Das, *in the matter of*	...	368	" " 469
Chunni Lal-Kalyan Das, *in the matter of*	...	372	" " 287
Daulat v. Sankatha Prasad	...	355	1925 A 324
Daulat Ram v. Kanhaiya Lal	...	462	" " 419
Dikshit & Co., Ltd. v. Mathura Prasad	...	94	" " 71
Dip Chand v. Muhammad Khalil ...	...	626	" " 584
Dip Narain Rai v. Lachman Upadhia ...	...	466	" " 479
Dwarka Das v. Muhammnd Ashfaq-ullah	...	86	" " 117
East Indian Railway Company v. Fazal Ilahi	...	136	1925 A 273
——— v. Jit Mal-Kallu Mal		538	" " 280
Emperor v. Abdul Wahab	...	39	" " 223
——— v. Amir	...	629	" " 498
——— v. Autar	...	306	" " 315
——— v. Azim-ud-din	...	287	" " 307
——— v. Babu Ram	...	606	" " 396
——— v. Baijnath Kedia	...	F B 298	" " 195
——— v. Bechan Teli	...	341	" " 614
——— v. Budhan	...	733	" " 694
——— v. Chittar Singh	...	280	" " 303
——— v. Dulli	...	59	" " 305
——— v. Gajraj Singh	...	722	" " 537
——— v. Kutru	...	575	" " 434
——— v. Madho Singh	...	409	" " 318
——— v. Mahadeo	...	611	" " 388
——— v. Moti Lal	...	855	" " 540
——— v. Muhammad Husain	...	267	" " 175
——— v. Nathu Mal	...	405	" " 309
——— v. Pita	...	147	" " 285
——— v. Ram Autar	...	511	" " 478
——— v. Ram Ghulam Singh	...	579	" " 401
——— v. Ram Nath	...	268	" " 230
——— v. Ram Sukh	...	284	" " 299
——— v. Raghunandan Prasad... ...	...	64	" " 290
——— v. Raghunath Venaik Dhulekar ...	...	205	" " 165
——— v. Sheikh Muhammad Akbar ...	...	288	" " 283
——— v. Sri Narain Singh	...	114	" " 129
——— v. Tulli	...	276	" " 185
Faqir-ullah v. Hikmat-ullah	...	925	1925 A 569
Farid-un-nissa v. Mukhtar Ahmad... ...	...	P C 703	" P C 204
Fateh Singh v. Jagannath Baksh Singh ...	...	P C 158	" " 55
Fazal Husain v. Fazal-ud-din	...	533	" A 291
Gajadhar Mahton v. Ambika Prasad Tiwari ...	...	P C 459	1925 P C 169
Gajadhar Pande v. Jadubir Pande... ...	...	122	" A 180
Gajadhar Singh v. Hari Singh	...	416	" " 421
Gajendra Singh v. Durga Kunwar... ...	...	F B 637	" " 503
Ganeshi Lal-Har Narain v. Debi Das ...	...	140	" " 267
Ganesh Prasad v. Bhagelu Ram	...	878	" " 773
Ganga Chamar v. Bindeshri Rai	...	904	" " 615
Ganga Dei v. Sukhdeo Prasad	...	78	1924 A 612

Names of parties	I.L.R.	pp.	A.I.R.		pp.
Ganga Prasad v. Mt. Kishni		319	1925	A	466
Ghumna v. Ram Chandra Rao		619	"	"	437
Girdhari Lal v. Zorawar Singh		1	"	"	57
Gopi Nath v. Ram Nath		374	"	"	356
Great Indian Peninsula Railway v. Radhe Mal-Mani Lal...		549	"	"	656
Gulab Dei v. Vaish Motor Company		782	"	"	570
Haji Sheikh Bodha v. Sukhram Singh	F B	31	1925	A	1
Harakh Chand v. Ganga Prasad Rai		391	"	"	371
Har Bakhsh Singh v. Dal Bahadur Singh		186	"	"	155
Harbans Singh v. Rajindar Kunwar		313	"	"	277
Harihar Prasad v. Ram Daur		172	"	"	17
Har Prasad v. Gulzari Lal		604	"	"	651
Har Prasad v. Kewal		169	"	"	26
Hazari Lal v. Abbas Mirza		330	"	"	360
Hazari Lal v. Ram Lal		746	"	"	813
Husain Bakhsh v. Mahfuz-ul-Haq...		944	"	"	559
Imtiaz-un-nissa v. Chuttan Lal		304	1925	A	236
Ishwar Dat Upadhiya v. Mahesh Dat Upadhiya ...		910	"	"	747
Ishwari Prasad v. Babunandan Shukul		563	"	"	495
Jagat Pande v. Sarwan Pande		743	1925	A	404
Jageshwar Prasad v. Suraj Bali Singh		53	"	"	16
Jagmohan Agrahri v. Prag Ahir		452	"	"	618
Janki Das-Gobind Ram v. Secretary of State for India ...		234	"	"	10
Jhandu Lal-Mitthu Lal v. Wilayati Begam		572	"	"	442
Jodha Singh v. Gokaran Das Pande		546	"	"	622
Kachauri Mal-Kalyan Mal v. Wali Muhammad-Abdul Latif		179	1925	A	154
Kali Charan Singh v. Bageshra Kunwari		929	"	"	585
Kalika Singh v. Ram Lal Singh		320	"	"	378
Kanhai v. Amrit		552	"	"	499
Kanhaiya Lal v. Gaura		127	"	"	19
Kanhaiya Lal v. Niranjan Lal		351	"	"	367
Kanhaiya Singh v. Kundan		561	"	"	486
Kanji Mal v. Durga Prasad		597	"	"	555
Kehar Singh v. Jahangir Singh		625	"	"	487
Kharak Singh v. Laccham Singh		332	"	"	293
Khem Singh v. Raghubir Singh		365	"	"	578
Khudayar Khan v. Rahat Khan		494	"	"	446
King v. King		50	"	"	237
Kishori Mohan v. Chhanga Lal		44	"	"	187
Kuber Upadhiya v. Ramakar Dat Upadhiya		357	"	"	351
Kulsum Bibi v. Muhammad Ismail		915	"	"	677
Kunwar Nihal Singh v. Chandra Kunwar		424	"	"	358
Lachhman Das-Babu Ram, *in the matter of*		631	1925	A	385
Lachhman Das-Narain Das, *in the matter of*		68	"	"	115
Lachman Prasad v. Munia		867	"	"	759
Lal Bahadur v. Ambika Prasad	P C	795	"	P C	264
Lal Bajinath Singh v. Chandrapal Singh		55	1924	A	795
Lalla Babu v. Lal Bahadur		557	1925	A	565

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Madhori Saran v. Parbati		881	1925	A	552
Mahadeo Prasad v. Anandi Lal		90	"	"	60
Mahadeo Rai v. Jan Muhammad		541	"	"	341
Mahip Narain Pande v. Mannu Singh		778	"	"	546
Maina Bibi v. Chaudhri Vakil Ahmad	P C	250	"	P C	63
Manki Kunwar v. Kundan Kunwar		403	"	A	375
Manni Lal v. Radhe Gopalji		501	"	"	602
Manzur Hasan v. Muhammad Zaman	P C	151	"	P C	36
Mata Prasad v. Nageshar Sahai	P C	883	"	"	272
Mehi Lal v. Ramji Das		13	1924	A	792
Moti Lal v. Bishambhar Nath		741	1925	A	431
Moti Lal v. Yar Muhammad		63	"	"	275
Muhammad Abdul Majid v. Ala Bakhsh		534	"	"	376
——— ——Habib-ullah v. Tikam Chand		57	"	"	276
———————Ibrahim v. Altafan		243	"	"	24
———————Mazhar Ali v. Biggha Begam		900	"	"	652
Mumtaz-ud-daula Mukarram Ali Khan v. James R. R. Skinner		335	"	"	263
Murari Lal v. E. V. David		291	"	"	241
Murlidhar v. Mahbub Khan		353	"	"	644
Muzaffar Husain v. Muhammad Yaqub		411	"	"	289
Nadir Husain v. Sadiq Husain		324	1925	A	361
Narain Das v. Chiranji Lal		361	"	"	364
Narain Dat Tiwari v. Rudra Dat Bhat		948	"	"	654
Nathu v. Ram Sarup		427	"	"	335
Naunihal Singh v. A. G. Skinner		803	"	"	707
Net Singh v. Receiver of the estate of Gajraj Singh ...		952	"	"	467
Niadar v. Ramji Lal		849	"	"	549
Nihal Ahmad v. Ramji Das		359	"	"	620
Parmanand Pandit v. Mata Din Rai		582	1925	A	427
Prag v. Bhagwan Din		926	"	"	734
Prem Narain v. Jagdamba Sahai		859	"	"	762
Rafat-un-nissa Begam v. Husaini Begam		294	1925	A	215
Raghunath Prasad Singh v. Lachhmi Narain Singh ...		667	"	"	394
Raja Devi v. Muhammad Yakub		738	"	"	411
Rajindra Narain Singh v. Sundra Bibi	P C	385	"	P C	176
Rajrup Kunwar v. Gopi		430	"	A	261
Rajrup Kunwar v. Kandhaiya Lal		2	1924	"	785
Ram Adhin v. Ram Bharose		181	1925	"	182
Ram Baran Chaube v. Bhagwati Pande		751	"	"	804
Rameshwar Prasad, *in the matter of*	F B	310	"	"	501
Ram Ghulam v. Ram Chandra		338	"	"	325
Ram Prasad Singh v. Jagdamba Prasad Singh ...		872	"	"	547
Ram Prasad Singh v. Naipal Singh		600	"	"	420
Ramrup Goshain v. Ramdhari Bhagat		770	"	"	683
Ram Sarup v. Arya Samaj of Dhampur		342	"	"	337
Ram Sia v. Bua		10	1924	"	790
Ram Sundar Misra v. Jai Karan Singh		456	1925	"	271
Ram Ugrah Singh v. Benares Hindu University		434	"	"	253
Ramzan Bakhsh v. Muhammad Ishaq		509	"	"	436
Ranodip Singh v. Parmeshwar Prasad	P C	165	"	P C	33

Names of Parties	I. L. R.	pp.	A. I. R.		pp.
Ravinandan Prasad v. Jagarnath Sahu ...	...	479	1925	A	459
Roshan Lal v. Chaudhri Bashir Ahmad ...	...	66	"	"	138
Rudra Prasad Pande v. Mathura Prasad Pande	...	916	"	"	566
Rudra Pratab Singh v. Sarda Mahesh Prasad Singh	...	543	"	"	588
Sanwalia v. Nathi Lal	...	920	1925	A	561
Sarju Prasad Rao v. Mangal Singh ...	...	490	"	"	339
Sarvi Begam v. Ram Chandar Sarup ...	...	850	"	"	778
Shagun Chand v. Asa Ram	...	917	"	"	807
Shah Muhammad Fakhr-ud-din v. Rahim-ullah	...	121	"	"	458
Shankar Sahai v. Bechu Ram ...	...	381	"	"	333
Sheobodh Ram Teli v. Shiva Prasad ...	...	322	"	"	293
Shiam Lal-Joti Prasad v. Dhanpat Rai ...	...	853	"	"	768
Shib Charan Das v. Kharka	...	348	"	"	346
Sital Rai v. Ram Khelawan Pande ...	...	780	"	"	543
Sita Ram v. Beni Prasad	...	263	"	"	221
Sita Ram v. Piari Lal	...	921	"	"	558
Sukarwa v. Nazir Ahmad	...	118	"	"	121
Sundar Bibi v. Lal Rajendra Narain Singh ...	...	496	"	"	389
Sundar Rai v. Suraj Bali Rai	...	932	"	"	783
Surja v. Joti Prasad	...	493	"	"	681
Swarath Ram Ram Saran v. Ram Ballabh	...	784	"	"	595
Tula Ram v. Bhup Singh	...	913	1925	A	691
Umar Daraz v. Sri Ram Das	...	450	1925	A	355
Union Bank, Allahabad, Ltd., *in the matter of the*	...	669	"	"	519
Vakil, *in the matter of a*	...	F B 377	1925	A	247
Vakil, *in the matter of a*	...	F B 729	"	"	641
Wajid Ali Khan v. Puran Singh ...	...	100	1925	A	108

[203 Cases]

THE

ALL INDIA REPORTER

1925 ALLAHABAD

LIST OF OVERRULED CASES

Chandan Sing hv. Emperor, 40 All. 103=16 A. L. J. 11	Overruled in	A. I. R. 1925 P. C. 1
Gokul Singh v. Saheb Singh, 15 A. L. J. 121	"	A. I. R. 1925 All. 1 (F. B.)
Gokul Prasad v. Ram Devi, 19 A. L. J. 771	"	A. I. R. 1925 All. 137
Sheo Nandan Ahir v. Ram Lagan Singh 13 A. L. J. 921	"	A. I. R. 1925 All. 1 (F. B.)
Sheoraj Singh v. Aminuddin Khan, 20 All. 539=(1898) A. W. N. 145	"	A. I. R. 1925 All. 66

ABBREVIATIONS EXPLAINED.

All. or A.	....	Indian Law Reports, Allahabad Series
A. L. J.	....	Allahabad Law Journal.
A. I. R. 1925 All.	....	All India Reporter, 1925 Allahabad.
Bom. or B.	....	Indian Law Reports, Bombay Series.
Bom. L. R.	....	Bombay Law Reporter.
A. I. R. 1925 Bom.	....	All India Reporter, 1925 Bombay.
Bur. L. T.	....	Burma Law Times.
Bur. L. J.	....	Burma Law Journal.
Cal. or C.	....	Indian Law Reports, Calcutta Series.
C. L. J.	....	Calcutta Law Journal.
C. L. R.	....	Calcutta Law Reports.
C. W. N.	....	Calcutta Weekly Notes.
A. I. R. 1925 Cal.	....	All India Reporter, 1925 Calcutta.
Cr. L. J.	....	Criminal Law Journal.
I. A.	....	Law Reports, Indian Appeals.
I. C.	....	Indian Cases.
Lah. or L.	....	Indian Law Reports, Lahore Series.
A. I. R. 1925 Lah.	....	All India Reporter 1925 Lahore.
Lah. L. J. or L. L. J.	....	Lahore Law Journal.
L. B. R.	....	Lower Burma Rulings.
A. I. R. 1922 L. B.	....	All India Reportor 1922 Lower Burma.
L. R. (P. C.)	....	The Law Reporter, Privy Council Sec.
L. R. (A)	....	,, Allahabad Section.
Mad. or M.	....	Indian Law Reports, Madras Series.
M. L. J.	....	Madras Law Journal.
M. L. T.	....	Madras Law Times.
L. W. or M. L. W.	....	Madras Law Weekly.
M. W. N.	....	Madras Weekly Notes.
A. I. R. 1925 Mad.	....	All India Reporter, 1925 Madras.
N. L. J.	....	Nagpur Law Journal.
N. L. R.	....	Nagpur Law Reports.
A. I. R. 1925 Nag.	....	All India Reporter, 1925 Nagpur.
O. & A. L. R.	....	Oudh and Agra Law Reporter.
O. C.	....	Oudh Cases.
A. I. R. 1925 Oudh	....	All India Reporter, 1925 Oudh.
O. L. J.	....	Oudh Law Journal.
O. W. N.	....	Oudh Weekly Notes.
P. R.	....	Punjab Record.
P. L. R.	....	Punjab Law Reporter.
P. W. R.	....	Punjab Weekly Reporter
Pat. or P.	....	Indian Law Reports, Patna Series.
P. H. C. C.	....	Patna High Court Cases (Supplement to C. W. N.)
A. I. R. 1925 P.	....	All India Reporter, 1925 Patna.
A. I. R. 1925 P. C.	....	All India Reporter, 1925 Privy Council
Pat. L. R.	....	Patna Law Reporter.
Pat. L. J.	....	Patna Law Journal.
Pat. L. W.	....	Patna Law Weekly.
R. or Rang.	....	Indian Law Reports, Rangoon Series.
A. I. R. 1925 Rang.	....	All India Reporter, 1925 Rangoon.
Sar.	....	Saraswati P. C. Judgments.
S. L. R.	....	Sind Law Reporter.
Suther.	....	Sutherland P. C. Judgments.
A. I. R. 1925 Sind	....	All India Reporter, 1925 Sind.
U. B. R.	....	Upper Burma Rulings.
U. P. L. R.	....	U. P. Law Reporter.
A. I. R. 1922 U. B.	....	All India Reporter, 1922 Upper Burma.

OTHER ABBREVIATIONS.

Appl	....	Applied.	Diss.	....	Dissented from.	P. C.	....	Privy Council.
Appr.	....	Approved	Expl.	....	Explained.	Ref.	....	Referred to
Dist.	....	Distinguished.	Foll.	....	Followed.	S. B.	....	Special Bench.
Disc.	....	Discussed.	F. B	....	Full Bench.			

THE

ALL INDIA REPORTER

1925

ALLAHABAD HIGH COURT

SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.

★ Indicates Cases of Great Importance.

★★ Indicate Cases of Very Great Importance.

A

Abetment.

——See Penal Code, S. 107.

Accomplice.

——See Evidence Act, S. 133.

Acknowledgment.

——See Limitation Act, S. 19.

Acquiescence.

*——Mortgagor and mortgagee — Mortgagee erecting building on mortgagor's land — Principle of acquiescence does not apply 576

Adjustment of Suit.

——See Civil P. C., O. 23, R. 3.

Adverse Possession.

——Adverse possession against life-tenant is not adverse possession against reversioner or remainder-man 707

——Cosharers — One cosharer taking lease from others — Remaining in possession even after expiry of term—Rent not paid—Possession is adverse 698

*——During continuance of equity of redemption mortgagee cannot claim prescriptive title 133

——Mutation—A mortgagee's name as proprietor does not constitute adverse possession 34

*——Two joint Hindu brothers—Death of one — Possession by widow of her husband's share with survivor's consent—On the second brother's death widow getting possession of whole property—Widow's possession is not adverse to reversioners 330

Agra Pre-emption Act (11 of 1922)

——S. 5—Wajib-ul-arz and rubkar must be construed together 553

——S. 14—Notice to person having pre-emptive right is not obligatory—Refusal to purchase on being informed of intention to sell bars pre-emption suit 645

——**(8 of 1923)**

——S. 12—Section lays down preference inter se 542

Agra Tenancy Act (2 of 1901)

——S. 4—Rent may include payment on produce of tanks—But where parties are not landlord and tenant, payment by one to other is not rent. 561

——S. 10 — U. P. Land Revenue Act, S. 36—Less than statutory rate of rent is claimable if agreed upon—Proceedings under S. 36, Land Revenue Act, are not necessary 100

——S. 10 (1)—Gift of sir land—No ex-proprietary rights are created 775

——S. 18 (b)—Ejectment of tenant does not necessarily extinguish mortgage created by him under express terms of lease 580

——S. 20 — Equity of redemption—Gift of, is not invalid 358

——S. 20 — Settlement between zamindar and the tenant regarding the incidents of the tenure cannot override the section 63

——S. 20 (3)—Appointment of receiver in execution proceedings

Agra Tenancy Act.

against thekadar, to collect latter's arrears of rent and utilize them for satisfying decree is egal 72

——S. 20 (3) — Express condition in lease makes lease transferable 580

——S. 22 — Mortgage of property by female absolute owner — Mortgage is valid and husband's heirs cannot oust mortgagee after her death 420

——S. 22 — Succession — Sons of pre-deceased son are entitled to succeed along with surviving se even to the tenancy rights of the deceased 786

——S. 22 — Succession to tenancy —Tenancy in possession of mortgagee at the time of tenant's death—Prospective heir of the tenant can be said to share in cultivation 794

——S. 32—One sharer kept out of possession by cotenants — Suit by him for profits or damages is not barred 697

——S. 32 (2)—Suit for possession of specific plots, against cotenants is not barred when the holding has been divided among themselves—Such suit does not lie against landlord 53

——Ss. 34 and 199—Defendant can have question of proprietary right referred to civil Court 210

——S. 34—Ejectment suit–Failure to plead S. 34 is not fatal—Person in occupation without landholder's consent can be ejected 210

——S. 34—Suit against person who came into occupation with consent of landlord — Section does not apply 812

——S. 40—Entry must be made on basis of possession — Question can be reopened on basis of title 200

——S. 57—Settlement entry of land as sir—Correctness can be questioned 200

——Ss. 57 (c) and 58 (b) —Condition relating to evacuation of land leased—S. 58 (b) and not S. 57 (c) applies 679

——S. 65 (2)—Well in a holding—Tenant using water for irrigating other plots of land—Suit for injunction and damages lies in

Agra Tenancy Act

civil Court and not revenue Court 571

——S. 79—Grove is not a holding Dispossession by zamindar for 6 months does not take away groveholder's right 776

——S. 79—S. 79 does not apply to auction-purchaser purchasing a tenant's interest after latter's ejectment 580

——S. 83—Tenant can surrender without landlord's consent by simply giving up lands—Liabi- [illegible] year of non-occupation 815

——S. 88—Non-occupancy tenant is notentitled to plant trees without the consent of the zamindar in writing 702

——S. 88—Occupancy tenancy—Trees cannot be planted without landlord's consent 796

——Ss. 97 and 41—Mere entry in the khatauni signed by landlord, tenant and kanungo is not agreement to enhance rent 123

——S. 159—Liability of cosharer —Lambardar can recover from the cosharer revenue paid by him on behalf of the cosharer where the cosharer separately paid revenue subsequently in to the treasury without informing the lambardar 95

——S. 165—Assignee of arrears of Profits can sue in revenue Court 765

——S. 165—Suit for profits against lambardar's heirs after his death—Heirs are not liable for uncollected profits 810

——S. 165—Suit under S. 165—Person allowed by lambardar to make collections cannot be made defendant 701

——Ss. 167 and 199—Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in revenue Court is not entertainable 615

——S. 167—Matter within S. 167 —Decision of revenue Court—Civil Court will not try suit calculated to reverse revenue Court's decision 19

Agra Tenancy Act.
——S. 167—Mortgagee a recorded cosharer—Decree for joint possession can be passed but not for mesne profits—Jurisidiction of civil Courts is barred in such cases 746
——S. 167—Suit for declaration that plaintiffs are joint tenants with defendants—Civil Court can try 465
——S. 177—Plea by tenant that he holds the land as khudkhasht raises question of proprietary title 30
——S. 193—Sale which ought to be held by Collector held by the Assistant Collector—Sale is not vitiated 743
——S. 193, Cl. (b)—Any isolated plot in a mahal is not a share of the mahal 743
——S. 193, Cl. (g)—Sub-tenant of exproprietary tenant paying off rent decree against exproprietary tenant—Sub-tenant cannot plead payment as set off in suit or rent against himself by exproprietary tenant 824
——S. 194——Lambardar is prima facie entitled to recover rent on behalf of all cosharers—If not so entitled, he cannot recover his share alone 817
——S. 194—Sir and khudkhast in exclusive possession of a cosharer and let out by him—Suit to eject the sub-tenant-Other cosharers are not necessary parties 775
——S. 194 (1)—Suit by lambardar for rent or ejectment—Lambardar is presumed to act as cosharers' agent—But presumption is rebuttable 49
——S. 198 (2)—Rent suit—Tenant asserting landlordship of another and payment of rent to him—Latter can be impleaded as party—But question of title decided between him and plaintiff is not res judicata between them 574
——S. 201 (1)—Suit against person in actual possession, by person who by mistake in record, was compelled to pay former's revenue, comes under S. 201 (1) 50
——S. 202 (2)—Appeal does not lie from revenue Court to civil Court even if parties had been wrongly referred to revenue Court orginally by a Civil Court 125

Allahabad High Court Rules.
——Rules for Subbordinate Courts Ch. 21, R. 1—First day of hearing for purpose of filing certificate of payment of pleader's fees is the first day fixed for hearing after the framing of issues 98

Amendment of Decree.
——See Civil P. C., S. 152

Amendment of Plaint.
——See Civil P. C., O. 6, R. 17

Appeal
*——Competency — Order passed without jurisdiction — Appeal lies if the order, when passed with jurisdiction, is appealable 737
*——Right to appeal is not inherent right F. B. 380

Arbitration
**——Award ay arbitrator chosen by parties—Claims irrecoverable in law Courts settled by arbitrator —Court cannot re-open the award F B 503
**——Award — Omission without consent of parties, to decide anything material, undertaken to be decided, vitiates award—Parties consent to omission need not be express—Consent is unnecessary for omission to do any thing which is practically impossible for the arbitrators to do 103
**——Award—Setting aside—Arbitrator ought not to be examined on commission—He may be examined as to procedure adopted by him, the materials before him, etc., but not as to why or how he arrived at a decision—His decision that as a fact the parties had consented to anything is final 103
*——Parties asking Court to decide by local inspection—No intention to be bound by decree—Decision is not award—Appeal lies 348

Arms Act (11 of 1878)
——Ss. 14 and 19 (f)—Two empty brass. 405 used cartridge cases found in accused's house in a locked box—Accused was held not liable. 498
*——S. 19 (f)—Accused's brother holding licence—Accused firing blank shots to warn would be

Arms Act.

mischief makers—Accused is not guilty. 396

——S. 19 (f)—Son of a licensee (the latter not being entitled to hand over gun to retainer) was convicted for possessing father's gun for shooting birds 175

——S. 30—Search illegal yet if evidence is conclusive conviction is proper—Obiter—Two persons must be present at the search—One making the search and the other the officer specially appointed 434

B

Bundelkhand Land Alienation Act (2 of 1903)

——S. 2—Trees apart from land are not 'land' within S. 2 587

——S. 9—Reference is competent even after a decree is made absolute 171

——S. 16—Trees apart from land can be sold 587

C

Civil Procedure Code (5 of 1908)

——Code applies to proceedings under Arbitration Act 154

——S. 2 (2)—"Decree" includes Revenue Court decree 264

——S. 2 (2)—Expiry of time for appeal without appeal being filed makes decree final 291

——S. 2 (3)—'Decree-holder' does not include an attaching creditor 123

——S. 2 (17)—Official receiver is a "public servant" 241

——S. 10—Agra Ten. Act (2 of 1901), Ss. 167 and 199—Ejectment suit—Question of title raised in defence—Defendant asked to file suit in civil Court—Suit filed after expiry of time fixed but before conclusion of suit in revenue Court is not entertainable 615

——S. 10—Suit for partition pending in Revenue Court—Suit in civil Court for partition of house is not barred 677

——S. 11 — Co-defendants — Res judicata applies if conflict of interest existed and if decision of suit rested on the issue 546

——S. 11—Decision among parties out of Court may be res judicata **F B 503

Civil P. C

*——S. 11—Decision on a point of law is not res judicata if cause of action in subsequent suit is different as in the case of recurring liability—Right to eject a tenant is a recurring liability—Therefore decision in ejectment suit against a tenant is not res judicata **761**

*——S. 11—Hindu Law—Reversioners — Suit by reversioner against transferees from widow—Subsequent similar suit against transferees of other portions of estate — Defendants' failure in previous suit to plead that plaintiff was not next reversioner does not bar that plea in subsequent suit **585**

*——S. 11——Issue not arising on pleading and so indistinct as not to show that parties were required to adduce any evidence—No res judicata arises **794**

——S. 11—Lower Court deciding on title and possession—Appellate Court deciding on title alone—No res judicata regarding possession arises **243**

*——S. 11—Might and ought—Suit to set aside sale on ground of non-receipt of consideration—Court finding that consideration was partly paid — Subsequent suit for balance of purchase money is not barred **486**

——S. 11 — Mortgage by Hindu widow—Mortgagor held entitled to mortgage during her life-time—Question is res judicata in subsequent suit **417**

——S. 11—Point left undecided is not res judicata **770**

——S. 11 — Pre-emption suit—Vendee and pre-emptor figuring as rival pre-emptors in previous suit—Interpretation of wajib-ul-arz in previous suit is binding in later suit **663**

*——S. 11 — Previous proceeding confined to question of possession—Question of title is not barred **200**

*——S. 11—Principal applies to execution proceedings **117**

——S. 11—Proceedings for partition of cosharer village—Rate of profits allowed to out-going

Civil P. C.

sharers is not res judicata as between parties continuing as co-sharers after partition 246

*——S. 11—Rent suit—Tenant asserting landlordship of another and payment of rent to him—Latter can be impleaded as party—But question of title decided between him and plaintiff is not res judicata between them 574

*——S. 11—Suit by the reversioner of Hindu widow is in a representative capacity 483

*——S. 11—Two appeals in same suit—Two decrees passed—Second appeal filed from only one—Appellant not prejudiced by the other—Second appeal is not barred 488

*——S. 11, Expl. 6—Decision in suit by or against joint family operates as res judicata as against any member thereof though latter was not impleaded as party 67

**——S. 11, Expl. 6—Decision between Hindu widow and alleged adopted son regarding the ownership of the estate is binding on reversioners. 79

——S. 20—Suit for refund of overcharge demanded by a foreign railway—Cause of action partly arises at place where goods were consigned 823

——Ss. 24 and 38—S. 38 is not exhaustive—Execution application may be transferred under S. 24 276

——S. 24—" Suit " includes execution proceedings 276

——S. 38—Section is not exhaustive—Execution application may be transferred under S. 24 276

——S. 41—Alter issue of certificate, whether rightly or wrongly, the Court to whom the decree is transferred cannot deal with execution matters 179

——S. 47—Collector is not a Court 146

——S. 47—Dispute between decree-holder (auction-purchaser), and judgment-debtor — Separate suit lies 703

——S. 47 — Exempted defendant suing for declaring property attached not to be J. D's.—Property entrusted to stranger pendente lite—He disposing of it on trial Court's decree—Decree reversed on appeal — He being ordered to refund in execution of decree—No appeal lies 328

——S. 47—Objection by judgment-debtor's representative under O. 21, R. 58—Case falls under S. 47, and decision thereon is a decree 594

*——S. 47 — Order discharging surety from suretyship is decree—Surety is a party within S. 47 344

*——S. 47 and O. 20, R. 12—Order that defendants are liable to account as legal representatives of deceased judgment-debtor — Amount due not determined — Order is not appealable 588

*——S. 47 — Pension —Saleability decided upon by trial Court — Executing Court cannot question 652

——S. 47—Property sold being in excess of that ordered by decree to be sold—Application by judgment-debtor to set aside sale—S. 47 applies 551

*——S. 47 — Receiver of attached property appointed in suit by defendant exempted from decree—Claim of refund against receiver—Executing Court has jurisdiction 328

*——S. 47 — Section cannot bar a suit by decree-holder specifically directed to file by an order under O. 21, R. 58 240

——S. 47—Section does not cover a dispute as to possession between auction-purchaser and judgment-debtor 236

——S. 47 (3)—Applicants claiming to be brought on record as legal representatives of deceased judgment-debtor — Claim rejected—Second appeal lies from the decision 578

——Ss. 47 (3) and 2—Order determining a party's right to be the representative of a deceased party is decree and appealable 66

——S. 53—Hindu son with ancestral property liable for the debt is legal representative 471

——S. 55 — Surety bringing judgment-debtor in Court during stay ordered in his favour — Conditions of suretyship are not fulfilled 344

Civil P. C.

——S. 60 — Agriculture the only source of livelihood — S. 60 applies 432

*——S. 60 — Pension — Saleability decided upon by the trial Court —Executing Court cannot question 652

——S. 66 is no bar when the certified purchaser does not contest plaintiff's claim 47

——S. 80—Official Receiver cannot be sued without notice 241

——S. 80 — Plea as to want of notice may be raised at the final hearing 241

——S. 89—(*Per Kankaiya Lal, J.* - 'Any other law' in S. 89 includes 2nd Schedule — *Mukerji, J.* (*contra*) **F. B. 503

——S. 92 — Declaration that the properties specified are waqf properties is within S. 92 683

——S. 92 — Neglect by trustee to take steps to save property from consequences of breach of trust by predecessor is breach of trust 683

——S. 92—Reliefs declaring alienations invalid come under S. 92 683

——S. 92—Suit under—Claim for possession included — Plaint should not be returned 683

——S. 92 — Suit under — Transferees of trust property can be impleaded 683

*——S. 92—Though defendants are not proved to be even de facto trustees, still suit for appointing new trustee lies—The new trustees can eject trespassers by suit —Trespassers, though not necessary parties, are not improper parties 759

*——S. 92 (h)—Cl. (h) refers to reliefs ejusdem generis with the ones actually mentioned in previous part of S. 92—Actual possession cannot be decreed against transferees 683

——S. 100 — Additional evidence rejected by appellate Court not in exercise of discretion but due to supposed insuperable legal difficulty—Second appeal lies 288

——S. 100—Finding of fact—Possibility of expert evidence given on both sides being true—Finding was held to be open to be considered in second appeal 24

Civil P. C.

——S. 100 — Inference from admitted entries is a question of fact 353

——S. 100—Inference of law from admitted facts—High Court can interfere if inference is wrong 796

——S. 100—Plea of law not raised in the grounds—Court can allow the plea to be raised 783

——S. 100—Question of inferences from documents other than documents of title is one of fact 39

——S. 100—Question purely legal is open 361

——S. 100 —Tenants, whether entitled to sell site of house is mixed question of law and fact 718

——S. 104—Order granting stay of suit pending arbitration is appealable 154

——S. 104 (f) and Sch. 2, para. 21—No order for filing award and no decree thereon separately passed —Single order disposing of whole case—Appeal is competent 404

——S. 105—Appeal from order impleading a person in appeal does not lie 768

——S. 105 —(*Per Lindsay, J.*,) "Decision" means decision upon merits **F B 610

——S. 105—Interlocutory order — Appeal from decree — Interlocutory order cannot be attacked unless affecting merits of the case 426

——S. 105—Order in pending suit superseding award can be questioned in appeal from decree 566

*——S. 109—Final order—Remand order directing lower Court to rehear application under O. 22, R. 9 is not a final order 263

——Ss. 115 and 152—Amendment of decree — Failure to exercise jurisdiction—Revision lies 556

——S. 115—"Appeal" applies only to High Court 267

——S. 115 — Appellate order setting aside ex-parte decree is "case"—Revision lies **F. B. 610

——S. 115 — Lower Court's order not clear—Case was sent back 202

——S. 115—Lower Court referring under local Act case to Collector — Revision lies as to correct exercise of jurisdiction 253

Civil P. C.

——S. 115 — No revision would be accepted if the lower Court has exercised discretion under S. 152 rightly 187

——S. 115 — Order of revenue Court or District Judge, original or appellate, in reference to questions under Local Tenancy Act—Revision does not lie 800

——S. 115 and Sch. 2, p. 15 — Order superseding award in pending case and directing suit to proceed—No revision lies 566

*——S. 115—Other remedy open — Revision may lie **F B** 610

——S. 115—Pending suit—No revision lies 458

——S. 115—Refusal of jurisdiction — Appellate Court concurring — Revision lies against orders of both Courts 267

——S. 115 — Refusal to exercise discretion in one case is not relevant in another case 218

——S. 115—Revision may be refused if the circumstances of the case justify such refusal 264

——S. 115 — Small Cause Court trying suit not fully triable by it on merits without objection—No revision was allowed 51

*——Ss. 141, 151 and O. 9, R. 9 — Restoration application dismissed for default — Application to restore it is entertainable 773

*——S. 145 — Order discharging surety from suretyship is decree —Surety is a party within S. 47 344

——S. 151 — Defendants granted adjournment on condition of paying costs — Default in paying — Defence can be struck off 280

——S. 151 — Mistake in execution sale will not be rectified after three years so as to affect a bona fide purchaser 236

*——S. 151 — Mistake of Court — Court can rectify even apart from S. 151 622

*——S. 151 and O. 9, R. 9—Restoration application dismissed for default — Application to restore it is entertainable 773

*——S. 152 — Correction of error is discretionary 187

——Ss. 152 and 115 — Court has jurisdiction to refuse amendment of decree — Failure to exercise jurisdiction makes revision competent 556

*——S. 153—Overvaluing a suit to get round a previous decision—Proper procedure is to return plaint 142

——O. 1, R. 3—Suit under S. 92—Transferees of trust property can be impleaded 683

*——O. 2, R. 2—Suit for profits under Agra Tenancy Act for particular year—Cause of action arising on date on which suit for profits for previous years was instituted — New claim also should be included in suit 795

*——O. 6, R. 17 — Allegations in plaint determine nature of suit—Suit brought under one section—Defendant objecting — Offer to amend plaint to suit another section should be allowed 538

*——O. 6, R. 17—Omission to verify is a mere irregularity curable even at a late stage 79

——O. 6, R. 17—Pre-emption suit — One plaintiff not entitled — Suit dismissed — Appeal — Unentitled plaintiff's name cannot be removed 355

——O. 6, R. 17—Suit on allegation of tenancy failing—Plaintiff cannot claim ejectment of defendant as trespasser — Plaintiff cannot be allowed to implead third party 705

——O. 7, R. 10 and S. 92—Suit under S. 92—Claim for possession included — Plaint should not be returned 683

*——O. 9, R. 3—Suit against several defendants—One defendant only present — Plaintiff and other defendants absent—Suit dismissed for default — Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several 425

*——O. 9, R. 8—Plaintiff missing train—Suit dismissed for default — Plaintiff reaching Court and applying for restoration same day—Restoration was ordered 601

——O. 9, R. 9—A refusal to restore an application for review, when the application to restore has

Civil P. C.

been heard on the merits, is not appealable 57

*———O. 9, R. 9—Restoration application dismissed for default—Application to restore it is entertainable 773

———O. 9, R. 13—Appeal from order rejecting application for setting aside ex-parte decree—Appellate Court cannot go beyond R. 13 610

F. B.

———O. 9, R. 13—Scope—No second appeal lies against an order refusing to set aside an ex-parte decree 267

———O. 17, R. 1—Defendants granted adjournment on condition of paying costs — Default in paying — Defence can be struck of 280

*———O. 17, Rr. 2 and 3 — Court wrongly acting under R. 3 instead of under R. 2—Remedy is by appeal 252

———O. 17, Rr. 2 and 3—Defendant absent at adjourned hearing — Order should be presumed to be under R. 2 in absence of mention otherwise 267

———O. 17, R. 2—Defendant taken time for producing evidence, and absent—Rule applies 267

**———O. 17, R. 2—Defendant taking time to produce evidence, but remaining absent on adjourned hearing—Court ought to pass an ex-parte decree and not a judgment on merits — Case-law reviewed 182

———O. 17, R. 2 — Wrong decision that O. 9, R. 13 did not apply—Revision lies 267

*———O. 17, R. 3 — Parties agreeing to abide by oath affecting a third person to be taken in particular manner — Oath illegal under Oaths Act—Court fixing date for oath to be taken—Oath not taken on that day — O. 17, R. 3 does not apply 604

———O. 18, R. 2 (1)—'The day fixed for the hearing of the suit' does not mean or include the day on which issues are framed 98

*———O. 20, R. 1—Invalid pronouncement — Decree following—Decree should not be violated. 293

———O. 20, R. 1—Parties absent—No notice to parties— Judgment cannot be validly pronounced 293

———O. 20, R. 12—Order that defendants are liable to account as legal representatives of deceased judgment-debtor — Amount due not determined—Order is not appealable 588

*———O. 20, R. 13 — In redemption suit no decree for accounts can be passed previous to preliminary decree—But interlocutory order for accounts can be passed 707

———O. 21, R. 1 — Court closed on the day fixed for payment—Payment made on re-opening day is valid 687

* ———O. 21, R. 1 — Payment out of Court to the decree-holder's attaching creditor cannot satisfy decree 123

*———O. 21, R. 2 — Payment made within three years of last starting point of limitation but certified after 3 years had expired takes effect from the date when it was made 802

*———O. 21, R. 16—Execution of decree granted — Judgment-debtor cannot afterwards say decree is not executable 662

———O. 21, R. 53 (1) — Decree covered by Rule—Proceeding as if decree is not covered by Rule is only irregularity 264

*———O. 21, R. 57 — Execution case struck off for default — Attachment directed to subsist—Order is valid and attachment continues 456

*———O. 21, R. 58—Civil P. C., S. 47 does not bar a suit by decree-holder specifically directed to file by order under O. 21, R. 58 240

*———O. 21, Rr. 89 and 90 — Application under R. 89 heard and disposed of — Application under R. 90 is not barred 778

*———O. 21, R. 90 — Auction-purchaser can apply under R. 90 459

———O. 21, R. 90 — "Substantial loss need not be pecuniary"—Sale proclamation representing encumbered property as free—Auction-purchaser can apply for setting aside sale 459

Civil P. C

——O. 21, R. 92—Decree amended after sale—Sale is not affected—Setting aside is revisable 264

*——O. 21, R. 92 (3) — Suit to set aside decision of Collector confirming a sale on the ground of fraud is not barred 146

——O. 22, Rr. 3, 4 and 10, S. 141, and O. 9, R. 13 — Applicant to set aside ex-parte decree dying—No appeal lies from order substituting legal representative 431

*——O. 22, R. 3—Pre-emption suit—Decree of the appellate Court, on appeal by vendee, in ignorance of death of one of the pre-emptors respondents, dismissing suit is nullity—Payment of decretal amount jointly by the pre-emptors does not affect the question 108

*——O. 22, R. 4 — Joint decree for possession passed — Appeal preferred against decree — One decree-holder dying and his representative not brought on record—Appeal abates as against his heirs only, but the appeal is imperfectly constituted and cannot be heard 623

——O. 22, R. 4—Joint suit for possession — Prior compromise merely defining share but partition not perfected — Decree in suit is a joint decree 623

*——O. 22, R. 4 — Mortgage suit—Judgment-debtor dying between preliminary and final decrees—Decree-holder substituting, honestly, person believed to be sole representative—Person entitled to be co-representative cannot redeem after final decree 479

——O. 22, Rr. 4 (3) and 9—Death of one respondent — No legal representatives substituted — Appeal abates against all respondents where their interest is inseparable 141

——O. 22, R. 12 — Decree capable of execution without final decree—Substitution of legal representatives need not be within 3 months of party's death 66

——O. 23, R. 1 — Withdrawal allowed—Question of formal defect not considered—Order is revisable 466

——O. 23, R. 1 (2) — Withdrawal

Civil P. C.

allowed but permission to bring fresh suit refused—Revision lies 272

*——O. 23, R. 3 — (*Per Walsh and Kanhaiya Lal, JJ. Mukerji, J. contra*)—Award is no adjustment **F B** 503

——O. 23, R. 3 — Compromise avoidable but not avoided — Decree can be passed 266

——O. 23, R. 3—Compromise due to coercion — Decree passed — Remedy is by suit 266

——O. 23, R. 3—Defendant's offer that suit may be decreed if certain person ate food out of plaintiff's hands—Offer acted upon—Suit must be decreed—O. 23, R. 3, does not apply 271

*——O. 23, R. 3—Parties agreeing not to adduce any evidence and to abide by Court's decision after local inspection—Decision after local inspection is one based on compromise and is not appealable 558

——O. 23, R. 3—Party abandoning his claim voluntarily—Court may decline to allow appeal to proceed further **F B 503

*——O. 29, R. 1—Unregistered body—All members must be impleaded 337

——O. 32, R. 3—Appointment irregular—No prejudice to minor—Decree is binding—Omission to appeal is not negligence 351

——O. 32 R. 3 (4) and S. 99—Non-compliance with O. 32, R. 3 (4)—Minor not prejudiced—Proceedings are not vitiated 548

——O. 32, R. 4—Consent of person appointed is necessary but can be presumed where despite opportunity to object, he has not objected to the appointment 214

——O. 32, R. 4—Irregularity and prejudice to minor are factors to be considered in cases of setting aside decree against minors for improper appointmentt of guardian 214

——O. 32, R. 4—Where a Hindu father is appointed guardian, in a suit on the basis of hundis executed by him, in absence of proof of immorality or illegality the decree is binding on the sons 214

Civil P. C.

*———O. 32, R. 7—Compromise—Paternal uncle signing on behalf of himself and his nephews major and minor, and on behalf of one of the major nephews as guardian of his minor brothers —Court's sanction is necessary 32

———O. 32, R. 7—Decree being passed on compromise does not necessarily imply Court has sanctioned the compromise—Where guardian changes mind before grant of leave, and does not want compromise, compromise cannot be forced on minor 570

———O. 33. Rr. 1 and 5—Hindu minor having share in joint family property is not necessarily entitled to sue as pauper 547

———O. 33, R. 5 (d)—Rejection of application on ground of suit matter being res judicata is illegal and revisable 275

———O., 34, R. 1—Merely an entry in village papers does not make a person a necessary party 593

*———O. 34, R. 1—Mortgage by Hindu coparceners—Mortgage suit — Mortgagors impleaded but minor co-parcener not impleaded—Suit is not bad but minor is not bound 335

———O. 34, R. 5—Plaintiff has only to apply for final decree 622

*———O. 34 R. 6—Mortgage decree against Hindu widow — Other properties can be attached 352

*———O. 34, R. 7—In redemption suits no decree for accounts can be passed previous to preliminary decree—But interlocutory order for accounts can be passed 707

———O. 34, R. 7—Redemption suit —Costs being a charge on property or not depends on interpretation of decree in each case—(*Per Daniels, J.*)—Construction of decree should accord with Civil P. C., O. 34, R. 7 492

*———O. 34 Rr. 7 and 8—T. P. Act, —S. 60 Civil P. C., S. 11—Previous decree directing mortgagee to withdraw mortgage money deposited by mortgagor and to deliver property to mortgagor—Subsequent suit for redemption is barred 484

*———O. 34, R. 13—Mortgagee whose final decree for sale is barred by time is not entitled to a share in the surplus 6

———O. 40, R. 1—Execution Proceedings—Receiver appointed — No transfer of J. D's property takes place 72

*———O. 41, R. 17—Absence of, vakil is client's default though client is present—But appeal must be heard though subject to some penalty 58

*———O. 41, R. 20—Appellate Court cannot itself implead a party—It should remand the case for the purpose 768

*———O. 41, R. 27—Additional evidence cannot be admitted merely because the evidence is such as would justify grant of review 808

———O. 41, R. 27—Evidence discovered after first Court's decree is admissible 288

*———O. 41, R. 27—Reason for admitting additional evidence recorded only in judgment—Law is complied with 752

———O. 41 R. 31—Appellate Court need not examine trial Court's finding on fact not objected to 585

———O. 41, R. 33—Suit decreed against 1st defendant but dismissed against 2nd defendant—1st defendant appealing—Plaintiff not appealing from dismissal of claim against 2nd defendant—Appellate Court can pass decree in plaintiff's favour against 2nd defendant 555

———O. 43, R. 1 (d)—Appeal from order rejecting application for setting aside ex parte decree—Appellate Court cannot go beyond O. 9 R. 13 **F B** 610

———O. 43 R. 1 (d)—Order by appellate Court that no application lay under O. 9. R. 13—Order is not in appeal against order under O. 9, R. 13. 267

———O. 43. R. 1 (j)—Execution sale, setting aside—Appeal dismissed—No revision lies against dismissal 264

———O. 43, R. 1 (w)—Right of appeal is subject to O. 47, R. 7. 552

*———O. 46 R. 1—Power to decide cases referred does not include power to hear appeal **F B** 380

Civil P. C.

*——O. 47, R. 1—'For any other sufficient reason' is not limited to matters ejusdem generis with matters in earlier part of the rule—The words provide for exceptional cases 364

——O. 47, R. 1—Point not raised at trial cannot be raised in review 552

*——O. 47 R. 2—Transfer of Judge to another Court ousts his jurisdiction to grant review 804

——O. 47, R. 3—In revision against order granting review of judgment plea that review application was not accompanied by copy of decree and Court-fee was insufficient is not valid 777

——O. 47, R. 4 (1) (b)—Discovery of old sale deed—Appellate Court not deciding if it related to land in dispute but granting review and remanding case for decision of issue on merits after allowing opposite side to rebut the evidence—Order was held justified 552

*——O. 47, R. 7—Appeal from order granting review—Grounds are limited to R. 7 364

——O. 47, R. 7—Grounds of appeal are strictly limited to R. 7 595

*——S. 2, Para. 3—Leave to revoke order of reference is not to be granted save when substantial injustice will otherwise result—Principles underlying exercise of power to grant leave discussed 202

*——Sch. 2, paras. 14 and 15—Arbitrators not considering defendant's plea—Award can be remitted but not set aside 393

——Sch. 2, para. 16—Decree duly passed—No revision lies 541

Clog on the Equity of Redemption

——See T. P. ACT, S. 60

Companies Act (7 of 1913)

——S. 84—Auditor should satisfy himself whether the books submitted to him show a true state of affairs—Honesty does not exempt from liability. 519

*——S. 135—Distribution of dividends when no profits are earned is misapplication of funds 519

*——Ss. 23 (3)—Lim. Act, Art. 120 alone applies—Time runs from appointment of liquidators 519

Companies Act

*——S. 81—Director being required by Articles of Association to control management of company but blindly trusting dishonest manager is not exempt though honest 519

Company

——Director — Additional remuneration is not due for doing what is his duty as director 71

——Unless articles specifically limit powers of directors in carrying on ordinary business of the company stranger dealing with them in good faith is protected 206

Compromise Decree

*——Direction that rent provided in compromise be entered in revenue papers is not incorporation of compromise into decree 32

Compromise of Suit

——See CIVIL P. C., O. 23, R. 3

Confession

——See EVIDENCE ACT, S. 24

Contract

——Construction — Court is not entitled to see what the parties might have intended and which they did not put in writing 97

Contract Act (9 of 1872)

——S. 2—Boy running away from home—Boy's father advertising reward to anyone tracing boy and bringing him home—Taking boy to Ry. police station, making report and sending telegram to boy's father is substantial performance of condition—Advertisement of reward is offer capable of an acceptance by any person fulfilling the condition 539

——S. 2 (d)—Forbearance to enforce legal rights is good consideration F B. 503

*——S. 11—Minority — Burden of proof is on party setting up minority 399

——S. 16—Mortgage—2 p. c. per mensem compound interest was held unconscionable 31

*——S. 23—Gift in consideration of future illicit intercourse—Gift is void 437

*——S. 23 — Suit for pre-emption—Vendee can defeat claim by obtaining interest in village and becoming cosharer before decree—S. 23 is not violated 358

Contract Act

*———S. 23 (h)—Past illegal cohabitation is not illegal consideration 474

———S. 24—Mortgage of occupancy holding and other lands for single consideration — Mortgagee in possession of occupancy holding suing for possession of other land —Suit should fail as otherwise result would be to enforce entire contract part of which is illegal 543

*———S. 24—Out and out transfer—S. 24 does not apply 474

———S. 30—Plaintiff alleging agency—Clear proof that plaintiff acted as agent between the defendant and third parties is necessary 102

——Ss. 31, 32, 33 and 34—Contract to purchase shares on condition of being made sole agent of company—Company going into liquidation before appointing purchaser sole agent—Latter is not liable as contributory 658

———S. 43 — Suit against several defendants—One defendant only present — Plaintiff and other defendants absent—Suit dismissed for default—Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several 425

———S. 68—Discharge of decretal debt by stranger as owner of property of the deceased, where deceased's minor sons were living, does not avail the stranger 213

———S. 74—Stipulation to pay compound interest at 1-1/2 p. c. p. m. on default to pay simple interest at 1 p. c. p. m. was held a penalty and the rate was reduced to 1 p. c. compound interest 78

*——S. 139—Sureties binding themselves to produce in Court, judgment-debtor on the date of dismissal of appeal and in case of failure, to pay decretal amount—No notice to produce debtor sent to sureties after dismissal of appeal—Counsel for decree-holder declining to require the production of the debtor—Sureties are not liable 5

Contract Act

———S. 253 (7)—One partner neglecting partnership business is not enough to dissolve partnership 787

———S. 253 (10)—Joint family business continued after partition—Death of one partner dissolves partnership 595

Co-operative Societies Act, (2 of 1912)

———S. 43—Rules under, by the U. P. Government — R. 20—Reference to arbitration under Civil P. C., Sch. II—Rule does not cover 356

———S. 43 (2)—"Business" includes election of officers 356

Co-owners

———*See* COSHARERS.

Cosharer

*———Joint tenant—Death of a joint tenant does not benefit the zamindar, but surviving joint tenant takes the whole 758

———Lambardar is prima facie entitled to recover rent on behalf of all cosharers — If not so entitled, he cannot recover his share alone 817

———One cosharer building on joint land without other's consent—Others can sue for demolition of building and joint possession of site 700

———One cosharer forcibly dispossessed from khudkasht—Physical possession can be decreed 593

———One cosharer making improvements bona fide in the interests of the property is entitled to compensation, though improvements were made without consent of other cosharers—Compensation, how assessed, indicated 770

*———Suit for joint possession — Defendants in peaceful possession of lands as khudkasht — Joint possession need not be decreed 668

Court-Fees Act (7 of 1870)

———S. 5—No reference made under S. 5—Court hearing appeal must decide question of insufficiency of Court-fee paid on memo. of appeal 787

———S. 5—Taxing Officer can decide as to deficiency of Court-fee on plaints or memo. of appeal 184

——S. 7—Value in plaint determines forum of appeal 376

Court fees Act—

*——S. 7 (iv) (c)—Court-fee must be levied on value of declaration of right plus that of the consequential relief 602

*——S. 7 (iv) (c) and (d) — Suit for declaring plaintiff to be rightful manager of trust properties and for injunction against defendants — S. 7 (iv) (c) applies though plaintiff is in possession of properties 602

**——S. 7 (4) (f)—Appeal from preliminary decree for accounts — Appellant is not bound by plaintiff's valuation of suit and can have his own valuation 787

——S. 7 (v)—Cross-objection claiming possession of immovable property—Ad valorem fee is payable 119

——S. 7 (ix) and Sch. 1, Art. 1—Foreclosure suit dismissed—Appeal—Ad valorem fee according to subject-matter of appeal is payable 734

——S. 7 (xi) sub-Cl. (cc)—Suit for possession on ground of forfeiture is governed by the clause 142

——Sch. I, Art. 1—Appeal from order under S. 144, Civil P. C., must be stamped ad valorem. (19 *A. L. J.* 771, *overruled*) 137

——Sch. I, Art. 1—Cross-objection claiming possession of immovable property—Ad valorem fee is payable 119

——Sch. I, Art. 1 — Foreclosure suit dismissed — Appeal — Ad valorem fee according to subject-matter of appeal is payable 734

Covenant running with land

——*See* T. P. ACT, S. 40.

Criminal Procedure Code (5 of 1898)

——S. 35 (1)—Sentences in different trials cannot be ordered to run concurrently 305

——(1923**)—S. 99 D—High Court can only consider whether the document is seditious **F B** 195

*——(**1923**)—S. 99 D — Series of books published — Whole series must be looked to **F B** 195

*——S. 107—Master and servant jointly tried—Evidence not sufficient — Master discharged but servant ordered to provide heavy securities—Order is wrong 443

Criminal P. C.—

——S. 110—Charge of being habitual robber — Accused gathering bad characters in his house is not in itself relevant 694

*——S. 110—'Dacoit' does not come under S. 110—Person guilty of definite offence — Preventive sections do not apply 250

——S. 110—Evidence of allegations against accused made in case in which he was acquitted is admissible 694

*——S. 110 — Evidence of substantative offence is not necessarily inadmissible 694

*——Ss. 112 and 110—Order under S. 112 should conform to terms of S. 110 694

——(**1923**)—S. 133 — Closing of public drain — Accused denying drain to be public—S. 139-A disregarded—Trial is vitiated 311

——S. 133 — Initial order if vague may be modified 310

——S. 137 — Accused appearing to show cause—Evidence in support of order should be heard before calling on accused for defence 614

——S. 144—Other means to avert danger if available proceedings should not be taken under S. 144 678

——S. 145 — Agra Tenancy Act, Chapter 5 — Ejectment proceedings — S. 145, Criminal P. C. applies 210

*——S. 145—Communal dispute — Magistrate may choose representatives of each community 316

——S. 149 — 'Interpose' connotes the idea of actively intervening and not merely a prohibition by word of mouth 165

——S. 149—Section does not empower police officer to pass any order he likes 165

——S. 154—Statement of witness during investigation is not first information — First information report is useful for contradiction or corroboration only 303

*——S. 195—Condition as to sanction cannot be evaded 230

——S. 195 — Conviction under S. 173 of the Penal Code without complaint by public servant concerned is illegal though convicting Magistrate purports to take

Criminal P. C.

cognizance of the offence under S. 225 (b) of the Penal Code to convict the accused a minor for offence under S. 173 129

——(**1923**), S. 195—Sanction granted before the new Code came into force — Prosecution after its coming into force is invalid 306

*——(**1923**), S. 195 (2) — The word "includes," as substituted for "means," has widened the scope of "Court" — (*Sulaiman, J., contra, Daniels, J.*) 737

——S. 195 (3)—Election Commissioners are not Court subordinate to principal Court of ordinary original civil jurisdiction 737

*——S. 201 (3)—Order to complainant to pay process for enforcing accused's attendance on the date of judgment—Process not paid—Complaint cannot be dismissed 392

*——Ss. 213 (2) and 209 — Words "not sufficient grounds for committing the accused" do not mean "case not proved"—Discretion should be carefully exercised in finding out whether there are not sufficient grounds—In case of doubt commitment should be ordered 670

——S. 215 — Manifest and fatal flaw in prosecution—Prosecution must be quashed 751

——Ss. 227 and 237—Ss. 227 and 237 should be read together 448

——Ss. 227 and 237—Both sections must be read together 448

*——S. 239—Injury caused by firing fireworks in public road—Persons causing injury cannot be tried together 301

——S. 288—Court can rely on witnesses' statements before committing Magistrate, though varied before the S. J., when satisfied of their truth 185

——S. 340—Opportunity for arguments in defence must be allowed 282

——S. 340 — Reasonable opportunity to engage pleader must be allowed — Opportunity to accused's pleader to cross-examine must be allowed 285

——S. 247—Enquiry under — Criminal P. C. S. 350 applies to an enquiry under S. 247 of the Municipalities Act 245

Criminal P C.

——S. 367—Judgment written by Magistrate himself but delivered unsigned—Irregularity is curable by S. 537 299

*——S. 403—Conviction for affray is no bar to subsequent conviction for causing hurt in the affray 299

——S. 417—Accused given benefit of a reasonable doubt and acquitted—Appeal by Government—Onus on appellant is very heavy 315

*——S. 435—Charge framed where none necessary — Interference is proper 311

——Ss. 435 and 439 —Prosecution for cheating—Lower Court finding fraud but acquitting accused on ground that fraud was inchoate—Revision was allowed 473

——S. 435 — Sessions Judge can make reference to High Court against order of District Magistrate 591

——S. 436 — Further enquiry is competent on the same facts 198

——(**1923**) S. 436—Revising authority differing from trial Court in conclusion on evidence—Further inquiry cannot be ordered 477

*——S. 436 (Proviso) and S. 203 — Complaint dismissed under S. 203 — Proviso to S. 436 does not apply 537

——S. 438 — Crown discovering fresh evidence relevant as to sentence — Retrial will not be granted 292

——S. 438—Penal Code, S. 295-B — Prosecution irregularly instituted — No revision lies against acquittal 318

——S. 438—Sessions Court not dissenting from decision of lower Court—Reference with object of obtaining ruling on law point is improper 318

——S. 476—Accused escaping from custody of peon of civil Court—Procedure is that servant should file complaint in ordinary way 318

——S. 476 — Case heard by Hon. Mag. — Dt. Magistrate can take action 410

——S. 476—Complaint of cheating before Tahsildar having powers of a Second Class Magistrate—Act of

Criminal P. C.
Tahsildar inquiring and ordering prosecution under S. 476 is legal 99
*——S. 476 and S. 195 (3) (b)—Election Commissioners are not 'civil Court' within S. 476—Complaint by them purporting to be under S. 476 should be deemed to be one under S. 195 (1) (b) 737
——S. 476-A — Invalid complaint by Mag. — Appeal to S. J.—S. J. can make complaint 667
*——S. 476 B—Appellant dying — Appeal abates 620
——S. 476-B — Appellate Court should reconsider entire matter on merits—Prima facie case if not made out, withdrawal of complaint should be directed 544
*——S. 476-B — Order passed by Commissioners without jurisdiction—Appeal lies 737
——S. 488 — Section includes application by wife or child–Maintenance does not include school-fees — Money received by mistress—Child's claim is not compounded 73
——S. 498 — Admitting to bail—Mention in the order that sentence is suspended is not illegal 218
*——S. 526 — Magistrate trying to effect compromise — Transfer is proper 289
——Ss. 526 to 528—Strong language used by Magistrate—Apprehension of unfairness may be justified 283
——S. 528 — Case transferred by Dt. Magistrate — Fresh transfer cannot be ordered by Sub-Divisional Magistrate 283
——Ss. 537 and 367 — Judgment written by Magistrate himself but delivered unsigned— Irregularity is curable by S. 537 299
*——S. 540—Both sides can freely cross-examine — Questions suggested by defence and put by Court are not cross-examination 285
——S. 561-A — Charge framed where none is necessary—Interference is proper 311
——S. 562 (1-A) — Penal Code, S. 579—Conviction under, by 2nd Class Magistrate—Magistrate can order release of accused after due admonition — Order is revisable only if it is mistaken or is injudicious or failure of justice has occurred 644
——Schedule II — Penal Code, S. 427 — Complainant's allegations determine jurisdiction 290

Criminal Trial
——Accused wishing to examine certain witness for defence — Non-examination—Conviction is bad 318
*——Conviction for rioting — Plea of self-defence raised for first time in appeal — Court should examine the plea 664
——Crown is party in criminal cases and should be represented by the Government Pleader 218
——Defence witness produced by one accused cannot be used by prosecution against others 769
——High Court — Same relief obtainable from Subordinate Court—High Court will not interfere 640
——Pleader—Private prosecution–Parties may engage their own pleader to represent their case 301
——Strong language used by Magistrate — Apprehension of prejudice may be justified 283
——Using knowledge of one case in another is wrong where accused are different 443

Custom
——Alienation of house and site—Residents in Pandauli though not cosharers can alienate 718
——Pre-emption—Custom creating right of pre-emption need not be immemorial 449
——Primogeniture — Existence of custom whereby estate descends to single heir does not raise presumption of pimogeniture 155
——Question whether tenant in village can alienate land and house involves question of title 718

D

Declaratory Suit.
—— *See* SPECIFIC RELIEF ACT, S. 42

Decree
——*See* CIVIL P. C., S. 2 (2)

Deed
——Construction — Arbitration award directing a man's property to be construed the property of two other persons — But owner

Deed

to remain in possession and pay annuities to the others—Owner's interest was held to be more than a right to future maintenance 297

——Construction — Tenant permitted to plant grove — Agreement that tenant should become owner of part of the grove subject to restrictions stated in agreement — One restriction being against sale by tenant to outsider — Restriction was held not to prevent mortgage to stranger 651

Defamation

——*See* TORT—DEFAMATION

Divorce Act (4 of 1869).

*——S. 10—Threat of force to pregnant woman is legal cruelty—Adultery condoned by wife can be revived by legal cruelty 237

E

Easements Act (5 of 1882)

——S. 27—Right to drop water on ground—Servient owner can do act whereby water will first fall on the roof of a house and then on the ground 348

*——S. 52—License may be implied from circumstances 203

*——S. 60 (b)—Denial of licensor's title is no ground for forfeiture or revocation where licensee has executed a work of a permanent character—Thatched house may be a work of permanent character 203

Ejectment—

——*See* LANDLORD AND TENANT

Election

——*See* T. P. ACT, S. 35

Estoppel

——*See* EVIDENCE ACT, S. 115

Evidence

*——Admissibility—Judge should decide summarily—Inadmissible evidence should not be read out to assessors—In doubtful cases Court should decide against admissibility 405

——Identification parade—Bringing outsiders to stand with accused is unusual but not illegal 223

——Identification parade — Garb different—Identification is not sufficient evidence 405

Evidence Act (1 of 1872)

——S. 9—Evidence of Magistrate conducting identification parade may be used to corroborate identifying witness's evidence 223

——S. 24—Admissibility of confession must be decided before contents of confession are looked at 606

——S. 24—(*Mears, C. J.*, and *Banerij, J.*)—Conviction may be based on retracted confession alone—(*Mukerji, J.*) *contra*—For rejecting confession positive proof of threat etc., is not necessary **F B 627

——S. 24—Person in authority telling accused that if he gives true account he will be pardoned—Accused's confession is irrelevant,, unless the inducement had ceased to operate when he confessed 606

——S. 32—Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits 227

——S. 32 (2)—Section applies to post-mortem report 413

——S. 32 (3)—Statement against interest is admissible 130

——S. 34—Statement in books of account may be corroborated by any evidence 742

——S. 35—Death register kept in police station is official book 79

*——Ss. 35 and 57—Officer specially deputed to record customs prevailing in a locality—Record by such officer is evidence and is admissible without further proof 648

*——S. 35—Record of First information report is corroborative and not substantive evidence 413

*——S. 45—Interpretation of law—Law of the land—Courts themselves should interpret—Evidence of experts is inadmissible—Foreign Law—Opinions of experts are admissible 720

——S. 68—Evidence of attestors to mortgage deed is indispensable unless it is impossible to produce them 56

——S. 68—Section must be observed even when secondary evidence is given 56

Evidence Act

*———S. 90—Signature of the executant purporting to be made by scribe—Authority of latter is presumed. (13 *A. L. J.* 921 and 15 *A. L. J.* 121, *overruled*) **F B** 1

———S. 93—Necessity to add or subtract words to give a clear meaning causes patent ambiguity—Other evidence is not admissible 34

———S. 101—Exclusion from share on account of congenital blindness—Onus is on party asserting the defect 366

———S. 101—Hundi not presented for payment—Drawer withdrawing after many days money deposited for payment—Burden lies on payee to prove that drawer did not suffer any loss 811

———S. 101—Onus—Onus is liable to shift on proof of particular circumstances 28

———S. 101—Suit on bond—Defendant pleading minority at the date of execution — Onus is on defendant 681

*———S. 114 ill. (a)—Articles of ordinary type found 2 1/2 years after theft—No presumption can be raised under the section against the accused 220

———S. 115—Attestation coupled with other circumstances can be "consent"—Hindu reversioners attesting mortgage by widow for paying their debt were held estopped from questioning mortgage 209

———S. 115—Refusal to purchase on being informed of intended sale precludes pre-emption suit 645

*———S. 115—Sale in execution—Purchase by decree-holders in lieu of decretal amount—One judgment-debtor entitled to interest in decretal amount—Conduct of both parties showing purchase was only for benefit of decree-holders — The judgment-debtor entitled to interest in the decree amount is not entitled to any interest in the property 331

*———S. 115—Undertaking given to Crimininal Court cannot be avoided by a civil suit 605

———S. 116—Kabuliyat executed by person already in possession as tenant of third party does not create estoppel 244

———S. 116—Lessee ejected by true owner—Rent suit by lessor—Lessor's title cannot be denied 275

*———S. 116—Mortgagee is estopped in a redemption suit from setting up an interest of a third party, at the time the mortgage was entered into 758

———S. 116 — Subsequent licensee can sue for injunction restraining prior licensee who has abandoned his rights, from exercising them 29

*———S. 133 — Conviction can be based on accomplice's uncorroborated evidence 223

———S. 145—Report of police officer in connexion with enquiry is admissible only for refreshing memory 808

Execution

———Property under attachment disposed of by officer appointed pendente lite—Officer and not party who asked for his appointment should refund 328

———Sale beyond decree is illegal 551

*———Sale in—Purchase by decree-holders in lieu of decretal amount — One judgment-debtor entitled to interest in decretal amount—Conduct of both parties showing purchase was only for benefit of decree-holders — The judgment-debtor entitled to interest in decree amount is not entitled to any interest in the property 331

Ex-parte Decree

———Setting aside of—*See* CIVIL P. C., O. 9, R. 13.

F

Family Arrangement

*——— Descendants of parties are bound 366

Finding of Fact

———*See* CIVIL P. C. S. 100.

G

Gambling Act (3 of 1867)

———Act extended to north bank of Ganges—Gambling on Benares side of midstream is no offence 518

Government of India Act (5 & 6 George V, Ch. 61, 1915)

****——S. 79—Special tribunal to decide special disputes — Local legislature can create F B 380**

——S. 80 (1)—Legislature of a province can repeal its own enactment 542

Guardians and Wards Act (8 of 1890)

*——Scope — Power to dispossess third persons—Dt. Judge has none 277

——S. 41—Discharged guardian—Liabilities continue and can be enforced in proceedings under the Act 457

——S. 45—Order to remove guardian directing delivery of possession of certain property to new guardian — Fine for disobedience—Appeal against order of fine—High Court can take notice of the fact that order for delivery was passed without enquiry of minor's title 785

H

Hindu Law

——Adoption — Custom — Sarin Khatris settled in United Provinces—Adoption of sister's son is valid 688

****——Adoption — Adoptive father and adopted son belonging to two different sub-castes of one primary caste—Adoption is not invalid 79**

*——Alienation — Attachment in execution of decree against father — Sons' shares are liable unless debts are illegal or immoral 327

*——Alienation—Coparcener—Surviving coparcener not challenging—Survivor's death — Reversioner can challenge 389

——Alienation—Father — Account stated at the time transaction was made may support alienation—But offer of other evidence by defendant justifies going behind the account 295

*——Alienation — Father — Joint family property sold in execution of decree against father—Son can avoid sale only by prov-

Hindu Law

ing debt, for which decree was passed, to be immoral 781

——Alienation — Father — Mortgage effected to discharge antecedent debt — Sons are liable unless antecedent debt is immoral or illegal. 367

*——Alienation—Father — Property unprofitable and difficult to manage—Proceeds applied to extension of existing family business—Sale is binding on sons 618

*——Alienation—Alienation by father can be attacked without proving illegal or immoral debt unless the sale was an execution sale or in lieu of antecedent debt 241

*——Alienation by father—Mitakshara—Mortgage by father for immoral purposes — Personal money decree passed against father—Joint ancestral estate attached in execution—Father's share cannot be released 801

*——Alienation by father — One-sixteenth of the total consideration found to be not for legal necessity—Sale was upheld F B 624

*——Alienation — Joint family—Revenue partition binding on father binds also son 421

*——Alienation — Legal necessity must be a defensive act—Pre-emption is not legal necessity 333

*——Alienation by limited owner for clearing debts birding on estate — Transferee need not prove that dire consequences would have resulted if debts were not paid 621

*——Alienation — Minor born or conceived after the expiry of limitation against all the coparceners existing at time of sale cannot revive cause of action 54

*——Alienation—Mortgage by coparceners — Mortgage suit — Mortgagors impleaded but minor coparcener not impleaded—Suit is not bad but minor is not bound 335

——Alienation — Mortgage by father—Execution of mortgage decree—Onus is on son to prove immorality of debt 120

——Alienation—Mortgage by father to clear encumbrance on pre-

Hindu Law

empted property—No benefit to family proved — Sons are not bound 96

*——Alienation — Widow — Consideration applied to pay debt—Whether alienation voluntary or involuntary, alienee gets limited or absolute estate according as debt is binding on husband's estate or not 495

*——Alienation—Widow— Exproprietary tenancy created by widow selling zamindary property is not portion of estate as it devolves on her—Payment of arrears of rent for such tenancy is not legal necessity 495

*——Alienation—Widow—Gift for religious purposes—Proportion of gift to estate in widow's hands at the time should be considered 495

*——Alienation— Widow — Necessity proved for a very large part of sale consideration—Sale was upheld 324

*——Alienation—Widow—Payment of arrears of rent for lease taken by widow for her own benefit is not legal necessity 495

*——Alienation by widow—Attestation by reversioner does not always imply consent—Court can draw proper inference from attending circumstances 692

*——Brahman becoming Bairagi does not necessarily lose caste 253

*——Debts-Father accepting surrender from Hindu widow—Claim by third party—Father honestly contesting claim but failing—Judgment-debt is recoverable from son's ancestral property 471

*——Debts--Father, decree against -Sons cannot challenge execution sale on the ground that the debt sued on was without necessity 180

*——Debts—Father — Receiver of Hindu insolvent's estate is entitled to take possession of property obtained by his sons at partition 221

——Debts — Unsecured debt by father for raising pre-emption money—Legal necessity exists 120

*——Guardianship — Man leaving his separate property and minor sons—Mother is natural guardian 595

Hindu Law

*——Joint family—Alienation by coparceners — Legal necessity may be presumed from concurrence of adult members and their presence at the transaction 28

——Joint family — All property belonging to family is presumed to be joint 820

——Joint family—Elder brother can give discharge under S. 7 Lim. Act 672

*——Joint family — Institution of partition suit, which was dismissed but not on merit does not remove presumption of all properties being acquired out of joint funds 813

——Joint family—Manager — Insolvency of junior member managing family business—Prior transfer by senior members to avoid creditors can be annulled 194

*——Joint family—Maternal uncle and sister's son do not form joint family 775

——Joint family—Suit by member for declaration of title to specific share does not lie in absence of partition being claimed 211

——Migrating family-Party pleading the original law as different from local law must prove 648

——Partition — Exclusion from share — Congenital blirdness — Onus of proof is on party asserting 366

*——Partition — Exclusion from share—Partition suit by blind coparcener compromised by recognising his title—Agreement is conclusive 366

*——Partition--Mitakshara-Grandmother's right-Owner dying leaving a widow and son—Son dying leaving widow and sons—Partition between these sons — The grandmother, i. e. the widow of the original owner, is entitled to a share 19

——Remarriage—Widow allowed to marry husband's brother by caste—Widow can inherit both brothers' property 440

——Reversioner — Nearest reversioner, a minor—A more distant reversioner cannot sue except as minor's next friend 585

Hindu Law

*———Reversioners—Suit by reversioner is in a representative character 483

*———Reversioner—Suit to impeach alienation by widow—Nearest reversioner only must sue unless he is precluded by his act or has colluded with the widow 8

*——Reversioners — Two brothers living jointly—One dying and his widow getting possession of his share with survivor's consent —After survivor's death widow getting possession of whole property—Widow's possession is not adverse to reversioners 330

*———Schools of law—The United Provinces—The Mitakshara is of paramount authority though where it is silent other books of authority can be referred to 19

*———Stridhan — Sons succeed to stridhan after mother's death as tenants-in-common 447

———Succession — A stepmother cannot inherit from her deceased stepson 417

*———Succession—Bandhus—Father's sister's son's son is a heritable bandhu and succeeds in the absence of nearer heirs 17

*———Succession—Collateral reversioners take separately 79

*———Succession—Daughters— Rich and poor—Comparative poverty is the test 375

*———Succession —Exclusion from—Marriage with woman of lower grade in same caste is valid and in absence of communal custom rendering it invalid, does not disentitle the man marrying or his issue from inheritance in the family property 26

———Succession — Mode of succession repugnant to ordinary law cannot be prescribed 155

———Succession — Sons of predeceased son are entitled to succeed along with surviving sons even to the tenancy rights of the deceased 786

*———Widow—Continuing in possession after remarriage—Prescription benefits first husband's estate 369

*———Widow—Decree against widow binds reversioners 339

Hindu Law

*——— Widow — Ex parte decree against widow binds reversioners 339

*——— Widow — Mortgage decree against widow — If mortgaged property is insufficient other properties can be attached 352

*———Widow—Reversioner entering into compromise in widow's lifetime is estopped from challenging it 453

*———Widow—Surrender to only one of several nearest reversioners is invalid 8

*———Widow — Widow has larger power than holder of life-estate in lieu of maintenance 190

I

Illegal Consideration

———*See* CONTRACT ACT, S. 23

Income Tax Act, (11 of 1922)

*———S. 2 (4) Scope—The negotiation of the sale of a large mill is "business" 469

*———S. 4 — Profits arising from wagering business—Tax can be levied 287

**———S. 4 (vii)—Even casual and non-recurring receipt from business, etc., is not exempted 469

**———S. 4 (vii)—Insolated transaction—Unusually heavy commission is not of "casual or non-recurring" nature 469

*———S. 4 (30)—Income derived from profits in trade or business, though the income may be dedicated to an idol, is not income from trust property 115

———Ss. 26, 2 (14) and 55—Successor is not bound to pay in respect of the predecessor any tax which the predecessor would not have been liable to pay 535

———S. 66—Question whether assessee is a member of joint family is one of fact 298

*———S. 66 (4)—Principal office of assessee in one area—Branches in other income-tax areas—Officer at the former area has jurisdiction to assess profit in other areas 385

*———S. 66 (6)—Costs cannot be reduced after final order has been passed 403

Inherent Powers of Court

———*See* CIVIL P. C., S. 151

Interlocutory Order

——*See* CIVIL P. C., S. 105.

Interpretation of Statutes

*——Fiscal Acts should be construed strictly against the Government 787

*——Headings should be ignored 787

*——Illustrations explain and do not restrict the meaning of section 220

——Marginal notes may be used to explain the meaning of section if doubtful **F. B.** 503

*——New words may be read into statute if context so requires (*Per Lindsay, J.* contra *Sulaiman, J.*) **F. B.** 610

——Specific provision prevails over general one 230

J

Joint Trial

——*See* CRIMINAL P. C., S. 239.

Jurisdiction

——Civil and revenue Courts—Suit for declaration in civil Court—Object of declaration being to affect the decision of revenue Court in a pending suit—Declaration should be refused **F. B. 637

—— High Court — Applications from Benares State submitted to Maharaja and decided by him—High Court cannot express opinion on 293

——'Residence' for purposes of jurisdiction is not actual residence at the date of plaint 140

L

Landlord and Tenant

——Abadi—Pucca well sunk in Sahan attached to tenants' house—Zamindar cannot sue for demolition 341

——Abadi—Rights of proprietor in village site become equal to those of any other person after his proprietary rights are sold in auction 29

——Agreement permitting tenant to plant grove—Tenant to be owner of one-fourth grove—Restriction on power of sale is valid 97

——Deft. taking possession under theka — No written lease but kabuliyat executed— Compensation for use and occupation should be paid 100

——Grove—Grove-holder does not lose his right simply because of falling down of trees which occupied a portion 776

——Grove—Tenant in possession in his own right according to wajib-ul-arz—Grove holder possesses full proprietary title and is not liable to be ejected 439

——"Grove"—Trees planted by non-occupancy tenant without zamindar's consent though such consent legally enjoined—Presence of trees not interfering with agricultural nature of land—No "grove" is formed 702

——Houses in zamindari area prima facie pass with zamindari 449

——Land distributed in several villages—Rent suit for each village will lie separately 193

——Occupancy tenancy — Rights akin to those of occupancy tenant can be created by contract 584

——Occupancy tenant—Permission to plant grove stops the tenancy 97

——Sir land — Occupancy rights cannot be acquired in sir land 702

——Sir rights—Sale by some of the joint owners does not affect the others—Sir rights cannot be purchased—Purchaser of entire sir rights can only get Khudkasht—Sir rights, though allowed only to proprietors, are distinct from mere proprietary right—Occupancy rights cannot be acquired by person cultivating under sir holders—Separate sir rights and joint proprietary rights can co-exist in same village 93

——Tenancy—Threshingfloor used by occupancy tenant for twenty years is presumed to be part of tenancy 16

——Tenants' successors-in-interest are bound by rent decree against tenants 189

——Tree on a holding—Tenant is entitled to tree in absence of custom or contract otherwise 119

*——Well in a holding—Tenant can

Landlord and Tenant
use water for irrigating other fields held from other landlord 571
Land Tenure
—— Cost arers—"Hissedar" owns a share in mahal - But proprietary right in mahal without ownership of share therein is possible 135
——Properties purchased from talukdari income are not talukdari 155
Lease
——Forfeiture — *See* T. P. ACT S. 11 (g).
Legal Practitioner
——Carelessly instituting on client's behalf manifestly improper criminal complaint is highly censurable **F B 247
*—— Unprofessional corduct — Groundless and insulting charges against witness made in pleadings – Insulting questions to witness asked without any ground for the implied allegations—Conduct is unprofessional **F B** 641
Letters Patent (Allahabad)
——Cl. 11—'Civil Courts'—Courts created by S. 2., U. P. Municipal Act, are not civil Courts **F B** 380
License
——*See* EASEMENTS ACT, S. 52.
Limitation.
——Starting point—Civil Court's decree favouring plaintiff within 6 years of denial of plaintiff's title—Subsequent denial of plaintiff's title — Limitation starts only from later denial 421
*——Starting point—Decree omitting names of appealing defendants– Names added in decree after enquiry by superior Court– Appellants' right to appeal will arise only on addition of names and not on the date of original decree 567
Limitation Act (9 of 1908)
——S. 4—Court closed on the day fixed for payment — Payment made on re-opening day is valid 687
*——S. 5—Honest mistake is a good excuse 567
——S. 6—Alienation of property of Hindu joint family—Suit for setting aside— Person in existence at date of alienation having

Lim. Act
cause of action—Subsequent birth of other members does not extend time 563
*——S. 6—Co-parcener existent at date of alienation debarred by limitation from setting aside— After-born members though minors are also debarred 247
*——Ss. 6 and 8—Minor dying during minority — Representative can sue within three years or within original period whichever is greater 692
——S. 7 — Hindu joint family — Elder brother can give discharge 672
——S. 10—Section does not apply to a suit against assigns for valuable consideration 822
*——S. 14—Proceeding under Criminal P. C., S. 476, treated as separate case — Formal order separately drawn up—Time taken in getting copy of the order should be excluded 419
*——S. 12 — Total period to be allowed is period as shown in Sch. I, plus time taken for copy of judgment and time taken for copy of decree 436
*——S. 15—Execution suspended by order of Court — Decree-holder can have it revived even after three years 572
*——S. 18 — Execution proceedings concealed from judgment-debtor from the beginning — Right to apply to set aside the sale accrues only when he becomes aware of the proceedings 778
——S. 19 —Agent's authority to acknowledge on principal's behalf may be express or implied or presumable from circumstances 176
——S. 19 – Law to be considered is the one in force on the date of suit 176
*——S. 19—Mention of property as a mortgaged property in the list of property to be sold under a decree amounts to acknowledgment 174
——S. 19—"Prescribed" is not restricted to Sch. I 68
——S. 19—Promise to pay sums that may be found due on comparison of accounts, is "acknowledgment" 340

Lim. Act
—S. 19 —"Signing" may be without putting actual name — Subscription in method usual with the party is enough 85
*—S. 19 —Statement that mortgagee rights were purchased is not acknowledgment of liability to be redeemed 353
*—S. 22—Impleading simple submortgagee after 60 years from the main mortgage bars redemption suit against him 174
*—S. 23—Vendee undertaking to clear prior mortgage—Non-performance on date of sale is breach of covenant—Breach is not continuous one 488
*—S. 25 — Applicability depends on interpretation in each case — Section does not apply where the parties have agreed that time must run from a particular date 128
—Art. 10—Place of registration different from place where major portion of property situate — After registration entry made by Sub-Registrar of latter place — Time runs from actual registration only 324
—Art. 29—Article applies only where attachment is illegal ab initio—Property attached before judgment — Suit decreed by first Court but dismissed by appellate Court — Time for suit for compensation runs from date of appellate decree and not from attachment 131
—Art. 30 — Goods missing on date on which consignees apply for delivery — Time runs from that date where goods are not proved to have been lost previously 656
*—Art. 31—Non-delivery of goods by railway — Limitation starts when delivery is expected 780
—Art. 49 — Art. 9 applies only where attachment is illegal ab initio—Suit decreed by first Court but dismissed by appellate Court—Time for suit for compensation runs from date of appellate decree and not from attachment 131
—Art. 75—Waiver — Mere abstinence to sue is not waiver 499

Lim Act
—Art. 81—Where date of payment by surety to creditor is uncertain, discretion should be exercised in favour of the surety 164
—Art. 89—Suit for accounts by successor-in-interest of the principal—Suit is not cognizable by Small Cause Court 682
—Art. 109 — Auction purchaser letting land and receiving rent—Subsequent sale of same land in execution of prior mortgage decree—Suit by second auction-purchaser to recover rent received by first one — Limitation runs from date of receipt 52
*—Art. 115—Vendee undertaking to clear prior mortgage — Non-performance on date of sale is breach of covenant—Breach is not continuous one 488
*—Art. 116 —Money left in hands of vendee for clearing prior mortgage—Vendee not paying — Suit for damages after six years from sale deed is barred 488
—Art. 118—Registration with Registrar of Companies is registration 519
**—Art. 118—Suit by reversioners for possession against alleged adoptee within 12 years of Hindu widow's death is in time 79
*—Art. 120 — Application under Companies Act, S. 230—Art. 120 alone applies—Time runs from appointment of liquidators 519
—Arts. 134, 140 and 148—Art. 134 controls both Arts. 140 and 148 707
*—Art. 134—(*Per Lindsay, J.*) Transfer need not be by mortgagee with possession — Mortgagee transferrer must be in possession (not necessarily by virtue of mortgage) at time of transfer — Transferee need not enquire how the possession was got—(*Per Kanhaiya Lal, J.*) Mortgagee's possession must be attributable to mortgage 707
—Arts. 139 and 144 — Tenant holding on after expiry of term—Art. 139 and not Art. 144 applies 698
—Art. 140—Adverse possession against life tenant is not adverse against reversioner or remainderman 707

Lim. Act.

——Arts. 140, 148 and 134 — Art. 134 controls both Arts. 140 and 148 707

——Art. 144—How far property can be possessed directly is material factor 454

*——Arts. 144 and 142—Plaintiff's title proved — No dispossession alleged or proved — Art 144 applies 454

——Arts. 144 and 139—Tenant holding over on expiry of term—Art. 139 and not Art. 144 applies 698

——Arts. 148, 140 and 134—Art. 134 controls Arts. 140 and 148 707

*——Art. 177 — Time given after Act 26 of 1920, but prior to Act 11 of 1923, was 6 months 77

*——Sch. I, Art. 181—Mortgage decree — Limitation for an application for final decree starts from the date of appellate decree 691

*——Art. 182—Payment of process-fee for attachment does not extend limitation 646

——Art. 182 (5) — Application to send for records may amount to step-in-aid 394

M

Mahomedan Law.

——Difference of opinion between different jurists–Traditions need not be examined — Opinions of recognized jurists will prevail 720

——Divorce — Divorce-deed not signed before wife is not invalid 550

——Divorce — Intention to make irrevocable divorce clearly expressed — Triple form need not be used 550

*——Divorce—Suit for—Impotency of husband—Rule entitling husband to an opportunity for a year to demonstrate the falsity of the charge, is one of substantive law not superseded by British Law though the other parts of the rule concerning the method of taking evidence, etc., are procedural and unenforcible at the present day 24

——Divorce—Untrue acknowledgment of divorce is ineffective. 550

*——Divorce — Wife's right to divorce is not absolute but subject to certain conditions—The mere fact of husband not having intercourse since marriage does not ipso facto entitle her to divorce unless husband's incapacity to cohabit with her is proved — Muhammadan Law contemplates the contingency of there being impotency regarding one woman though not regarding others 24

*——Guardianship — De facto — Guardian cannot alienate minor's property even for necessity or benefit to minor 36

*——Marriage—Hindu married woman adopting Islam—Subsequent marriage with Muhammadan is illegal unless first marriage is dissolved through Court 474

*——Marriage—Shiah girl married to Sunni husband by her father as guardian — Marriage is not void—She can exercise option of puberty before consummation 720

**——Marriage of Sunni with Shiah is not illegal 720

——Pre-emption — Guardian de facto cannot consent to a sale so as to affect minor's right to pre-emption 424

*——Pre-emption — Shiah Law — Property not joint at time of sale or at any time previously—Right of way enjoyed in common by owners of several houses — No right of pre-emption arises on sale of one of the houses 579

——Pre-emption — Two cosharers —Equal rights of pre-emption—Each should be allowed to pre-empt half 361

——Texts — Shiah—Authorities—Text-books—Sharaya-ul-Islam is most authoritative 720

Maintenance.

——*See* CRIMINAL P. C., S. 488.

Master and Servant

*——Servant justifiably dismissed without notice for misconduct is not entitled to wages for the period since last due date of payment 680

Minor

*——Minor is not liable to be sued for specific performance of contract for sale made on his behalf by guardian 595

Mortgage
——Mortgagor's assignee suing for redemption—Contest really between mortgagor and another who was not mortgagee—Suit is on mortgage and not title—Mortgage must be strictly proved 56
——Redemption suit — Decree of appellate Court — Costs being a charge on property or not depends on interpretation of decree in each case — (*Per Daniels J*) Construction of decree should accord with Civil P. C., O. 34, R. 7 492
*——Redemption suit—Decree terminates mortgage — Execution barred by limitation — No redemption is possible afterwards 323
Motor Vehicles Act (8 of 1914).
——S. 5 — Accused seeing another car approaching in addition to the one passing in his direction and trying to force his way on—Such conduct comes within S. 5 and conviction is proper 798
——S. 5—Driver driving for many years — Many certificates for good driving — No previous conviction for bad driving—Punishment of cancelling license is too severe 798

N

Negotiable Instrument.
——*See* NEGOTIABLE INSTRUMENTS ACT, S. 13
Negotiable Instruments Act (26 of 1881).
——Ss. 64 and 76 (d) - Hundi not presented for payment — Drawer withdrawing after many days money deposited for payment—Burden lies on payee to prove that drawer did not suffer any loss 811
——S. 68 — Presentment before maturity is not void 442
*——S. 76 (b) — Partial promise to pay — Further presentment is not necessary 442
——S. 87—Promissory note—Stipulation to pay interest interpolated without executant's knowledge—Instrument becomes void 282
——**(8 of 1919)**
——S. 13, Expln. 1—Promissory note payable to specified person only is negotiable instrument 282
New Plea
——*See* PRACTICE— NEW PLEA
N. W. P. Rent Act (18 of 1873)
——S. 7—Possession by mortgagee is possession by proprietor, for accrual of exproprietary rights 748
Notice
——*See* T. P. ACT S. 3.

O

Oaths Act (10 of 1873)
*——S. 8—Oath by man with his hand on his son's head is not permissible 604
Occupancy Holding—
——Mortgage of occupancy holding illegal 69
*——Sub-mortgagee of occupancy holding, can sue his mortgagor for money if the latter fails to put him in possession 736

P

Penal Code (45 of 1860)—
*——S. 94—Accused helping removal of dead body from his master's house—Master threatening to kill accused if help refused—S. 94 would save accused from conviction under S. 201 315
*——Ss. 96 and 100—Accused first hitting — Then running away from attack with lathis—Accused striking in self-defence—Death—Accused is justified 313
——S. 96 — Impending attack by one faction on another—Members of latter collecting together to resist—Riot—Latter party were held to have acted in self-defence 664
——S. 100—Fight in self-defence—Gun levelled against accused—Accused stabbing—No offence is committed 319
*——S. 107—Husband looking on while wife bet daughter-in-law—No conspiracy proved—Husband is not guilty of abetment 126
*——S. 107—Unintentionally aiding is no abetment 230
——S. 146—Organized fights with lathis — Combatant using firearm—Transportation for life is the only proper sentence for such combatant 664
*——S. 147—Armed party escorting ladies wishing to be so escorted—

Penal Code

Obstruction — Fight in self-defence—"Rioting" is not committed 319

*———S. 171-F—Offence under S. 171-F cannot be dealt with as one under S. 465 230

*———S. 173—Refusing to take summons is no offence 322

———S. 179—Giving indirect answers amounts to refusal but not insult 239

*———S. 186—Patwari refusing to allow Kanungo to examine his books—No offence is committed 409

*———S. 186—Resigning membership of panchayat and instigating others not to accept the membership—No offence under S. 186 is committed 401

———S. 188—'Promulgate' indicates some form of publication 165

———S 188—'To be legally empowered' is different from 'to be justified' 165

———S. 193—No oath administered to accused by Court—Accused's offence is not negatived 410

———S. 201—Removal of dead body from house to field—Offence is committed—Destruction of evidence of murder itself is not necessary 315

———S. 211—Making definite statement to police about commission of offence—S. 211 applies 472

*———Ss. 224 and 225—Formation of crowd at a distance—Police desisting from arresting through fear—No illegal obstruction is caused 308

———S. 225-B — Judgment-debtor arrested — Court granting him time for paying and keeping him in custody of peon—Custody is unlawful 318

*———S. 228—Giving indirect answers amounts to refusal but not insult 239

———S. 279—Offence under Motor Vehicles Act, S. 5 falling within S. 279—Trial under either is legal 798

———S. 300—Murder established by retracted confession—Dead body not discovered—Sentence should be one of death (*Per Mears, C. J. contra*) *Banerji, J.*, **F. B. 627

———Ss. 300 and 146—Organized fights with lathis — Combatant using fire-arm — Transportation for life is the only proper sentence for such combatant 661

———S. 300 Excep. 1, Ss. 302 and 304—Deceased, accused's wife leading immoral life—Accused remonstrating—Wife insisting on same life—Accused beating, wife not repentant but biting accused's fingers — Accused giving several injuries resulting in her death—Offence is culpable homicide and not murder 676

———S. 300, Excep. 4, Ss. 302, 304 and 109—Enmity between parties—Challenges to come out and fight passing—Accused being followed by deceased inside the accused's house—Encounter occurring inside the accused's house where fatal injury inflicted—Sentence was altered from S. 302 to S. 304 as it came within Except. to S. 300 753

———Ss. 302 and 304—Accused, a person of considerable intelligence accepting unequivocally his guilt — Accused convicted without taking whole evidence in the case—Accused's petition of appeal to High Court raising bare possibility of applicability of I. P. C., S. 304—Whole evidence was directed to be taken 647

*———S. 302 — By-standers supporting murder are as much guilty 185

———Ss. 302 and 304—Striking on head with heavy stone—No intention to kill—Death caused—Knowledge that death was probable must be presumed—Conviction should be under S. 304 4

———S. 304 — Continual ill-treatment of daughter-in-law by mother-in-law—Daughter-in-law dying as a result of beating—No evidence showing intention or knowledge on the part of mother-in-law of likelihood of causing death — Offence committed was held to be under S. 323 and not Ss. 302 or 304 126

———Ss. 304 and 302—Striking on head with heavy stone—No intention to kill—Death caused—Knowledge that death was pro-

Penal Code

bable must be presumed—Conviction should be under S. 304 4

——S. 323 — Continued ill-treatment of daughter-in-law by mother-in-law — Daughter-in-law dying as a result of beating—No evidence showing intention or knowledge, on the part of mother-in-law, of likelihood of causing death — Offence committed is under S. 323 126

——S. 336 — Throwing bricks at the crowd and firing shots—Hurt caused to none—No offence is committed 396

——S. 363—Boy under 14 kept in charge of applicant for teaching koran — Applicant running away with the boy—Offence under S. 363 is committed 295

——S. 379 — Intention to cause wrongful loss absent — Charge under S. 4-7 is not sustainable 311

——S. 397 — Conviction merely under S. 397 is bad—Section does not deal with substantive offence 305

——S. 402—Accused coming from different villages arrested on suspicion in a village — Various circumstances showing their guilty intention—Conviction was upheld 62

——S. 404—"Property" is not expressly limited to "moveable property"—Parts of immovable property when severed may also become property under the section 673

——S. 411—Property found in room accessible to persons other than accused—Conviction is liable to be set aside 478

——S. 426—Bona fide dispute obviates offence 291

——S. 445 (5)—Whipping Act, S. 3 (d)—House-breaking to commit adultery—Sentence of whipping is not legal 591

——S. 448 — Dakhalnama giving formal possession to complainant against accused—Accused entering or remaining on land is not guilty 592

——S. 448—Intent to assert title and gain possession against complainant is no offence though accused is aware that annoyance will be caused by his act 540

——S. 448—Property must be in actual possession of person to be annoyed etc. 540

——Ss. 465 and 171 (f)—Offence under S. 171 (f) cannot be dealt with as one under S. 465 230

——S. 477-A—Accused obtaining by falsifying accounts securities worth amount justly going to be due to himself in near future but whose realization is doubtful acts fraudulently 654

——S. 504—Pulling a Muhammadan's beard in public is an offence 318

——S. 511—Fraudulently obtaining signature slip is no offence under S. 171 (f) read with S. 511 226

Pensions Act (23 of 1871)

——S. 4—Assignees of land revenue subsequently becoming proprietors of land—Assignees are not grantees of revenue-free immoveable property 565

Police Act (5 of 1861

——S. 34—Penal Code S. 279—Finding that no offence was committed under Police Act, S. 34—Conviction under Penal Code S. 279 is bad 448

Possessory Right

——Property frequented by public as if it were public road—Private person cannot assert possessory right 348

——Right cannot be extended beyond actual user 348

Practice

——Authorities — Divergent opinions—Those in conformity with equity, justice and good conscience should be accepted 720

——Change of case—Suit on allegation of tenancy failing—Plaintiff cannot claim ejectment of defendants as trespassers—Third party cannot be impleaded 705

——Criminal P. C. S. 488—Application for school-fees cannot be amended as one for maintenance by Court on its own motion 73

——Judgment—Pre-emption decree—Appellate Court can take notice of subsequent developments and reverse decree 361

Practice

——Judgment — Technical defect does not justify setting aside proceedings 808

——New plea—Case remanded in second appeal—Objection to remand cannot be raised after return of case 369

*——New plea—Change of case—Suit based on title cannot on failure of title be converted into suit based on possession 69

——New plea—Plea of legal necessity cannot be raised in second appeal 440

*——Parties not governed by same personal law—Case should be decided according to the law of defendant 720

——Pleadings—Evidence of party is not part of pleading 759

——Precedents — Authorities are useful only for law laid down but not for questions of facts 658

——Remarks in a case dismissed for want of jurisdiction are obiter 230

——Suit on lease—Lease not proved—Court cannot enquire into question of plaintiff's title and award possession on basis thereof 59

Precedents

——*See* PRACTICE—PRECEDENTS.

Pre-emption

——Custom — Discrepancies between wajib-ul-arzes of various dates—Custom was held not established 336

——Custom—Wajib-ul-arz prepared in connexion with settlement cannot be negatived by any other wajib-ul-arz, though latter be earlier one 44

——Custom need not be immemorial 449

——Custom recorded in settlement—Mahal being one man's property at time of settlement—Subsequent division — Custom applies 362

——Husband's maternal grandfather's nephew is not near relation 449

——Later wajib-ul-arz restricting pre-emption to cases of sale while earlier wajib-ul-arz allowing it in mortgage also—No discrepancy necessarily exists 44

——New categories of pre-emptors added in later wajib-ul-arz—Custom is not negatived 449

——Partition made under Revenue Act—Relationship of parties to partition continues until partition becomes effective 747

——Partition of village—No new wajib-ul-arz—Pre-existing custom of pre-emption is not negatived—But right will be confined to the new fiscal units 449

——Settlement rubkar is not complete wajib-ul-arz—Absence of entry therein does not disprove custom of pre-emption 44

——Settlement of pre-emption in 1885 in United Provinces—Entry is specially important 449

——Suit for—One plaintiff having no right to pre-empt—Whole suit fails 355

——Suit for—Plaintiff set up by a stranger—Suit cannot be dismissed if plaintiff is entitled to pre-empt 449

*——Suit for—Vendee can defeat claim by obtaining interest in village and becoming cosharer before decree—Contract Act, S. 23, is not violated thereby 358

——Two properties sold under the same sale deed—One property capable of being pre-empted—Pre-emptor paying (under decree) entire consideration—Both properties cannot be pre-empted 765

——Wajib-ul-arz giving right of pre-emption to cosharers of village—Partition subsequent to preparation of wajib-ul-arz—Right of pre-emption can be claimed only by co-sharer of same mahal as that of vendor 554

——Wazib-ul-arzes prepared after 1897 do not contain entries as to pre-emption, because of new rules of settlement issued in 1897 44

——Wajib-ul-arz — Construction—Bhai haqiqi bhaiqaribi and Digar hissedaran-i-deh entitled to pre-empt — Mere relationship was held insufficient to create right 360

——Wajib-ul-arz— Construction—Change of circumstances subsequent to preparation of wajib-ul-arz should be taken into account 491

Pre-emption.

——Wajib-ul-arz — Later wajib-ul-arz ampler than earlier ones —Custom in older wajib-ul-arz is not necessarily negatived 449

——Wajib-ul-arz — Pre-emptors clasified according to priority — Priority applies to cases inter se 719

——Wajib-ul-arz — Rights of co-sharers inter se on sale to stranger cannot entitle cosharer to pre-emption on sale to cosharer 378

——Wajib-ul-arz—Two wajib-ul-arzes — Earlier one putting brothers and cosharers separately —Later one putting them together — Brothers were held to supersede cosharers 342

——Wajib-ul-arz — "Whenever share of cosharers is sold or mortgaged"—Preference among cosharers inter se is not excluded 345

Private Defence

——Right of—*See* PENAL CODE, S. 96.

Provincial Insolvency Act (5 of 1920)

——S. 4 (2)—No fresh jurisdiction has been conferred by the section 221

——S. 6—Mere inability to pay debts is not sufficient—Mere absence of debtor from the village for a few hours when creditor sent a man to him for collecting debt, his not carrying on business vigorously, or not keeping accounts etc., is not sufficient 564

——Ss. 28 (2) and 78—Permission under S. 28 (2) impossible to act upon—S. 78 applies 735

*——S. 28 (4)—Receiver of insolvent Hindu debtor's estate is entitled to take possession of property obtained by his sons at partition 221

——S. 28 (5)- S. 28 (5) applies to land coming under Bundlekhand Alienation of Land Act (III of 1901) S. 16 467

——S. 75 (2)—Creditor can appeal 549

——Ss. 78 and 28 (2)—Permission under S. 28 (2) impossible to act upon—S. 78 applies 735

Pro. Small Causes Courts Act, (9 of 1887)

*——S. 17—"Amount due under decree" refers to amount due at date of decree 412

——S. 17—Full security deposited —Genuine error in stating the amount due is immaterial 379

*——S. 23—Suit based on contract — Question of title raised in defence—Suit does not cease to be small cause 821

——S. 25—Award set aside—Revision does not lie until decree is passed 393

——S. 25 — Finding of fact is unassailable 273

——S. 25—No revision lies unless the finding is perverse or impossible 172

——S. 25—No substantial injustice caused—No revision lies 273

——S. 35—Case decided by officer without Small Cause Court powers—Appeal lies 569

——S. 35 — Case instituted before officer with S. C. Court powers—Officers losing jurisdiction—Case taken up by successor not having S. C. Court powers in ordinary course — Omission by latter to rehear evidence does not vitiate proceedings where merits are not affected 569

——Sch. II, Arts. 6 and 11 — Suit on hypothecation bond — Claim against mortgaged property abandoned and suit framed as money suit—Suit is not small cause 205

——Sch. II, Cl. 19—Suits of a declaratory nature are not small cause suits 40

*——Sch. II, Cl. 28—Applies only to a suit for a share of the estate and not to suit for only an item thereof 40

——Sch. II, Art. 31 — Suit for accounts by successor-in-interest of the principal — Suit is not cognizable by Small Cause Court 682

——Sch. II, Art. 35 (ii)—Property taken under claim of right—Suit for compensation lies in Small Cause Court 130

——Sch. II, Art. 35 (g)—Suit for recovery of jewels given and money expended under marriage arrangement — Suit is not small cause, but where tried fully by Sm. C. C. Court, High Court did not interfere 51

Public Gambling Act (3 of 1867)
——S. 3—Chance of loss to booth-keeper extremely rare — Offence is complete 309
——S. 5—Asst. Superintendent of Police cannot search without warrant 301
——S. 6—Illegal search—Presumption under S. 6 does not arise 301
——S. 10—Person illegally arrested cannot be examined 301

Public Servant
——*See* CIVIL P. C., S. 2 (17).

Q

Question of Fact
——*See* CIVIL P. C., S. 100.

R

Railways Act (9 of 1890)
——S. 55—Plaintiff making honest attempt to remove goods but not allowed to do so — Company subsequently asking plaintiff to take delivery but plaintiff not complying — S. 55 does not apply 656
*——S. 72—Company cannot dispute consignor's title to the goods consigned 656
——S. 72—Railway claiming exemption must prove loss to Company 675
*——S. 72—Railway Company undertaking to carry goods to a station on foreign line is liable for over-charge demanded from consignee 823
——S. 72—Risk note signed by deliverer is enough 675
——S. 72—Risk note B—Guard not endeavouring to recover article known to have been removed — No wilful neglect by company was held proved 273
——S. 72—Risk note B—"Running train"—Stoppage for a few minutes is immaterial 273
——S. 72—Risk note B—Sending waggons long distance sealed only with paper string and wax is wilful neglect by railway 562
——S. 72—Suit for damages in respect of goods consigned—Railway must prove loss 384
*——S. 72 (2)—Risk note B—Goods taken off the route indicated by the Risk note—Railway is not exempt from liability 10

Railways Act
*——S. 77—Compensation for pilfered goods—Notice must be given within six months from delivery of goods to Company 144
——S. 77—"Non-delivery"—Notice is essential 273
*——S. 77—No notice is necessary where Railway Company does not allege loss but alleges non-receipt of articles 144

Redemption
——*See* CIVIL P. C., O. 34.

Registration Act (16 of 1908)
——S. 2 (9)—Growing crops—Crops not actually in existence but that would afterwards be in existence are also growing crops 411
——S. 17—Contract to sell—Mango crop not in existence—Contract need not be registered 411
——S. 17—Family settlement of disputed claims need not be registered 176
*——S. 17—Undertaking before criminal Court to abstain from disturbing certain immovable property requires no registration 605
*——S. 32 (b)—Presentation by one representative is sufficient 215
*——S. 35 (1) (c)—Admission of husband on wife's behalf is an irregularity curable by S. 87 215
*——S. 50—Prior mortgage for Rs. 99 unregistered—Subsequent sale of that property—Vendee can ignore the mortgage 325

Remarriage
——*See* HINDU LAW—REMARRIAGE.

Res-judicata
——*See* CIVIL P. C., S. 11

Review
——*See* CIVIL P. C., O. 47

Revision (Civil)
——*See* CIVIL P. C., S. 115

S

Second Appeal.
——*See* CIVIL P. C., S. 100

Specific Relief Act (I of 1887)
*——S. 21—Suit compromised—Future disputes to be referred to arbitration—Suit on same subject is not barred 366
*——S. 22—Plaintiff abandoning intention of going on with contract for purchase of property but stimulated into activity sub-

Sp. Rel. Act

sequently by chance of property being sold to another — Specific performance should not be granted 595

——S. 42 — Bare declaratory decree which would be useless should not be granted 745

——S. 42 — Civil and Revenue Courts — Suit for declaration in civil Court — Object of declaration being to affect the decision of revenue Court in a pending suit—Declaration should be refused **F B 637

*——S. 42—Revenue Court's decision declining to eject defendants unless lease was adjudicated upon by civil Court whether right or wrong, legalizes declaratory suit 37

**——Ss. 42, 54 and 55 — Suit against University to declare candidate to have passed in an examination does not lie—Nor is declaration or injunction open 253

*——S. 42 — Suit by mortgagor to declare his title — Time for redemption not expired — Prayer for redemption is not essential 421

Stamp Act (2 of 1899)

——Sch. 1, Art. 5, amended by U. P. Stamp (Amendment) Act (1923)—Agreement by mortgagor to pay higher interest and by mortgagee to extend period of payment — No fresh mortgage—12 annas stamp is enough **F B** 501

Step-in-aid of Execution

——*See* LIM. ACT, ART. 182.

Succession Certificate Act (7 of 1889)

——S. 16—J. D. cannot resist execution by holder of succession certificate on plea of latter not being D. H's heir 66

Suits Valuation Act (6 of 1887)

——S. 8—Value in plaint determines forum of appeal 376

T

Tort

——Criminal act is different from a reckless one 230

*——Defamation—Fair comment—Calling an official, who made repeatedly unfounded charges against his fellow officials, quarrelsome is fair comment—Words used on privileged occasions must not be too strictly scrutinized 762

——Defamation—Malice — Statement not going beyond what the occasion warrants—No malice is to be inferred 762

*——Defamation — Mere abuse—Reputation suffering due to circumstances—Action lies 371

*——Defamation — Privilege—Act without express malice—Privilege is not lost because of other defendants having malicious motives 762

——Trespass—Damages — Trepass on immovable property—Money compensation is not proper remedy 576

Transfer of Property Act (4 of 1882)

——S. 3—"Notice"—Registration is not notice in itself 557

——S. 6 (e)—Past arrears of profits can be sold but not pre-empted 765

*——S. 6 (h)—Consideration partly void—Transfer may be good 474

*——S. 14—Vendor can reserve an inalienable interest for himself and his descendants, reverting to vendee in absence of vendor's descendants 65

——S. 19—Interest to accrue after the death of the holder of estate—Interest is vested and not contingent 389

*——S. 35—Life tenant granting perpetual lease — Reversioner accepting rent from lessee—Ignorance of true facts—No election arises 190

——S. 40—Covenant running with the land—Contract to grant lease is not 427

**——S. 41—Transferee from Hindu widow is not protected by S. 41 79

*——S. 51—Permanent lease by Hindu widow—Lessee trusting in widow's power—Eviction by Reversioner—No compensation for improvements is due 261

*——S. 51—Perpetual tenant inducted by life-tenant—Ejection by reversioner — Improvements made bona fide should be made good 190

T. P. Act

——S. 52 — Pre-emption suit—Vendee reselling to vendor after filing of suit—Section applies 487

——S. 52—Pre-emption suit pending—Vendee reconveying to vendor—S. 52 applies 502

*——S. 53—Prejudice to pre-emptive rights of cosharer of the village, and not co-owner of plots transferred — Section does not apply 358

——S. 54—Sale of property worth less than Rs. 100—Possession delivered — Sale is complete—Unregistered sale deed executed at the same time does not destroy sale, but is admssible to prove nature of possession 206

——S. 55—Vendee undertaking to clear prior mortgage—Non-performance on date of sale is breach of covenant 488

——S. 55 (g)—Express stipulation as to encumbrances does not exclude vendor's liability to discharge an undisclosed encumbrance for which no provision has been made 704

——S. 60—Agreement practically making redemption impossible is clog on equity of redemption—Right of redemption postponed for 96 years — Stipulation for payment of interest along with the principal sum only—Conditions were held to be "clog." 643

**——S. 60—Clause, entitling mortgagee to retain possession after redemption, is clog 427

——S. 60—Period of 62 years with condition that redemption be allowed only on one particular day and the money for redemption not to be borrowed constitute clog 34

——S. 60—Redemption must not be allowed within term fixed though term is very long and though deed says mortgage should not be redeemed even after the term 42

——S. 63—Grove is accession and is incapable of separate enjoyment 427

——S. 63—Mortgagee planting trees on the land mortgaged—Mortgagee can remove them 794

T. P. Act

*——S. 63 — Mortgagee planting trees on land—Mortgagor unwilling to pay for them on redemption—Mortgagee may be allowed to remove the trees. 748

*——S. 68—Sub-mortgagee of occupancy holding can sue mortgagor for money if the latter fails to put him in possession 736

*——S. 74—Equity of redemption vesting in prior mortgagee—Right of prior mortgagee as owner of equity of redemption to redeem is preferred to that of puisne mortgagee 804

——S. 76 (c)—Mortgagee is bound to pay rent on mortgaged property accruing only after mortgage 189

*——S. 89—Civil P.C., O. 34 R. 13 Mortgagee whose final decree for sale is barred by time is not entitled to share in the surplus under Civil P. C., O. 34, R. 13 6

——S. 91—Recognition of occupancy rights by landlord only does not give a person right of redeeming a mortgage in favour of third party—Rights as heirs of mortgagor must be established 15

——S. 100—Charge not amounting to mortgage operates against purchaser without notice 60

——S. 106 — Notice announcing tenant's liability to pay damages in case of non-compliance—No option of paying enhanced rent is given 199

——S. 106 — Temple property—Notice to quit—Notice not headed as such and signed by manager's agent—Notice is not bad 199

——S. 108 (c)—Lessee ejected by stranger—Lessee is not bound to pay any rent to the lessor. 275

*——S. 108 (j)—Mortgage by tenant who is expressly authorized by lease to mortgage—Extinction of lease does not extinguish mortgage unless mortgagee has had opportunity to prevent that extinction—Rule applies to agricultural leases 580

——S. 111 (g) — Mere denial of landlord's title is not sufficient to forfeit lease 346

T. P. Act

*——S. 126 — Gift voidable by donor—Donor's heirs can avoid after donor's death 437

Trusts

——Breach of trust—Neglect by trustee to take steps to save property from consequences of breach of trust by predecessor is breach of trust 683

Trusts Act (2 of 1882)

——S. 77 — Trustee dissatisfied with cotrustees' management—Trust cannot be cancelled 277

U

U. P. Excise Act (4 of 1910)

——S. 60 (f)—Articles suspected to be implements found with accused—Excise officers must explain what they are 388

——Ss. 64 and 71—Accused's servant selling toddy after prescribed hours not at shop but at palmgrove—Accused is not liable 307

——S. 71—Sale of adulterated liquor by the son of license-holder—No proof of reasonable care by him—Conviction is proper 313

U. P. Land Revenue Act (3 of 1901)

—— S. 36 — Agreement between vendor and vendee fixing rent payable by former for his ex-proprietary tenancy is not void but can be accepted by revenue Court for decision as to the rent 745

——S. 36 — Order under, is binding in absence of fraud or want of jurisdiction 198

——S. 44—Tenant getting himself entered as thekadar and plaintiffs as lessors — Presumption under the section arises in favour of plaintiffs 100

——Ss. 56, 48, 49, 50 and 230—Cess recorded by Asstt. Record Officer in absence of appointment of Record Officer and Government Notification is invalid 121

——S. 86—Cess recorded without definite sanction of Local Government is irrecoverable 121

——S. 111 — All disputes as to ownership should be finally decided in partition proceedings 784

U. P. Land Rev. Act

——Ss. 111 and 112—Order on objections under S. 111—Order of another partition officer at subsequent stage of same proceeding cannot affect the order 481

——S. 114—Objector alleging private partition wherein he became owner in severalty—Question is one of proprietary title 818

——S. 118 — Suit for partition pending in revenue Court—Suit in civil Court for partition of house is not barred 677

——S. 126—Partition—Sir land of one cosharer alloted to another—Former not continuing to cultivate it does not become ex-proprietary tenant 674

——Ss. 210 (2) and S. 110—Assistant Collector refusing to entertain objection to partition on the ground of its being made not when notice was issued but when partition proceedings had commenced—Appeal lies to Collector 818

——S. 233 (k)—Hindu joint family—Family continuing joint—But some properties recorded in names of some members alone—S. 233 (k) does not preclude claim to these items as being joint 820

——S. 233 (k) — Imperfect partition — Section applies also to imperfect partition 784

——S. 233 (k)—S. 233 (k) is not applicable only to cases under S. 111 determining question of title — Question of proprietary right being raised in partition Court cannot be re-agitated 590

——S. 233 (k)—No question touching partition or union of mahal—Section does not apply 246

——U.P. Land Rev. Act, S. 233 (k) and S. 111 (b)-Partition proceedings—Parties referred to civil Court after framing issues — Order is not improper 807

U. P. Municipalities Act (1 of 1900)

——S. 2 (23)—A lane is a street if people residing on its sides have a right of access through it 234

——S. 211—No order can be passed in respect of a projection over private land 234

U. P. Municipalities Act (2 of 1916)

——Ss. 19 to 27—Election of a member—Suit to challenge does not lie in civil Court **F B** 38

——S. 22—Letters Patent (Allahabad), Cl. 11—Courts created by S. 22 are not "civil Courts" under Cl. 11 of Letters Patent (Allahabad) **F B** 380

——S. 23 (e)—Power to decide case referred does not include power to hear appeal **F B** 380

——S. 185—Offence technically committed—Municipal Board also not taking prompt action on notices given under S. 178—Nominal fine was levied 415

——S. 207 (b)—Accused fined for disobedience of notice—Further daily fine is illegal 251

——Ss. 321, 180, 318 and 178—Municipality refusing to sanction erection of building—Remedy of aggrieved party—Suit for injunction against Municipality is incompetent 699

——S. 326 (3)—Suit by employee to recover arrears of pay—Claim rejected by employers—Demand re-asserted—No fresh period of limitation begins 276

Usurious Loans Act (10 of 1918)

——S. 2 (3) (b)—Party liable as a surety—Act applies 400

——S. 3—Mortgage—Compound interest at 2 % per mensem was held unconscionable 31

V

Void Agreement

——*See* CONTRACT ACT, S. 23.

W

Waiver

——*See* LIMITATION ACT ART. 75.

Wajib-ul-arz

——Construction—Language of another wajib-ul-arz cannot be considered 345

——Entries are evidence of custom of pre-emption 663

——Subsequent partition does not necessarily abrogate custom recorded therein 446

Whipping Act (4 of 1909)

——S. 3 (d)—House-breaking to commit adultery—Sentence of whipping is not legal 591

THE

ALL INDIA REPORTER

1925

ALLAHABAD HIGH COURT

*** * 1925 ALLAHABAD 1**

Full Bench.

WALSH, AG. C. J., SULAIMAN, MUKERJI, DALAL, AND NEAVE, JJ.

Haji Sheikh Bodha — Defendant — Appellant.

v.

Babu Sukhram Singh and others— Plaintiffs—Respondents.

L. P. A. No. 56 of 1923, Decided on 23rd July 1924, from a judgment of Gokul Prasad, J., D/- 22nd February 1923.

* * *Evidence Act, S. 90 — Signature of the executant purporting to be made by scribe— Authority of latter is presumed.*

The presumption permitted by S. 90 in the case of a document purporting to be 30 years old, that it was duly executed by the party by whom it purports to be executed, includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him. **13 A. L. J, 921 and 15 A. L. J. 121 overruled.** [P. 1, C. 1, 2]

Iqbal Ahmad and *Mukhtar Ahmad*— for Appellant.

M. L. Agarwala — for Respondents.

Walsh, Ag. C. J.—This is a question of law which arose in a Letters Patent Appeal which came before my brother Sulaiman and myself. Owing to certain decisions, to which it will be necessary to refer in a moment, the result of the discussion by way of appeal from the judgment of the learned Judge of this Court was that the following question was referred to this Bench.

"Whether the presumption permitted by S. 90 of the Evidence Act in the case of a document purporting to be 30 years old, that it was duly executed, by the party by whom it purports to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorised to sign for him."

It should be observed that that question is carefully confined to the ambit or extent of the presumption of due execution which is permitted by S. 90 It does not purport to open the door to a discussion whether in the particular case the document purported to have been executed by the executant or party, through or by the pen of the scribe. That question therefore is not before us. It is assumed for the purpose of the general question of interpretation. For my own part I merely wish to say that it seems to be a question which must depend upon the circumstances of each case as they appear, either from the document, or from matters outside, and in this case it is a matter which still remains to be decided by the Bench which will finally dispose of the appeal.

The question therefore is a simple one, and deals only with a document which purports to be executed by the party or executant, not by the hand of the executant himself, but by the pen of the scribe. There must have been thousands of such cases occurring for generations in India, and there must be a large number, which from time to time come into the Courts, where the document is more than 30 years old. In our view the expression "duly executed" must include all the facts which would be necessary in order to establish due execution before a Court by positive evidence, if the obligation of produc-

ing positive evidence were not dispensed with by the presumption. In other words, as Mr. Justice Neave put it in argument if this document were ten years old, it would be necessary to prove that the scribe who purports to have executed it with the authority of the executant, had such authority in fact. If that fact may not be presumed in the presumption of due execution which is permitted by S 90, that portion of the section would become a dead letter. We therefore hold that the question must be answered in the affirmative

The necessity for referring the matter to a larger Bench arose owing to certain authorities which were cited to us, and which appeared to us to place obstacles in the way of our coming to the decision, which this Bench now arrives at unanimously. It is not necessary to go through them at length. The decision in the case of *Ubilack Rai* v. *Dallial Rai* (1) may clearly be distinguished inasmuch as there the agent who signed, purported to sign, not as a physical act carried out under the express authority and supervision of the executant, but rather to execute the document himself, authorised for that purpose by another document in the nature of a power of attorney, which gave him general authority to do other things as well as execution. We express no opinion about that decision. The question has arisen in England and in the case of *Airey* v. *Stapleton* (2) which was cited to us in argument, but the point there is clearly distinguishable from this point, because the document purported to be executed not by the executant, but by an agent having authority under a power of attorney, and it may well be that, even although it is of sufficient age, the authority under the power of attorney must be proved by independent proof of the document constituting such authority.

It is however difficult to decide this question in the affirmative without coming to the conclusion that the decision in the case of *Sheo Nandan Ahir* v. *Ram Lagan Singh* (3) was wrong. In one sense, but only in a pedantic sense, it may be distinguished from the question submitted to us, inasmuch as the view there taken was founded upon a statement that the document did not purport to be executed by the mortgagors at all, a question which Dr. Agarwala would have liked to have argued before us to day. But that statement in the judgment is inconsistent with a statement in the same judgment which precedes it, namely, that the names of the executants purported to have been written upon the document by the hand of Gajadhar Das the scribe. That being so, repeating what I have said at the beginning of this judgment, I should hold that the document purported to have been executed by the mortgagor by the pen of the scribe, and if that is a correct finding of fact, then the decision was wrong, and the presumption under S. 90 ought to have been allowed.

It would appear also that it would be difficult if we answer this question in the affirmative, not to disagree with the view taken in the case of *Gokul Singh* v. *Saheb Singh* (4). There the question was of attestation, but the attestation was clearly placed upon the document by an agent employed for that purpose. In our view if the document comes within the section, and is 30 years old, the presumption of due attestation includes the authority of any person who purports to have attested the document as agent for a person who purports to be the real witness attesting it.

In conclusion it seems superfluous to point out that it is only a presumption. Every presumption is rebuttable. The Court is not even bound to make it. It is another question if there are circumstances which justify it in rejecting it. But if it is unable to give any reason for not making it, and holds itself bound to make it, then it includes all the facts necessary to prove due execution, and therefore the authority of the scribe.

Sulaiman, J.— If this reference is confined to the only question whether, when a document does purport to have been executed by a party thereto, the presumption under S. 90 as to

(1) [1877-78] 3 Cal. 557.
(2) [1897] 1 Ch. 161=66 L.J., Ch. 152=76 L. T. 151=45 W. R. 286.
(3) [1915] 13 A.L.J. 921=30 I.C. 908.
(4) [1917] 15 A.L.J. 121=38 I.C. 163.

its due execution includes the presumption that the person making the signature of the party was duly authorised to sign for him, then there can be only one answer to the question. If the document does purport to have been executed by him, the presumption, certainly is that it was duly executed, and due execution includes the authority of the agent to make the signature for the party.

The cases which seem to lay down a contrary rule proceed on the assumption that where a document merely bears the signature of the party by the pen of another, it does not purport to show that that other person had authority to make the signature for the party. In a case where a party does not sign and seal a document, or make a mark thereon, but asks another to sign it for him, due execution by him implies two elements, namely, the making of the signature by that other person, and the authority given by the party to him to make that signature. The question whether a document which merely shows the signature of a party by another person does purport to have been "executed" by the other party, *i. e.* purport to contain both the necessary elements, may require consideration. That however on the terms of the reference does not arise in this case. I therefore agree that the answer to the question should be in the affirmative.

Mukerji, J.—After what has fallen from the learned Chief Justice and Mr. Justice Sulaiman, I have hardly anything to say, because I am entirely at one with them. In the case of *Lokman Das* v. *Ganga Sahai* (5) the Court really refused to assume that the document had been executed by any party at all. At the place where ordinarily the signature of the party professing to execute the document is to be found, there was a mere line, and there was no note to show that, that line had been drawn by the person whose name appeared at the head of the document. Whatever therefore was said in that case, was in the nature of *obiter dicta*, and cannot be considered to embody the opinion of the eminent Judges, who decided that case.

I agree in answering the question in the affirmative.

Dalal, J. I agree. The point is that when a document purports to have been executed by A, and the signature of A is by the hand of B, can it be assumed that B had A's authority to put down the signature? The answer to this question must be in the affirmative. In the rulings cited by the learned Chief Justice there appears to be a confusion between two distinct matters. The question was not put distinctly whether the document purported to have been executed by A. The two questions whether the document purports to be executed by and whether B had authority to sign it, were jointly considered; hence the confusion arose. In this reference the two matters are kept distinct, and the answer is that by due execution it meant that B had A'S authority to put down the signature.

Neave, J—I agree. I have nothing to add to the judgments which have been delivered by the learned Chief Justice and Mr. Justice Dalal.

The case coming up finally on 23rd July:—

Walsh, A. C J.—In this case the learned Judge of this Court, following a previous decision of this Court, held that the sale deed on which the defendants relied was not admissible, because the authority of the scribe to write the signature on behalf of the executant was not proved, by the presumption under S 90. Thinking the matter of importance we referred that question to a Full Bench which has held that the decision is wrong and that the presumption must be made in this case that this deed was duly executed by the party on behalf of whom it purported to have been executed by the pen of the scribe. That decision applies to both the documents. We have now to dispose of the appeal but these sale deeds are only part of the issue involved in the case. They certainly present a strong case on behalf of the defendant, and throw the onus upon the plaintiff, as will appear to anybody who takes the trouble to study the Munsif's judgment, The

(5) [1921] 60 I.C. 96.

District Judge after rejecting these sale-deeds appears to have taken the view that the defendant must necessarily be wrong and he found every fact in favour of the plaintiffs overruling the Munsif.

We find it impossible to dispose of the case by giving judgment ourselves, and although the amount is small and the delay has been considerable, the fact remains that these deeds are only a portion of the evidence which had to be taken into account with the rest of the evidence in the case. No question of law now remains to be decided. The controversy turns upon the question of fact. We therefore remand the case to the District Judge with direction to restore it to his pending file and hear the appeal and dispose of it on the question of fact without delay. The appellant is entitled to his costs of all the proceedings in the High Court on the higher scale. The costs incurred in the Courts below and future costs will abide the result.

Sulaiman, J.—I would like to add that the two deeds in question are in the vernacular. In the trial Court, before the lower appellate Court, as well as before the learned Judge of this Court it was assumed that these deeds purported to have been executed by Lotu Rai and others. The Court of first instance had distinctly remarked that they appear to have been executed by a few members of the family of Niranjan Rai in favour of the defendant's father and his other relatives." In their grounds of appeal in the lower appellate Court the plaintiffs did not suggest that the documents do not purport to have been executed by those persons. The learned District Judge in his judgment remarked. " The sale deeds upon which the lower Court has relied are not admissible because they are not signed by the persons purporting to execute them. The learned Judge of this Court also in his judgment stated that the presumption of law was that they were executed by the persons who purported to execute them, but that there was no presumption that the scribe who signed these documents for the executants had authority from the executant to do so." it seems to me that the question that these documents in vernacular do not purport to have been executed by Lotu Rai and others was never raised at any stage in the case; and this point I am not prepared to allow to be raised now in Letters Patent Appeal. I would join in remanding the appeal.

Appeal allowed.

Case remanded.

1925 ALLAHABAD 4

MUKERJI AND DANIELS, JJ.

Ganesha—Appellant.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 1105 of 1923, Decided on 19th February 1924, against the order of the Sessions Judge of Jhansi, D/- 1st December 1923.

Penal Code, S. 304—No enmity between accused and deceased—Accused's wife and deceased, wives of two brothers quarrelling about sharing pumpkin—Accused breaking pumpkin against deceased's wishes—Deceased abused him—He striking her with a lump of limestone weighing 3 pounds—Fracture of skull resulted in death—Case does not fall under S. 302 but under S. 304.

There was no enmity between accused and deceased. The accused's wife and the deceased who were the wives of two brothers were quarrelling about sharing a pumpkin. The accused coming along broke the pumpkin into two against the wishes of the deceased wherefore she abused him. He thereupon struck her with a lump of limestone weighing 3 pounds. This resulted in the injury.

Held: accused acted from impulse of moment and had no intention either to kill her or to fracture her skull; but that as the lump of limestone weighed 3 pounds it must be taken that he knew that there was a probability of fatal injury being inflicted 21 A. L. J. 316 Dist. [P. 5, C. 1]

The Assistant Government Advocate—for the Crown.

Judgment.—The appellant Ganesha has been convicted under S. 302 I.P.C, by the learned Sessions Judge of Jhansi of murdering his sister-in-law by striking her on the head with a lump of limestone called *patni matti*.

The facts are clear. There was no previous enmity between the two and the accused clearly had no intention off killing her. A dispute arose over a pumpkin between the accused's wife and the deceased. The deceased wanted to take away the whole pumpkin whereas accused's wife only wanted to let her make half. The accused came up while the dispute was going on and broke off half the pumpkin. The deceased began to abuse him where upon the accused picked up the lump of limestone and struck her on the head with it. The result was that her skull was fractured and she died in consequence of the injury. It is perfectly clear that the accused acted on the impulse of the moment and had no intention either of killing the deceased or of fracturing her skull. The case does not come under either of the four clauses of S. 300 I. P. C. At the same time as the lump of *potni matti* weighed three pounds it must be taken that he knew that there was a probability of a fatal injury being inflicted. The learned Sessions Judge considered himself bound by the ruling in *Emperor* v. *Umrao* (1) to convict the accused of murder. The circumstances of that ruling are entirely different and it is not applicable to the present case. We alter the conviction to one under S. 304 I. P. C. and reduce the sentence to one of two years rigorous imprisonment. We consider that a light sentence will meet the requirements of the case.

Conviction altered.

Sentence reduced.

(1) [1923] All. 355—21 A.L.J. 316—4 L.R.A. Cr. 89—24 Cr. L. J. 753.

✱ 1925 ALLAHABAD 5.

SULAIMAN, J.

Thakur Mahipal Singh—Plaintiff—Appellant.

v.

Athal Singh and another—Defendants—Respondents.

Execution Second Appeal No. 675 of 1923, Decided on 6th November, 1923, against the decree of the Subordinate Judge of Cawnpore, D/- 10th January 1923.

✱ *Contract Act, S. 139—Sureties binding themselves to produce in Court Judgment-debtor on the date the appeal was dismissed and in case of failure to pay decretal amount—No notice to produce debtor sent to sureties after dismissal of appeal—Counsel for decree-holder declining to require the production of the debtor—Sureties are not liable.*

Where the sureties bound themselves to produce in Court, the judgment debtor on the day the appeal, then pending, was dismissed and in case of failure, to pay the decretal amount but after dismissal of appeal no notice was sent to the sureties to produce the judgment debtor and the counsel for the decree-holder even declined to require the production of the judgment debtor,

Held: that it was practically impossible for the sureties to know before hand on what date the appeal would be finally disposed of by the High Court, that a reasonable construction of the document was that the sureties undertook to produce the judgment debtor in Court after the dismissal of the appeal when they were called upon to do so, that though the judgment debtor had got himself released by furnishing security which was not in compliance with the order of the Court, yet it was to some extent the fault of the decree-holders that they did not examine the security bond at the time and that the sureties were not at fault and were not liable to pay the decretal amount. [P. 6, C. 1.]

U. S. Bajpai—for Appellant.

K. N. Katju—for Respondents.

Sulaiman, J.—This appeal arises out of certain execution proceedings. Mahipal Singh brought a suit for a simple money decree against Raghunandan which was decreed sometime ago. An appeal was presented to the District Judge, and was dismissed. While a second appeal was pending in this Court the decree was put in execution and the judgment debtor was arrested and brought to the court of first instance. On his behalf an application has been made that the proceedings should be stayed inasmuch as a second appeal was pending in the High Court. The learned Munsif passed an order that the judgment debtor should be released provided he deposited in court a security bond for Rs. 800 as well as furnished sureties for the same. On the 8th April 1921 a security bond signed by two persons Hardeo Singh and Athal Singh was presented which was accepted as sufficient by the court and the judgment-debtor was released.

The second appeal was ultimately dismissed on the 23rd June 1921, and

after its dismissal the decree-holder applied to the court of first instance for execution of the decree against the sureties. On objections being raised by the sureties the application was dismissed as against them. That order was upheld in appeal and the decree-holders have now come up in execution second appeal and urge that the sureties are liable.

It is true that the security bond was not quite in conformity with the order of the Court No objection to it, however, was raised on behalf of the decree-holder and it was accepted as sufficient by the court. It is now impossible to go behind it and hold that the sureties are liable for anything more than what they had undertaken under this deed. Under this deed they undertook to produce the judgment debtor in court on the date the appeal was dismissed, and if they failed to produce him they held themselves liable to pay the decretal amount. It is not disputed that after the dismissal of the appeal no notice was ever sent to the sureties to produce the judgment debtor in Court. It was practically impossible to know before hand on what date the appeal would be finally disposed of by the High Court. The decree holders since then took no steps to call upon the sureties to produce the judgment-debtor in court. A reasonable construction of the document is that the sureties undertook to produce him in court after the dismissal of the appeal when they were called upon to do so. Before the lower appellate Court the learned Vakil for the decree-holders was expressly asked whether he wanted the judgment-debtor to be brought into court inasmuch as the sureties were ready to produce him. The reply was that he did not want him as he had become an insolvent, and it was no use having him up in Court. In these circumstances I am unable to hold that the sureties made a default and are liable to pay the decretal amount. It may be that the judgment debtor got himself released on furnishing security which was really not in strict compliance with the order of the Munsif. It was however to some extent the fault of the decree-holders themselves that they did not examine the security bond at the time. The appeal fails and is dismissed with costs including in this court-fees on the higher scale.

Appeal dismissed.

✱ 1925 ALLAHABAD 6

SULAIMAN AND KANHAIYA LAL, JJ.

Mohammad Abdul Rahim Khan and another - Defendants—Appellants.

v.

Ram Bharos Ojha and others—Plaintiffs—Respondents.

S. A. No 1410 of 1922, Decided on 12th June 1924, from the decree of the First Additional Judge of Gorakhpur.

✱ *Civil P.C. O. 34 R. 13—Mortgage whose final decree for sale is barred by time is not entitled to a share in the surplus—T. P. Act S. 89.*

After a mortgagee obtains a decree for sale he becomes a decree-holder and not a mere mortgagee. If he allows his rights under that decree to become barred by time he cannot be said to be a person who still has interest in the property sold and therefore he is not entitled to any surplus of the sale proceeds of the mortgaged property sold in execution of a mortgage decree. [P. 8. C. 2.]

Gulzari Lal—for Appellants.

Haribans Sahai—for Respondents.

Sulaiman, J—This is a defendants' appeal arising out of a suit for a refund of Rs. 805-6 which sum was paid to the defendants, under an order of the execution Court, dated the 26th June, 1920. It is connected with S. A. No 1411 of 1922.

The facts of this case are slightly complicated and it is necessary to state them in their chronological order. On the 26th February, 1895, Dubri and two other persons made a mortgage of 16 gandas share to Mt. Dilao for a sum of Rs. 262. On the 23rd January, 1897, Dubri executed a sale-deed of 8 gandas share in favour of Abdul Rahim Khan for a sum of Rs. 826, and also made a mortgage in favour of Abdul Rahim's mother, Mt. Shahanshah Begum, for a sum of Rs. 449. Out of the sum of Rs. 826, which was the sale consideration, a sum of Rs. 178 had been left in the hands of Abdul Rahim for payment to the

prior mortgagee, Mt. Dilao. A further sum of Rs. 271 was left in his hands for payment to one Debi Sahai, and other sums for payment to certain other creditors. It is admitted that Abdul Rahim did not pay the sum of Rs. 873 or any part of it to Mt. Dilao. Mt. Dilao, on the 6th June, 1910, brought a suit on the basis of the mortgage of 1885, impleading Abdul Rahim and Mt. Shahanshah Begum as well as the representatives of the mortgagors. This suit was decreed on the 28th July, 1910, and ultimately, in execution of this decree, the 16 gandas share was sold at auction on the 24th March, 1920 and purchased by the decree-holder's representatives for a sum of Rs 3,500. The purchasers deposited Rs. 1,610 in cash and filed a receipt for the balance in full satisfaction of the decretal amount,

We may mention that in the meantime Mt. Shahanshah Begum brought a suit, on the 19th September, 1910, on the basis of her mortgage-deed of 1897, but did not implead the prior mortgagee, Mt. Dilao. She obtained a decree, on the 25th November, 1910, for sale of the 8 gandas share against the representatives of the mortgagors, and a final decree for sale on the 27th June, 1914.

It is not disputed before us that after having obtained the final decree for sale in 1914, Mt. Shahanshah Begum took no steps by way of executing that decree. However, after the property had been sold at auction on the 20th March, 1920, in execution of the prior mortgagee's decree and a surplus of the sale proceeds had been deposited in Court, an application was made by Mt. Shahanshah Begum as well as by Abdul Rahim for the payment of the surplus to them. The Court, on the 26th June, 1920, ordered that half the surplus was to be made to Mt. Shahanshah Begum and the other half to Abdul Rahim. No part of the sum was allowed to be taken out by the representatives of the mortgagors.

The representatives of the mortgagors have, therefore, instituted the present suit and the connected suit for a refund of the amounts so paid It was a point in dispute as to whether the claim was within time, but this was decided in favour of the plaintiff by both the Courts and has not been raised here before us.

The main question, which we have to consider in this appeal, is whether the execution Court's order directing that the surplus of the sale proceeds should be paid to Mt Shahanshah Begum, the subsequent mortgagee, was right.

It is contended on behalf of the defendants-appellants that even if the application for execution of the subsequent mortgagee's decree had been barred by time, it was only his remedy to execute the decree that was barred but the mortgage debt was still subsisting. It is, therefore, strongly urged that under Order 34, rule 3, the subsequent mortgagee, even though her remedy was barred by time, was a person who was interested in the property sold and therefore, was entitled to part of the surplus. On the other hand, the Courts below have held that inasmuch as the decree had become barred by time, the subsequent decree-holder had no rights whatsoever left and was not a person to whom any part of the surplus of the sale proceeds should have been paid.

It is true that S. 28 of the Limitation Act would not in terms apply to a case of this kind. There may also be some force in the contention that an application for payment of the residue of the sale proceeds cannot, strictly speaking, be called an application in execution. All the same it cannot be disputed that after the decree absolute, the mortgage security had merged in the decree and whatever rights Mt. Shahanshah Begum then proposed were the rights which she acquired under that decree. If owing to her own default she allowed her remedy to be barred by time, it seems quite proper that the mortgagors should be allowed to resist her claim to take a portion of the sale proceeds. The principle involved in this case is, in our opinion, covered by the decision of their Lordships of the Privy Council, in the

case of *Het Ram* v. *Shadi Ram* (1). In that case the first mortgage was executed in the year 1880 followed by a subsequent mortgage of the year 1881. The prior mortgagee brought a suit for sale on the basis of his prior mortgage without impleading the subsequent mortgagee and obtained a decree. He, however, also acquired in some other way the rights and interest of the mortgagor subject of course to the subsequent mortgage. He made no attempt to execute his decree for sale obtained on the previous mortgage and allowed the ordinary period of limitation to expire. Later on the subsequent mortgagee instituted a suit on his subsequent mortgage impleading the prior mortgagee not as such but as a representative of his mortgagor. The point raised by the prior mortgagee was that the sale on the basis of the subsequent mortgage should be ordered subject to his prior charge. Their Lordships of the Privy Council repelled this contention and pointed out that when the prior mortgagee obtained a decree, that decree was a substitute for his rights under the mortgage. That when the right to execute that decree became barred by time, under Article 179 of the Limitation Act, the decree ceased to be operative. It really became wholly ineffective long before that suit was instituted.

It is worthy of note that in that case, if the plea of the prior mortgagee had been allowed, the result would have been that if the property was sold in execution of the decree of the second mortgage, the sale proceeds would have to be distributed under S. 97 of the Transfer of Property Act corresponding with Order 34, rule 13 of the new Code of Civil Procedure. The question which arises in the present case, although it did not arise at that time, is certainly one which would have arisen if the plea of the prior mortgagee had been upheld. We are, therefore, of opinion that it is impossible to distinguish the present case from that case. It is, however, urged very strongly on behalf of the appellants that that was a case falling under S. 89 of the Transfer of Property Act and is, therefore, distinguishable. It was decided by their Lordships in that case that the true construction of S. 89 of the Transfer of Property Act was that on the making of the order absolute for sale under that section, the security as well as the defendant's right to redeem were both extinguished. In our opinion that circumstance makes no difference whatsoever. The view expressed therein that after the passing of the decree for sale the mortgage security was substituted by a new right under the decree, still holds good. After Mt. Shahanshah Begum obtained a decree, for sale, she became a decree-holder and not a mere mortgagee. If she allowed her rights under that decree (and she had no other rights left) to become barred by time, she cannot be said to be a person who still had an interest in the property sold. We, therefore are of opinion that the order of the execution Court directing that half of the surplus of the sale proceeds should be paid over to Mt. Shahanshah Begum was not a correct one. We accordingly uphold the decree of the Court below and dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) [1918] 40 All.407=45 I.A. 130—5 Pat. L.W 88—16 A.L.J. 607—35 M L.J. 1—24 M.L. T. 92—28 C L.J. 188—(1918) M.W.N 518—20 Bom. L.R. 798—45 I.C. 798—22 C.W. N. 1033—9 L.W. 550—12 Bur. L.T. 73 (P.C.)

✱✱ 1925 ALLAHABAD 8

DANIELS AND NEAVE, JJ.

Bechu Pande—Defendant — Appellant.

v.

Mt. Dulhma and others—Plaintiffs—Respondents.

S. A. No. 1272 of 1922, Decided on 27th May 1924, from a decree of the Sub J. of Jaunpur, D/-5th July 1922.

✱✱ (*a*) *Hindu Law—Widow — Surrender to only one of several reversioners of the same decree is invalid.*

A surrender to be valid must be in favour of the nearest reversioner if there be only one or all the reversioners nearest in degree if there be more than one. 42 Mad. 532 Foll. 22 A. L. J. 472; 42 Bom. 719 Rel on. [P. 8, C. 1]

**** (b) *Hindu Law—Reversioner—Nearest reversioner only must sue unless he is precluded by his act.***

The rule is that a suit for declaration that an alienation by a widow is invalid must ordinarily be brought by the reversioner nearest in succession at the time. If the nearest reversionery heir refuses without sufficient cause to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow or concurred in the act alleged to be wrongful the next presumable reversioner would be entitled to sue. [P. 8 C 2]

Gadadhar Parsad for *Kumuda Prasad*—for Appellant

N. Upadhya for *P L. Banerji*—for Respondents.

Judgment.—The question in this appeal is whether the plaintiff is entitled to a declaration that a deed of gift executed by Mt. Dulhma in favour of her daughter Musammat Maharaji is invalid as against the rights of the reversioners. The pedigree of the family to which the parties belong is given in the judgment of the Court below. Musammat Dulhma's husband Ram Adhin was the last survivor of the joint family to which he belonged, and on his death Musammat Dulhma succeeded to a widow's interest in the property. She has three daughters who are all alive and are defendants to the suit, and at the time of the institution of the suit there was also a daughter's son Bachcha who was defendant no 5. This child has since died.

The gift was in favour of one only of Musammat Dulhma's three daughters. The Courts below have held that it was valid as an acceleration of the widow's life interest. This finding is erroneous. It was held by the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1) that a surrender to be valid must be in favour of the nearest reversioner if there be only one, or all the reversioners nearest in degree if there be more than one. This decision has been followed in this Court in the recent case of *Prag Narain* v. *Mathura Parsad* (2) and by the Bombay High Court in *Dodbasappa Ramlingappa* v. *Basawaneppa Shivlingappa* (3).

The next question is whether the plaintiff as a remote reversioner had any right to institute the suit. The general rule on the subject was laid down by their Lordships of the Privy Council in *Rani Anada Kunwar* v. *The Court of Wards* (4). The rule is that a suit of this nature must ordinarily be brought by the reversioner nearest in succession at the time. The cases in which a remote reversioner may be entitled to sue are thus stated.

"If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful the next presumable reversioner would be entitled to sue."

In this case the next reversioners entitled to sue are Mt. Maharaji's two sisters Musammat Chandra and Musammat Badra. There was an allegation in the plaint that they were in collusion with the widow, but no issue was framed on the point and no circumstance has been pointed out to us from which an inference of collusion could be drawn. The only fact relied upon by the appellant is that they refrained from suing for a peroid of some ten years after the gift. There is a conflict of authority on the question whether the fact that the nearest reversioner is a female holding a life interest is in itself sufficient to give the remote reversioner a right to sue. The cases on both sides are given in a footnote to the 9th edition of Mayne's Hindu Law at page 956. In this case, however, we have to see whether the plaintiff had a good cause of action on the date when he instituted his suit. If he had no cause of action on that date his suit cannot succeed because one or more deaths have taken place during the pendency of the litigation. On the date when the suit was brought there was admittedly a daughter's son of Musammat Dulhma in existence, so that the plaintiff was not even the next reversioner after the death of the daughter's son. In *Gumanan* v.

(1) [1919] 42 Mad. 523=46 I. A. 72—26 M. L. T. 5=36 M.L J. 493=17 A.L.J. 536=29 C. L. J. 539=21 Bom. L. R. 640=23 C.W.N. 777=(1918)M.W.N. 262=50 I. C. 498=10 L. W. 105 (P. C.)

(2) 1924 All. 740=22 A L.J. 472=5 L.R.Aciv 363.

(3) [1918] 42 Bom. 719=46 I. C 239=2 Bom. L. R. 783.

(4) [1881] 6 Cal. 764=8 I. A. 14=8 C. L. R. 381=4 Sar. 195 (P. C.)

Jahangira (40 All. 518) it was held by this Court that in the presence of daughters and a daughter's son, even if the daughter's son be a minor a remoter reversioner is not entitled to sue.

We accordingly dismiss the appeal with costs, but as we are deciding the case on a different ground from that on which it was decided by the Court below and overruling its decision on that ground, we think the costs should not include fees on the higher scale, and we direct accordingly.

Appeal dismissed

✱ ✱ 1925 ALLAHABAD 10

BOYS, J.

Janki Das Gobind Ram — Petitioner.

v.

Secretary of State and another — Opposite Parties.

Civil Revision No. 74 of 19 4, Decided on 23rd July 1924, from an order of the Small Cause Court Judge at Agra, D/- 2 th December 1923.

✱ ✱ *Railways Act, S. 72 (2)— Owner's risk note on form B does n t exempt Railway when the goods were t ken off the route indicated by the terms of the note.*

Where the important terms of the risk-note were, "wherea s the co signment * * * is charged at a special reduced rate * * *, I, the undersigned, do in consideration of such lower charge agr e and under ake to hold * * * railway dministrat on * * * over wh se railways * * * the said goods may be carr ed in transit from Nimtolla s at on to Jumna Bridge station harmless and fre f om all respon-ibility for any loss, dan age, d struction or dete-rioration of o damage to the said consignmen t, from any cause whate er (x e, t for the loss*** due to wilfu neglect * * * r to the theft * * * before, dur ng and after transit over the said railway lines";

Held: that the route by which the goods were to travel was "exp ess'y i d cat d", at the very least "imp l e ly indicated", by the terms of t e contract, to b t e rd nary route from Nimtolla o Jumna B idge and that in taking the goods off tha r ute the Con pany violated the contract a d are not exempted by the owner's risk-note from liability Case law discussed. [P. 14, C. 2; P. 15, C. 1]

S. K. Dar and *K. N. Katju* — for Petitioner.

L. M. Banerji and *L. P. Zutshi*—for Opposite Parties.

Judgment.—This case raises an important question as to the rights and liabilities of the public and of the Railways when goods are despatched under an Owner's Risk-Note Form B. Some timber was despatched on 18th from Nimtolla station on the Eastern Bengal Railway to the Jumna Bridge station at Agra for delivery to the plaintiff. Two Railways were concerned, but it is agreed that for the purposes of this case they may be treated as one Company. I shall, therefore, speak of "the Company". The usual period of transit would be about eight days and there is no question as to what the route should have been *i. e.* there is no suggestion of ordinarily alternative routes. The goods were in fact sent by the Railway Company to Jubbulpore where by some further mistake they were delivered there to the Military Authorities. On the 18th of September, the timber was traced to Jubbulpore, recovered by the Company and rebooked to Jumna Bridge. On the 25th of September, it was delivered to the plaintiff after a Railway officer had assessed the damage at Rs. 350-6-0. The Company however refused to pay anything on the ground that the goods had been despatched under an "Owner's Risk-Note, Form B". The plaintiff thereupon sued the Company alleging loss due to delay and deterioration, the consequence of the negligence and carelessness of the Company.

The responsibility of the Company is governed by the Railways Act, No. IX of 1890, S 72. That section, subject to any provisions of the Act, imposes on the Company the responsibility of a bailee under Ss. 151. 152 and 161 of the Contract Act, No. IX of 1872. Under S. 151 of the Contract Act the Company is bound to take such care of the goods as a man of ordinary prudence would take of his own goods. If it has taken that care, S 152 lays down that it is not, in the absence of a special contract, responsible for deterioration; and under S. 161 if, by default of the Company, the goods are not delivered at the proper time the Company is responsible for deterioration. So far as responsibility is regulated by S. 72 of the Railways

Act, the Common Law of England and the Carriers Act No. III of 1865 are inapplicable.

If then the goods have deteriorated by failure of the Company to deliver at the proper time and that failure is due in its turn to failure of the Company to use ordinary prudence, the Company is, in the absence of a special contract, responsible.

Under S. 76 it is sufficient for the plaintiff, apart at any rate from any special contract, to prove the deterioration; the burden of proof is not on him to show how it was caused

Here there is a special contract, the owner's risk-note. It is not a special contract within the meaning of S. 152 of the Contract Act, for it is not a contract increasing the responsibility of the Company and saddling it with responsibility even though it has used the due care required by S. 151. It is a contract purporting to limit its responsibility under Ss. 151 and 161, such an agreement as is referred to in S. 2 (2) of the Railways Act. The important words of the Risk-Note are.—

"Whereas the consignment * * * is charged at a special reduced rate * * * I, the undersigned, do in consideration of such lower charge agree and undertake to hold * * * railway administration * * * over whose railways * * * the said goods may be carried in transit from Nimtolla station to Jumna Bridge station harmless and free from all responsibility for any loss, damage, destruction or deterioration of or damage to, the said consignment, from any cause whatever except for the loss * * * due to wilful neglect * * * or to theft * * * before, during and after transit over the said railway lines."

No question of loss due to neglect or theft has been raised before me. The plaintiff contends that this Form B did not exempt the Company from liability for damage suffered owing to his goods being sent, not from Nimtolla to Jumna Bridge by the ordinary route but from Nimtolla to Jubbulpore a place off the ordinary route, and thence later to Jumna Bridge. It is not contended by the defendant Company that Jubbulpore is on the ordinary route or that it could possibly be considered to be on an alternative route; but simply that the Form B absolves them provided they delivered the goods eventually at Jumna Bridge. This defence was accepted by the learned Judge of the Court of Small Causes and the plaintiff has come to this Court in revision.

I will deal with the matter first as it presents itself to me independently of authority. The issue seems to me to be really simple. When a contract is entered into the parties must respectively be held to be bound by the ordinary meaning of the words where the words are not proved to be used in some special sense.

For the Company it is contended that if they at some time or other eventually got these goods from Nimtolla to Jumna Bridge, irrespective of where they went in the course of their journey or how long they took, the Company is exempt.

To establish this defence the Company must show not only that this is the construction which they themselves put and which they intended should be put by consignors on the risk note, but they must further establish that it is the reasonable construction which any ordinary intelligent person acquainted with the English language must put upon it. As it appeared to me when reading this risk-note for the first time, no one could fail to understand by it that the consignor's agreement to make no claim for certain cases of damage was limited by the understanding that he was holding the Company free from responsibility while taking his goods from Nimtolla to Jumna Bridge by the ordinary route. The words of the risk-note could never to my mind be reasonably held to raise in the mind of an ordinary person any idea that his goods might be carried half round the world by the act of the Railway and that he would have no claim for damage suffered provided that the goods eventually arrived at their destination. The words are plain "over whose railways * * * the said goods may be carried in transit from Nimtolla station to Jumna Bridge". There is one ordinary transit route from Nimtolla to Jumna Bridge and not an infinite variety of routes spread all over India as the Company would have it. The words that I have just quoted are followed later by the words "before, during and after tran-

sit". I should not have considered it necessary to mention this second reference to "transit" but that my attention was invited to it, though I was unable to appreciate the exact argument that it was intended to found thereon. There is no question here of any damage before the transit began or after it was completed. It is clear that the word "transit" can only have the same meaning that it has when used earlier in the Note and that the phrase "during transit" can only mean during transit on 'the route expressly *or impliedly* indicated," to quote the phrase used by Lord Atkinson (page 273) in the case *London and N. W. Railway Company* v. *Neilson* (1) to which I shall later refer. Here there is no question of damage during transit on such route. The damage resulted from departure from the route expressly or at least impliedly indicated. Apart altogether from authority I am of opinion that in taking the goods off the ordinary route the Company went outside the terms of the contract and cannot found a claim for exemption on the terms of that contract. I should have no hesitation in setting aside the order of the Court of Small Causes and returning the case for decision of the other issues that arise.

I will now turn to the authorities. The learned Judge of the Small Causes Court held the Company exempted from responsibility by the risk note, holding that "the facts in this case are on all fours with those of *Ram Kishun* v. *North-Western Railway* (2). It is true that the facts were much the same in that case, though there was in fact no wrongful handing over of the goods to a third party between the despatch and the delivery such as occurred in the present case, which in itself might differentiate the case. A suit was brought against the Railway Company because of damages suffered owing to certain goods despatched from Umballa to Ballia having been carelessly carried by mistake to Balley. The learned Judges before whom the case came in this Court decided against the plaintiff. If the point which is not before me had been decided I should, of course, be bound by the decision unless I referred the present case. They did not, however, decide the point. It does not even appear that it was raised before them. It is true that it was said "Under the terms of that risk-note, the N. W. Railway Company would only be responsible in the event of the loss of the consignment * * * due to wilful neglect." But the very next words show that the only point which, so far as appears from the judgment, was argued was that "deterioration" was not the same as "loss." In other words the judgment only dealt with the second portion of this risk note which makes the Company liable for the loss of a consignment due to wilful neglect or theft.

On the other hand, the point now before me was definitely raised and decided in a Bombay case [*Valli Muhammad Hamad* v. *G. I. P. Railway Company* (3)]. That case does not appear to have been referred to in the Allahabad case; probably it had not then been published. The learned Judges of the Bombay High Court hold, "it seems obvious that the contract was to carry the goods by the nearest route." By taking the goods by another route the Company "went outside ths terms of the contract and could no longer rely on the protection afforded by the risk-note so as to be absolved from liability for the loss which occurred." The case for the plaintiff before me is, if possible, even more clear, for it cannot even be suggested that Jabbulpore was on an alternative route.

The only other case to which it will be necessary to refer, but one of very great importance, is that of *The London and North Western Railway Company* v. *Neilson* (1). In that case the House of Lords upheld an order of the Court of Appeal (1 K. B., 192) affirming an order of the Divisional Court (3 K.B.D., 213) which reversed a judgment of the County Court given in favour of the defendant Railway. On behalf of the defendant Company here an endeavour

(1) [1922] L.R. 2 A.C. 263.
(2) 1923 All. 122=20 A.L.J. 973=4 L.R.A. Civ. 20.
(3) 1922 Bom 74=46 Bom. 830=24 Bom. L. R. 54.

has been made to distinguish that case from the present. It is, therefore, necessary to state the facts of it in some detail. Examined carefully I believe it will be found to be wholly applicable. A Theatrical Company desired to move with their belongings, including their theatrical costumes, from Llandudno to Bolton. The ordinary route, as was admitted would be *via* Manchester. For the benefit of theatrical companies there existed a special form of risk-note. Under ordinary circumstances Neilson Company, having more than ten tickets, were entitled to have their property placed in a sealed van which would travel along with them attached to their passenger train. Had the contract remained at this, it is clear there would have been no shadow of doubt that there was an expressly agreed route for the luggage to travel *i.e.*, the route along which the passenger train would travel I hold that in the case before me there is also a clearly agreed route, but if those had been the only facts in Neilson's case the point would not have even been arguable. It was on the ground that in Neilson's case the passenger route was expressly indicated that it was argued on behalf of the Railway here that that case was distinguishable, but that is not so. I have quoted above the ordinary Theatrical Company contract, but in the case of Neilson's Theatrical Company there was a specific variation of the ordinary contract made with such theatrical companies. The plaintiff Neilson was informed beforehand by the Railway Company that it was impossible to send the van along with the passenger train in which the Theatrical Company would travel further than Manchester and that thence it would be forwarded later and would arrive at Bolton "probably" in time for their theatrical performance. It is therefore important to appreciate that in Neilson's case the special condition of the ordinary theatrical risk note (that the goods should travel with the passengers) only affected the route from Llandudno to Manchester and that from Manchester to Bolton that condition did not apply, and so far as this second portion of the route was concerned upon which the trouble arose the conditions were identical with those in the present case. I have only quoted the portion of the conditions specially relating to theatrical companies in order to show that these special conditions do not in the particular circumstances of Neilson's contract differentiate that case from the present. The remaining conditions were those of the ordinary owner's risk note. The terms of the English Risk-Note in Neilson's case will be found in the judgment of Lord Buckmaster at pages 2 6 and 268, A comparison will show that the English note differs from the Form B in in this case in only two particulars. In the English Note the words "in transit" only occur and are not followed by the names of the stations of despatch and destination. The insertion of those names in the Indian Risk-Note, if it makes any difference at all, makes the case stronger against the defendant Railway here. The other point of difference is that there do not occur in the English note the words "before, during and after transit." I have already noted that these words do not add anything to the meaning of the word "transit."

Now briefly what happened in Neilsons's case was this. The van accompanied the passenger train as agreed as far as Manchester. It was there cut of as agreed. It should have followed later to Bolton but by some accident the label on the van had become detached. Owing to this accident and the further careless reading of a telegram by a Railway servant the latter did not know what to do with the van. He therefore opened it and took out all the lug gage. Some members of the theatrical company knowing that their luggage was to proceed in a sealed van had not taken the trouble to relabel their own articles with the result that some had no labels and some had old labels. The articles with no labels the Railway servant placed in the Manchester exchange Station Cloak room and those which had labels he sent to various towns whose names were borne on the labels. The result of course was that the threatrical company did not get their costumes in

time for their performance and sued the Railway for damages. It may be noted that in Neilson's case an endeavour was made by the plaintiff to show wilful neglect but this was held not to be established (page 276). It would, in fact, be very difficult to establish.

The House of Lords, upholding the two lower Courts, held that the Railway Company was liable. Lord Buckmaster (page 268) said:—

"The exemption is from liability during the "transit", and when once the goods are diverted from that route the protection ends"; and again (page 269) "If the route be abandoned, whether it was due to oversight, ignorance, accident or design, equally he agreed transit is departed from, and the privileges the carrier enjoys by contract during that transit cease".

In quoting the English note Lord Buckmaster put the words "the transit" in italics; and the above quotations make it perfectly clear that the breach of contract referred to was not in the breaking open of the van nor in the failure to send the luggage in company with the passengers from Manchester to Bolton, a condition of the contract which had been specifically waived by agreement between the parties, but in sending the goods off the ordinary route. That is what has happened in the present case.

Lord Atkinson said (page 273):—

The special provision absolving the railway must be held to refer to the subject matter of the contract and of that alone namely the carriage of the goods from the point of departure to the destination named, *by the route expressly or impliedly indicated*". And again "As soon as the carrier deliberately deviates from the stipulated route he carries the goods where the consignor never agreed that they should be carried, and when he (the carrier) by his special contract never agreed that he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it, ceases to act in accordance with it, in fact violates it".

It may be incidentally noted that Lord Sumner, J. held (page 277) that even taking the goods out of the sealed van and storing them in the cloak room of a station on the agreed route was a breach of the contract to take them by the agreed route.

"Neither on the findings nor on the printed contract did the route from Llanfairno to Bolton run through the Manchester Exchange Cloak room".

With how much more force would this apply to actually delivering the goods to some third party, as in this case to the Military Authorities in Jubbulpore and leaving them with them for weeks. But even without this element the case against the Railway is clear On this question of "transit", we find further in Halsbury's Laws of England Volume IV "Carriers" (page 7).

"A carrier is bound to carry by his *usual and customary route* and must not deviate therefrom unnecessarily"; and (at page 14) "he carrier s bound to carry the goods by the *usual route* by which he possesses to carry, and is therefore liable for damages for delay caused by unnecessary deviation from the route".

I hold that in fact there is no ambiguity about Form B on the only point which I have to decide; but if there were such ambiguity it is certain that it is not the defendant company who could avail themselves of it; and it could be said as was said in Neilson's case by Lord Buckmaster at page 269 (in reference to the use of the word "misconveyance" in the English note).

"were the appellant's contention accepted it would amount, as counsel were compelled to concede, to reading the clause as one providing that the company should not be liable for loss or damage under any circumstances other than wilful negligence on the part of their servants * * * I decline to give to confused phrases in such a contract a meaning which an ordinary man would be slow to realise".

Lush J. in the Divisional Court (3 K B. D., 213 at 222) commented "A consignor may well consent to bear the risk of loss or delay while his goods are being carried a specified distance of say twenty miles, but it is quite another thing to ask him to bear that risk while his goods are being carried a distance of perhaps five hundred miles through some mistake on the part of the Railway Company's servants".

No further authority is required for the well established proposition that limitation of the liability of the Company if they wish to plead it must be in precise terms.

The result is that in my opinion the route by which the timber was to travel was "expressly indicated", at the very least "impliedly indica-

ted", by the terms of the contract to be the ordinary route from Nimtolla to Jamna Bridge and that in ta ing the goods off that route the Company violated the contract and are not exempted by the owner's risk note from liability. I therefore set aside the decree of the Court of Small Causes with costs on the higher scale against the defendant on this application in revision and return the case to the Court of Small Causes for the decision of the remaining points in issue.

Case remanded.

1925 ALLAHABAD 15

NEAVE, J.

Ram Jatan Tiwari—Plaintiff Appellant.

v.

Radha Kishun Tiwari and others—Defendants—Respondents

S A. No. 6 of 1923, Decided on 16th May 1924, from a decree of the District Judge of Ghazipur.

T. P. Act, S. 91—Recognition of occupancy rights by landlord only does not give a person right of redeeming a mortgage in favour of third party.

The fact that the zamindar has recognized the occupancy rights of some persons is no doubt conclusive so for as he and they are concerned but it cannot be said that this recognition is sufficient to give them a right to redeem the mortgage held by a third party in the absence of evidence that they acquired these rights as heirs of the mortgagor.

[P. 15, C. 2, P. 16, C. 1]

Harbans Sahai—for Appellant.

Peary Lal Banerji—for Respondents.

Neave, J.—This appeal arises out of a suit for the redemption of a usufructuary mortgage of one plot (No. 128) of his occupancy tenancy executed in 1880 by one Bakhauri. It is admitted that Bakhauri's occupancy holding consisted of 6 plots and that he died about 25 years ago. It is further admitted that the appellants are in possession of the five other plots of the holding, but that the plots in suit are held by the defendants as mortgagees.

The appellants' case is that they are the heirs of Bakhauri and as such entitled to redeem this mortgage. The main defence raised was that the appellants were not the heirs of Bakhauri. The first Court found in the plaintiffs' favour, but the lower appellate Court dismissed their suit finding that though they were the collaterals of Bakhauri they were not his heirs within the meaning of section 22 of the Tenancy Act as they were not proved to have been joint with him in the cultivation of the holding at the time of his death.

It has been contended in appal that this finding is wrong. It is, however, clearly a finding of fact which cannot be disturbed now. The learned pleader for the appellant, however, has a second line of attack. This is that under section 91 of the Transfer of Property Act the appellants are entitle to redeem the mortgage as they have an interest in the property. It appears that all the six plots are still recorded as one holding. It further appears that it has been the practice of the zamindar when giving receipts for rent to the defendants to describe the rent as paid by the present plaintiffs through the defendants as mortgagees. It is argued that the appellants are liable for the rent of the entire holding including the plot in suit, and that this liability confers on them the interest which is required by section 91 of the Transfer of Property Act.

As already mentioned it has been found that the plaintiffs did not acquire possession of the other five plots of the holding as heirs of Bakhauri under the Tenancy Act. They are certainly now recognised as occupancy tenants by the zamindar. What the result of this recognition might be in the event of the defendants refusing or failing to pay their rent, and whether such a failure would render the appellants liable to ejectment are questions which can hardly be determined now. The fact that the zamindar has recognized the appellants' occupancy rights is no doubt conclusive so far as he and they are concerned, but it cannot be said that this recognition is sufficient to give them a right to redeem the mortgage held by a third

party in the absence of evidence that they acquired these rights as heirs of the mortgagor, and indeed in the face of a positive finding to the contrary. In these circumstances the appeal must fail and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 16

SULAIMAN AND MUKERJI, JJ.

Jageshwar Prasad and others—Plaintiffs—Appellants.

v

Suraj Bali Singh and others—Defendants—Respondents.

L. P. A. No. 121 of 1923, Decided on 24th July 1924, from a judgment of Mr. Justice Gokul Prasad, D/- 30th April 1923.

Landlord & Tenant—Tenancy—Threshing floor used by occupancy tenant for twenty years is presumed to be part of tenancy.

The fact that plaintiffs were tenants in the village and they had been in occupancy of the plot in suit for more than twenty years and used it as their threshing floor, raises the presumption that they held the land as a part of the contract of tenancy and the burden in the circumstances would be on the landlord to show that the land which is claimed as the threshing floor was really not held as a part of the contract of tenancy but otherwise, 16 A. 181 Foll. [P 16 C 2]

K. N. Katju—for Appellants.

Peary Lal Banerji—for Respondents.

Judgment.—The question before us is whether the learned Judge of this Court was right in holding that the evidence before the lower appellate Court would not justify the inference which he drew from them. The matter is not really a question of fact but a question of law.

The plaintiffs who are the appellants in this Court brought the suit out of which this appeal has arisen to obtain possession over a certain plot of land on the allegation that it formed their threshing floor and the defendants, who are co-sharers in the village, had unlawfully taken possession of the same and had built upon it. The learned Judge of the lower appellate Court found that the plaintiffs were tenants in the village, that they had been in occupancy of the plot in suit for more than twenty years and used it as their threshing floor. He found that there was no clear evidence to prove that the periods of the tenancy of the agricultural lands and of the holding by the plaintiffs of the land in suit were co-extensive. But he said that the fact that the plaintiffs had been holding the land and using it for the purposes of threshing corn was enough to raise the presumption that they held the land as a part of the contract of tenancy. The learned Judge of this Court held that if the evidence fell short of proof that the periods of the holding of two things, *viz.*, the agricultural land and the threshing floor were not co-extensive, the inference drawn by the lower appellate Court could not be drawn.

We are clearly of opinion that this opinion of the learned Judge is not correct The burden in the circumstances would be on the defendants to show that the land which is claimed as the threshing floor was really not held as a part of the contract of tenancy but otherwise A tenant may begin by holding a small portion of land in the village and then may grow up, holding gradually more lands. If he was allowed to occupy land for the purpose of his agriculture from time to time, it would not be necessary for him to show that the threshing floor was given to him for use when he first occupied land in the village. As we have said, the burden lay on the defendants to show that the user of the land was not a part of the contract of tenancy. The case is really governed by the authority in *Dalal* v. *Bhajoo* (1). We are entirely in agreement with this case and think that the learned Judge of this Court was in error.

We set aside the decree of this Court and restore that of the lower appellate Court dated the 14th July 1921. The costs of this Court must be paid by the defendants to the plaintiffs.

Appeal allowed.

---

(1) [1894] 16 All. 181—(1894) A. W. N. 15.

✱✱ 1925 ALLAHABAD 17

KANHAIYA LAL, J.

Harihar Prasad — Defendant—Appellant.

v.

Ram Daur alias *Ram Das and another* — Plaintiff and Defendants—Respondents.

S. A. No. 65 of 1923, Decided on 11th July, 1924, from the decision of the D. J., Benares, D/-10th November 1922

✱✱ *Hindu Law—Succession — Father's sister's son's son.*

Father's sister's son's son is a heritable bandhu and succeeds in the absence of nearer heirs. Case law discussed.

Harnandan Prasad—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—The dispute in this appeal relates to a fixed rate tenancy belonging to one Sumera, who died leaving a widow Mt. Partapi. The plaintiff claims to be the nearest heir of Sumera deceased. He denied that Mt. Pratapi was lawfully married to Sumera, but the courts below found on that point against him. The fixed rate tenancy in question has been sold by Mt. Partapi to Harihar Prasad for a consideration of Rs. 300 on the 4th July 1919, out of which only Rs. 50 have been found to have been taken for legal necessity.

The main question for consideration in this appeal is whether the plaintiff is the nearest reversionary heir of Sumera deceased, and as such entitled to impeach the validity of the sale. The court of first instance found against him, but the lower appellate court held, relying on the pedigree proved in the case and on an admission of the contesting defendant himself in a previous suit, that the plaintiff was the nearest Bandhu or reversionary heir of the deceased and entitled as such to protect his reversionary right.

It appears from the pedigree that the common ancestor of the plaintiff and Sumera deceased was Kashi, who had a son Chikuri alias Hanuman, and a daughter, Mt. Budhia. Sumera was the son of Hanuman. The plaintiff is the son of Gangu, the son of Mt. Budhia. There is no nearer kinsman agnate or cognate shown to be alive in the family. The rule as to the succession of Bandhus, laid down in the Mitakshara, (ch. 2 S. 6 para 1) runs as follows:—

"On the failure of agnates, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text:—

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his cognate kindred. The sons of his father's paternal aunt, the son of his father's maternal aunt and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be reckoned his mother's, cognate kindred."

Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.

The text above quoted is variously attributed to *Vrihha Shatatap* or to *Bavdhayana*. It defines and illustrates the different classes of Bandhus, who are capable of inheriting. It was not cited by the author of the Mitakshara for the purpose of giving an exhaustive enumeration of the Bandhus, entitled to inherit, but only as an authority for or illustration of his proposition that there were three classes of Bandhus, namely Atma Bandhus or those related to the person himself, Pitri Bandhus or those related through his father, and Matri Bandhus or those related through his mother. Mitra Misra, the auther of the Vira Mitrodaya, points out that the maternal uncle is recognized as an heir, but he is not mentioned there, and it would be anomalous, if his sons are included, and he is not included. Balam Bhatta, a lady commentator on the Mitakshara, suggests that the words "sons" includes daughters, and that the sisters and their sons are not excluded.

In *Girdhari Lal* v. *The Government of Bengal* (1) their Lordships of the Privy Council accordingly held that the enumeration of Bandhus in the text is only illustrative and not ex-

(1) [1867-69] 12 M. I. A. 448—1 B. L. R. P. C 44—10 W. R. P. C. 31—2 Suther 160—2 Sar. 382 (P. C.)

haustive; and in *Budha Singh* v. *Lalta Singh* (2) and *Aditya Narayan* v. *Mahabir Prasad Tiwari* (3) their Lordships declared that the word "sons" used there is used in generic sense and includes a grandson.

Manu declares (IX, 187) that the inheritance of a deceased Sapinda goes to the nearest of the Sapindas. He does not mention Bandhus specifically. But later writers have pointed out that Bandhus are also Sapindas, though of a different Gotra. The sapinda relationship arises according to the Mitakshara between people who are connected by particles of one body; but as such a relationship might exist in some remote decree in a very wide circle, the author of the Mitakshara has discussed the limits within which such Sapinda relationship exists in his dissertation on marriage, to which similar considerations are applicable.

Commenting on the text of Yagnyavalkya (152-53) requiring that a man should marry a girl who is not his sapinda that is within seven and five degrees from the father and mother respectively the author of the Mitakshara says:—

"She is called his Sapinda who has (particles of) the body (of some ancestor etc) in common (with him) Nonsapinda means not his sapinda. Such a one (he should marry)."

The Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father, because of particles of his father's body having entered (his). In like manner stands the grandson (in sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his (grand father's) body have entered (into his own). Just so (is the son a sapinda relation of) his mother, because particles of his mother's body have entered (into his). Like-wise the grandson stands in sapinda relationship to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grand father) have entered (into his and theirs); likewise does he stand (in sapinda relationship with paternal uncles and aunts and the rest). So also the wife and the husband (are sapinda relations to each other) because they together beget one body (the son). In like manner brother's wife also (are sapinda relations to each other because they produce one body (the son) with those who have sprung from one body. Therefore one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent.

Vignyaneshvar then proceeds to refute the theory that the sapinda relationship with maternal relations rests on the connection arising from obsequial offerings, the exception as regards obitual impurity being otherwise explicable, and referring to the passage in the text beyond the fifth and the seventh from the mother's side and the father's side respectively he observes:—

"On the mother's side in the mother's line, after the 5th, on the father's side in the father's line, after the 7th (ancestor), the sapinda relationship ceases. These two latter words must be understood; and therefore the word "sapinda" which on account of its (etymological) import, (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word Pankaja (which etymologically means "growing in the mud" and therefore would apply to all plants growing in the mud, designates the lotus only) and the like, and thus the 6th descendant beginning with the son and one's self (counted) as the 7th (in each case) are sapinda relations."

The sapinda relationship thus ceases beyond the 5th ancestor from the mother's side and beyond the 7th from the father's side. The plaintiff is the fourth in descent from the common ancestor, namely the grandfather of Somer, and so as the nearest reversionary heir at the present time he is entitled to protect his reversionary right.

The learned counsel for the appellant relies on the decision in *Ram-*

(2) [1915] 37 All. 604—42 I. A. 208—29 M. L. J. 434—2 L. W. 897—13 A. L. J. 1007—18 M. L T. 409—17 Bom. L. R. 1022—20 C. W. N. 1—22 C. L. J. 481—30 I. C. 529—(1915) M. W. N. 772 (P. C.)

(3) [1920] 48 I. A. 86—40 M. L. J. 270—(1921) M. W. N, 153—19 A. L. J. 208—23 Bom, L. R. 692—25 C. W. N. 842—33 C. L. J. 263—2 Pat. L. T. 97—29 M. L. T. 240—6 Pat. L. J. 140—60 I. C. 251—14 L. W. 20 (P. C.)

chandra Martand v. *Vinayak Venkatesh* (4) but the general conclusion there arrived at after a close examination of the authorities was (*a*) that the sapinda relationship on which the heritable right of collaterals was founded ceased in the case as *bhinna* gotra sapindas with the 5th decree from the common ancestor; and (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they would be sapindas of each other.

But the common ancestor in the present instance was Kashi and the plaintiff is only 4th in decree from him. In *Anitza Narayan* v. *Mahabir Prasad Tiwari* (3) the mother's sister's grandson was given preference to the son of the morther's paternal aunt; and the principle there laid down was that under the Mitakshara in preferring the nearer to the more remote class of Bandhus, reliance was not to be placed on the individual propinquity or on the efficacy of offerings to a deceased person, but the rule was that a Bandhu must, in order to be heritable in a female line, fall within the 5th degree from the common male ancestor and must be so related to the deceased person that they were actually sapindas of one another *i. e.*, where the Mitakshara applies persons connected by particles of one body. Within the agnatic circle, sapindaship is always mutual. But among cognates or Bandhus the question of the mutuality of sapinda relationship is by no means easy of solution, specially where several females intervene, unless the principle of religious benefit which the Mitakshara seeks to exclude, is introduced. But as regards the grandson of the father's sister, there would be a common ancestor near enough to whom he and the deceased, or one in the absence of of the other, may have offered oblations, for Manu (IX. 186) says:—

"To three (ancestors) must water be given at their obsequies); for three is the funeral cake ordained; the fourth (in descent) is the giver (of these oblations); the fifth has no concern with them."

(4) [1914] 42 Cal. 384—41 I. A. 290—18 C. W. N. 1154—27 M. L. J. 334—1 L. W. 831—10 N. L. R. 112—16 M. L. T. 447—(1914) M. W. N, 835—16 Bom. L. R. 863—12 A. L. J. 1281—25 I. C. 290—20 C. L. J. 573 (P. C.)

Professor Rajkumar Sarvadhikari, applying the principle of religious benefit as a test of mutuality treats the father's sister's grandson as within the heritable line (Sarvadhikari's Hindu law 2nd edition P. 637) Mr Golap Chandra Sircar excludes the principle of religious benefit and taking affinity by Sapindaship according to the Mitakshara law as necessarily mutual includes him within the heritable line (Shastri's Hindu Law 4th edition pp. 74 and 294).

The cross-examination as regards the extent of the legal necessity is futile.

The appeal and the cross-objection must therefore fail and are dismissed with costs including fees in this court on the higher scale

Appeal and cross-objection dismissed.

✱ ✱ 1925 ALLAHABAD 19

WALSH, AG. C. J. AND SULAIMAN, J.

Kanhaiya Lal—Plaintiffs — Appellants.

v.

Mt. Gaura and another—Defendants—Respondents.

L. P. A. No. 73 of 1923, Decided on 28th July 1924, from a judgment of Gokul Prasad, J. reported in 1923 All. 456, D/- 11th January 1923.

✱ (*a*) *Hindu Law—Schools of law — The United Provinces—The Mitakshara is of paramount authority though where it is silent other books of authority can be referred to.*

In the United Provinces, the Mitakshara by Vijnaneswara is of paramount authority. But where the Mitakshara is silent or is doubtful, other books of authority can legitimately be referred to. But where the Mitakshara lays down a rule clearly, then, even though it contradicts other books of authority, it has to be followed in the United Provinces. [P. 21, C. 1, 2]

✱ ✱ (*b*) *Hindu Law—Partition — Grandmother's right.*

In the Mitakshara school, where the original owner of the preperty dies leaving a widow and where his son also dies subsequently, leaving a widow and sons, in a partition between these sons, their grandmother *i. e.* the widow of the original owner is entitled to a share. 34 All. 505 F. B. distinguished. Case-law discussed. [P. 22, C. 2]

P. L. Banerji—for Appellants.

S. N. Sen—for Respondents.

Sulaiman, J. — The only question which arises in this appeal is whether a grandmother gets a share in the family property on a partition between her grandsons only. One Nainsukh Das was the owner of the property in question. On his death he left a widow Mt. Gaura, defendant, and a son Chunni Lal. Chunni Lal has since died leaving a widow Mt. Har Kuar, and two sons, Kanhaiya Lal and Makhan Lal. The point for consideration is whether in a partition between Kanhaiya Lal and Makhan Lal, Mt. Gaura gets any share in the property which originally belonged to her deceased husband Nainsukh Das.

The trial Court as well as the lower appellate Court came to the conclusion that she was entitled to a share under the Mitakshara law. That view has been affirmed by a learned Judge of this Court, who himself is well acquainted with the provisions of the Hindu law.

The question raised in this appeal is however not a very easy one to decide, and it is therefore necessary to consider the authorities in some detail.

Taking the case law first, it may be stated that the case of *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1) is no authority in support of the defendants' contention. The text of the Mitakshara quoted at page 62 by Mitter, J. was paraphrased as meaning:

> "The mother or grandmother, as the case may be, is entitled to a share when sons or grandsons divide the family estate between themselves".

The point however did not at all arise in the case, and it was only conceded for the sake of argument that the grandmother was entitled to a share.

In the case of *Pudum Mookhee Dossee* v. *Rayee Monee Dossee* (2) and subsequently in the case of *Rayee Monee Dossee* v. *Puddum Mookhee Dossee* (3) the rule was laid down that on a partition between the sons after the death of the father, the grandmother was not entitled to a share. No clear authority had been cited before the learned Judges, and the case also was one under the Dayabhaga law.

In the case of *Sibbosoondery Debia* v. *Bussoomulty Debia* (4) and in the case of *Badri Roy* v. *Bhugwat Narain Dobey* (5) it was held that a grandmother was entitled to a share. But both these cases were under the Dayabhaga law, and were cases of a partition not exclusively amongst grandsons, but one to which the son also was a party.

In the case of *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (6) it was merely held that the mother was entitled to a share.

In the case of *Purna Chandra Chakravarti* v. *Sarojini Debi* (7) Henderson, J., after an exhaustive review of numerous authorities, came to the conclusion that the grandmother was entitled to a share. Referring to the case in 12 W. R., 409, he remarked :—

> "That as the report of the case was not clear, he sent for the record, and from that it appeared that the partition was apparently a partition between the widows representing their respective husbands, and that it was not a partition among grandsons, but rather in the nature of a partition among sons".

The case before Henderson, J. was one in which a grandson was suing for a partition of the property left by his grandfather, the plaintiff's own father being dead. It was held that the widow of the grandfather was entitled to a share. Had not the case been one under the Dayabhaga law, it would have been directly in point.

On the other hand in the case of *Radha Kishen Man* v. *Bachhaman* (8) which has been subsequently followed in the Full Bench case of *Sheo Narain* v. *Janki Prasad* (9) it was laid down that upon a partition between a father and his sons that is when the father is alive the grandmother (that is the father's mother) does not get a share in the case of a family governed by the Benares School of the Mitakshara law. It is to be noted that the present case admittedly is not one of

---

(1) 9 W.R., 61.
(2) 12 W.R, 409.
(3) 13 W.R. 66.
(4) [1881] 7 Cal. 191.
(5) [1882] 8 Cal., 649=11 C.L.R. 186.
(6) [1888] 15 Cal., 292.
(7) [1904] 31 Cal., 1065=8 C.W.N. 763.
(8) [1881] 3 All. 118.
(9) [1912] 34 All. 505=16 I.C. 88=9 A.L.J. 749 (F.B.)

a partition during the life time of the father.

In the case of *Har Narain* v. *Bishambhar Nath* (10) it was merely decided that a step-mother is entitled to a share just as much as a natural mother.

In the case of *Vithal Ramkrishna* v. *Prahlad Ramkrishna* (11) which was in fact a case under the Mitakshara law, it was held that a step grandmother was entitled to a share at a partition between her step-grandsons exclusively, her own husband and her step-son being dead. Though the case was under the Mitakshara law, Shah, J., who delivered the principal judgment in the case, came to the conclusion that the Mitakshara was altogether silent as to the right of the grandmother. In that view he felt justified in invoking the aid of the Mayukha. In consequence of this, it may be said that the case is not a clear authority on the point.

This being the state of the judicial pronouncements it is necessary to consider the texts themselves. It is well settled rule that in these Provinces the Mitakshara by Vijnaneswara is of paramount authority. But the Mitakshara is a mere commentary on the Yajnavalka, which is by no means an exhaustive work. Vijnaneswara has made his commentary more comprehensive by quoting from the institutes of other Rishis and Smriti writers as well. The Mitakshara being a commentary on an incomplete treatise, is itself on some points not exhaustive. Vijnaneswara has himself pointed out that each of the Smriti writers was authoritative, and that the point not mentioned in one, can be supplied from the others. Similarly the Mitakshara is not the only commentary which can be properly received. Where the Mitakshara is silent or is doubtful, other books of authority can legitimately be referred to. As to the Viromitrodaya, their Lordships of the Privy Council in the case of *Gridhari Lall Roy* v. *Bengal Government* (12) remarked that it was stated by Mr. Colebrooke and others to be a treatise of high authority at Benares, and was properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School. But where the Mitakshara lays down a rule clearly, then even though it contradicts other books of authority, it has to be followed in these Provinces.

It is therefore necessary to examine whether there is anything in the Mitakshara itself bearing on the question before us. The scheme of the first chapter of the Mitakshara is as follows:—Section I deals with certain general notions relating to inheritance, partition and property. Section II deals with partition. Paragraph 1 quotes a text from the Yajnavalkya allowing a father to separate his sons at his pleasure, either the eldest with the best share, or all with equal shares. Paragraphs 3, 4 and 5 refer to the unequal shares. Paragraph 7 states that there are four periods of partition, three in the life time of the father, and one after his death. Paragraph 8 quotes a text from the Yajnavalkya; "If he makes the allotments equal his wives, to whom no separate property has been given by the husband or the father-in-law, must be rendered partakers of like portions". Paragraph 9 refers to the case when the father, by his own choice, makes all his sons partakers of equal portions. It is not necessary to refer to the other paragraphs. S. 3 deals with the case of partition at the fourth period, namely, the partition after the father's decease. A text of the Yajnavalkya is quoted:—"Let sons divide equally both the effects and the debts, after their two parents". In this section it is pointed out that though Manu had authorised an unequal distribution, such an act was abhorred by the world. S. 4 deals with effects not liable to partition, with which we are not concerned. S 5 deals with the equal rights of father and

(10) [1916] 38 All. 83=31 I.C. 907=13 A.L.J. 1129,

(11) [1915] 39 Bom. 373=28 I.C. 967=17 Bom. L.R. 361.

(12) [1867-69] 12 M.I.A. 448=10 W.R. P.C. 31=1 B.L.R. P.C. 44=2 Suther 160=2 Sar. 382 (P.C.)

son in property ancestral. Paragraph 1 begins by saying:—"The distribution of the paternal estate among sons has been shown; the author next propounds a special rule concerning the division of the grandfather's effects by grandsons". Paragraph 7 expressly states that the text of the Yajnavalkya quoted in S. 2 paragraph 1 relates to property acquired by the father himself.

It would therefore look as if S. 2 was dealing with the partition of the property which belonged to the father himself, and not one which had belonged to the deceased grandfather. Whether the text of the Yajnavalkya quoted in S. 2 paragraph 8 referred to the self-acquired property of the father only, and not the ancestral property in his hands, is a point on which it is unnecessary in this case to express an opinion. In the Full Bench case of *Sheo Narain* v. *Janki Prasad* (9) it was certainly assumed that the text applied to both ancestral and self-acquired properties, and was the only text applicable when the partition was to be effected after the life time of the father himself.

S. 6 deals with the rights of a posthumous son and of one born after the partition, and with such rights we are not concerned in the present case.

S. 7 paragraphs 1 and 2 are as follows:—

Paragraph 1:—

"When a distribution is made during the life of the father, participation of his wives, equally with his sons, has been directed. (If he makes the allotments equal, his wives must be rendered partakers of like portions)."

The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father:

"Of heirs dividing after the death of the father, let the mother also take an equal share".

Paragraph 2:—

"Of heirs separating after the decease of the father, the mother shall take a share equal to that of a son; provided no separate property had been given to her. But, if any had been received by her, she is entitled to half a share, as will be explained".

In our opinion the word "father" used in the Yajnavalkya, as well as in the Mitakshara quoted above does not only mean the deceased father of the sons who are partitioning the property. It may very well also mean the father who owned the property, and who is now dead. Similarly the word "mother" need not mean only the mother of the sons partitioning the property. (Certainly it does not mean only their natural mother, as the step-mother has been held to be entitled to a share). It may just as well mean the wife of the father who owned the property, and who is now dead. On this interpretation it would follow that if certain property belonged to the deceased owner, then his wife would be entitled to a share when the partition of that property between the heirs takes place after his death. As to who the heirs are, has to be gathered from S. 5, under which the sons and grandsons take equal shares in the grandfather's effects.

In the present case Nainsukh Das was the original owner of the property. Partition has taken place after his death. It so happens that his son Chunni Lal is also dead, but the heirs of Nainsukh Das are his grandsons Kanhaiya Lal and Makhan Lal. In a partition between them the widow of Nainsukh Das is entitled to a share. Yajnavalkya's text is:

"Of heirs dividing after the death of the father, let the mother also take an equal share".

When the original owner was Nainsukh Das, and the property has come down from him, there is no reason why he should not be included in the expression "father", and his wife in the expression "mother" It is noteworthy that in the text from the Yajnavalkya last quoted, the words are not "of sons dividing after the death of the father", but the words are "of heirs etc", According to this interpretation it would follow that in a case of a partition after the death of the original owner, his widow, if alive, would be entitled to a share. It is contended strongly on behalf of the plaintiff that the logical result of this interpretation would be to hold that the Allahabad Full Bench case proceeded on a wrong interpretation. Our answer to this objection is that in the case a clear distinction was drawn between a partition during the life

time of the father which admittedly is not the case here, as both the grandfather and the father are dead-and the case when a partition takes place after the death of the father. The Full Bench thought that the text applicable to the case before them was the text quoted in Chapter I, S. 2, whereas admittedly that text cannot apply to the case before us. Here the case comes under S. 7, and the only point which we have to consider is whether this section disallows a share to a grandmother. We are of opinion that it is possible to interpret S. 7, paragraphs 1 and 2, so as to give the widow of the owner a share when a partition takes place after his death among his grandsons, even though the owner's own son is also dead.

As we have had no access to the original texts but have had to depend on translations only, it is not possible to say positively that this interpretation is necessarily correct. At the same time we are prepared to hold that there is nothing in S. 7 which expressly prohibits the grandmother from getting any share.

We have already stated that where the Mitakshara is silent, or where its text is doubtful, other books of authority may be properly relied upon. The Viromitrodaya, which is a commentary on the Mitakshara, quotes a text of Vyasa, another Smriti writer, namely,

"The sonless wives of the father are declared equal partakers. Grandmothers are also declared to be equal to mothers."

Having quoted this text he proceeds to consider whether stepmothers are entitled to a share, but he does not comment on the right of grandmothers to an equal share with the mothers. It is contended by the learned Advocate for the plaintiff that the Viromitrodaya has simply quoted the text of Vyasa, but has not necessarily approved of it. We are unable to accept this contention. Unfortunately the treatise of Vyasa is not available, and only passages from it are to be found quoted in various commentaries. It is therefore a matter of some difficulty to interpret the text of Vyasa when isolated from its context. The Allahabad Full Bench in the case referred to above when referring to this text of Vyasa, remarked :—

"It must be borne in mind that Vyasa evidently refers to the case of a partition between sons after the demise of the father, when the mother of those effecting the partition gets a share, and declares that grandmothers being 'equal to mothers' are like the mother entitled to a share".

The learned Judges however expressed no definite opinion on the question, which has directly arisen in the present case, because that was not before them. We may also remark that the text of Vyasa has been quoted in the Dayabhaga and the Mayukha, and that under those systems of law, a grandmother's right to a share is recognised. Even if therefore the Mitakshara is silent or doubtful, it is proper to supplement it by Vyasa's text as quoted in the Viromitrodaya.

We may also note that amongst modern English Commentators, the balance of authority is in favour of giving the grandmother a share. Sir F. McNaughten in his Considerations on Hindu law has stated that after consulting the Pandits, he assigned her a share, although her great grandsons may be the partitioners, provided some of her more immediate descendants are parties, or some one more immediate descendant is a party to the partition. Shama Charan Sirkar has also assigned her a share, and Mayne in his Hindu law has followed McNaughten.

In West and Buhler's Hindu law, 4th edition, page 712, the paternal grandmother and step grandmother have been given a share.

Ghose in his Hindu law, part I, page 298, has allowed a share to the grandmother both under the Mitakshara and the Dayabhaga law, and has thought that there was little justification for a divergence of opinion.

It is unnecessary to quote later text-book writers whose opinions are based on the previous rulings and authorities.

We are therefore of opinion that the view taken by the learned Judge of this Court, and the Courts below, must be affirmed.

The appeal accordingly fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 24

SULAIMAN AND MUKERJI, JJ.

Mohd. Ibrahim — Plaintiff—Appellant.

v.

Mt. Altafan and others — Defendants—Respondents.

L. P. A. No. 149 of 1923, Decided on 29th July 1924 against the order of Kanhaiya Lal, J. in S. A. No. 610 of 1922, D/- 10th July, 1923.

(a) *Civil P. C., S. 100—Question of fact.*

Where it was possible that the expert evidence given on both sides was true.

Held: that the finding of the lower appellate Court could be considered afresh in second appeal. [P. 25 C. 2]

(b) *Mahomedan Law—Divorce.*

The rule entitling a husband whose wife sues for separation on the score of impotency to an opportunity for a year more to demonstrate the falsity of the charge, is one of substantive law not superseded by British Law though the other parts of the rule concerning the method of taking evidence etc. are procedural and unenforcible at the present day.

The doctrine of the Mahomedan Law, that where a woman brings her husband before a judge, and demands a separation on the ground of impotence and alleges that she is still a virgin, the case is to be adjourned for a year and if after the expiry of that year the woman still alleges that she is a virgin, an inspection by women is to be ordered, and if they declare that she is not a virgin, then her claim should be dismissed, but if they declare that she is a virgin then that fact coupled with a statement on oath should be accepted, is partly a rule of mere procedure and partly one of substantive law. The method prescribed for bringing the husband before a Kazi and the way in which the evidence is to be recorded and the rule of the law regarding what weight is to be attached to that evidence are rules of procedure, superseded by British Law. But the right of the husband to have an opportunity of demonstrating that he is not impotent is not a rule of procedure but a substantial right recognised by the Mahomedan Law. [P. 25 C. 2 P. 26 C. 1]

(c) *Mahomedan Law—Divorce — Wife's right to divorce is not absolute but subject to certain conditions—The mere fact of husband not having intercourse since marriage does not ipso facto entitle her to divorce unless husband's incapacity to cohabit with her is proved and the Mahomedan Law contemplates the contingency of there being impotency regarding one woman though not regarding others.*

Under the Mahomedan Law, a wife has no absolute right to obtain a divorce. She has that right under certain specific contingencies and conditions. The mere fact that since marriage the husband has had no intercourse with her and that therefore she is still a virgin, would not *ipso facto* entitle her to a divorce unless it is proved that the husband is incapable of cohabitation with her. The Mahomedan Law, contemplates that there may be impotency with regard to one woman though not with regard to others. [P. 26 C. 1]

Iqbal Ahmad—for Appellant.

Malcomson and *M. A. Aziz*—for Respondents.

Sulaiman, J.—Letters Patent Appeals No. 149 and No. 150 are connected and arose out of two suits, one brought by Mohammad Ibrahim, the husband, for restitution of conjugal rights and the other brought by his wife, Mt. Altafan, for the annulment of their marriage on the ground that the husband was impotent.

The parties were married in 1914 when the girl was about 13 years old and the husband some 3 or 4 years older. It is not disputed that for some six years after the marriage the husband and wife lived together and had access to each other. Owing to some subsequent differences the wife came away from the house and has since been living separately with her own parents.

The Court of first instance dismissed the suit for the restitution of conjugal rights and decreed the claim for the annulment of the marriage *in toto*.

On appeal the learned District Judge came to a different conclusion. His finding amounted to holding that the husband was not proved to be impotent and he accordingly decreed the suit for the restitution of conjugal rights and dismissed the suit with regard to the annulment of the marriage. On a second appeal to this Court a learned Judge of this Court has taken a different view. He came to the conclusion that the finding of the learned district judge was not a finding of fact so as to be binding on him and he held that under the strict Mohammedan law a decree *nisi* should be passed in favour of the wife for the annulment of her marriage with the defendant, but it would not be made absolute till a year from the date of the decree, during which period the defendant husband should have access to his wife so as to be able to exercise his marital rights.

He accordingly passed a decree in the suit for annulment of the marri-

age and remanded the suit for the restitution of conjugal rights. The wife has submitted to the decree, but the husband has appealed in both the cases.

The suit for the restitution of conjugal rights has been remanded to the Court of first instance with a direction to reinstate it and to dispose of it in accordance with the final result of the cross suit for the annulment of the marriage.

So far as this order is concerned it cannot be questioned if the order in the other case is to be upheld.

The first point which we have to consider is whether the finding of the learned district judge was a finding of fact binding on this Court in a second appeal. The learned judge did not believe the oral evidence adduced by the parties, but rested his decision entirely on the medical evidence. The position as regards the expert evidence was this. Two lady doctors were examined on behalf of the wife whose statement was that she was still a virgin and that her hymen was intact and that therefore so far as they could judge she had had no intercourse with a man. On the other hand, the husband produced three doctors whose view was to the effect that there was apparently no physical defect in the husband and that he was not impotent. The doctors however had to admit that it was possible that the plaintiff might be impotent towards one woman for whom he has no liking even though he may be potent with regard to other women. The learned district Judge thought that the evidence of these two sets of madical experts was divergent and came to the conclusion that the evidence produced by the husband was more weighty.

We are of opinion that the evidence of the two sets of medical experts was not necessarily contradictory. The lady doctors had tried to prove that the woman was still a virgin and that her hymen was still intact. The male doctors, who had had no opportunity of examining the wife, could not of course express any opinion on this point. Their evidence was confined to what they gathered after examining the husband. There was therefore a possibility that both these sets of medical evidence were true, namely, that although outwardly the husband was potent, nevertheless, for some reason or other he had not had an intercourse with his wife or was impotent towards her. In this view of the matter we are of opinion that it was open to the learned judge of this Court to consider this finding afresh and arrive at his own conclusions.

We think that it was open to the learned judge of this Court to reconsider the matter and hold that it has not been adequately established that the wife was not a virgin or that the husband actually had an intercourse with her, or that he was potent towards her.

The learned Judge of this Court has referred to the authorities of the Mohammedan law and laid down that according to that law where a woman brings her husband before a judge, and demands a separation on the ground of impotence and alleges that she is still a virgin, the case is to be adjourned for a year, and if after the expiry of that year the woman should still allege that she is a virgin, an inspection by women is to be ordered, and if they declare that she is not a virgin then her claim should be dismissed, but if they declare that she is a virgin then that fact coupled with a statement on oath should be accepted. There can be no doubt that this is a correct statement of the strict Mohommedan Law. All the leading authorities namely Hidaya, Fatwa-Kazi-Khan, Durrul Mukhtar, Baddul Mukhtar, Fatwa-Alamgiri as well as the English commentators accept it to be a correct statement of the Hanafi Law.

The only point worth consideration is whether the rule thus laid down is a rule of mere procedure which would be taken to have been superseded by the British law of procedure or whether it contains any part of a substantive law which in matters of divorce is enforcible. The method prescribed for bringing the husband before the Kazi and the way in which the evidence is to be recorded and the rule of law regarding what weight is to be attached to that evidence are

of course rules of procedure. But it seems to me that the right of the husband to have an opportunity of demonstrating that he is not impotent is not a rule of procedure but a substantial right recognised by the Mohammedan law. Under the Mohammedan law a wife has no absolute right to obtain a divorce. She has that right under certain specific contingencies and conditions. The mere fact that since the marriage the husband has had no intercourse with her and that therefore she is still a virgin would not *ipso facto* entitle her to a divorce unless it is proved that the husband is incapable of cohabition with her. The Mohammedan law, as pointed out by the learned judge of this Court, contemplates that there may be impotence with regard to one woman though not with regard to others. It therefore recognises that the husband should have full opportunity, after he has once been challenged, to prove that he is not impotent. This in my opinion is his substantive right and not a mere rule of procedure. The fixing of the period of one year comprising all the four seasons was according to the Hidaya based on certain specific grounds. That period has been unanimously accepted as a correct criterion for the test. I therefore agree with the view taken by the learned Judge of this Court that the rule of the Mohammedan law requiring the wife to agree to the exercise of the conjugal rights by the defendant husband for a period of one year so as to give him full opportunity to prove that he is not impotent is enforceable.

The last point urged in the grounds of appeal is that the conditions imposed by the learned Judge are not fair. We cannot accept this contention. The learned judge has ordered that the wife should live in the house of her parents or elsewhere but not outside Aligarh and that wherever she lives she must allow full access to the defendant at all reasonable times to exercise his marital rights as her husband. This we think is a fair and just order.

I would therefore dismiss this appeal with costs.

Mukerji, J.—I agree,

By the Court.

This appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

✱ ✱ 1925 ALLAHABAD 26

SULAIMAN AND KANHAIYA LAL, JJ.

Har Prasad—Plaintiff—Appellant.

v.

Kewal and others — Defendants—Respondents

F. A. No. 477 of 1921, Decided on 27th May 1924 from a decree of Sub J. Saharanpur, D/- 29 thJuly 1921.

✱ ✱ *Hindu Law—Succession — Exclusion from—Marriage with woman of lower grade in same caste is valid and in absence of communal custom rendering it invalid, does not disentitle the man marrying or his issue from inheritance in the family property—Hindu Law—Marriage.*

A man may marry a woman of a lower class or grade within his caste and may, by such a marriage fall into the class or grade to which his wife belongs, but in the absence of any clear and definite evidence to show that such a marriage would not be recognised as valid by the custom of the community to which either the husband or the wife belongs neither he nor his issue can lose their right of inheritance in the family property. [P. 28 C. 1]

J. M. Banerji—for Appellant.

Nehal Chand—for Respondents.

Kanhaiya Lal, J.—The dispute in this case relates to the property of two brothers, Dewan and Ranjit. Ranjit died, leaving a widow, Musammat Ganeshi, who died sometime in April 1920. Dewan died about six or seven months prior to the suit. The plaintiff claims to be the son of Multan Sigh, a brother of Dewan and Ranjit. The defendants claim to be the descendants of Bhai Singh, another brother of Dewan and Ranjit. The parties are Taga Brahmins. The family to which the plaintiff claims to belong used to reside in the village Jaranda. The allegation of the plaintiff was that his father, Multan Singh had gone to live in the village Rohana and that in his absence Ranjit, Dewan and Bhai Sing got the family property entered in their names and that after the death of Multan Singh,

when the plaintiff claimed his share in the family property by inheritance from his father, the defendants satisfied his claim by giving him a money compensation. His complaint was that on the death of Musammat Ganeshi, the widow of Ranjit, and that of Dewan, the defendants got the entire property belonging to the share of Ranjit and Dewan entered in their names to the exclusion of the plaintiff. The present suit was filed by him for the recovery of a half share of the property left by Ranjit and Dewan with mesne profits.

The defence was that Laiq Ram and his sons were Taga Brahmins of the Bisa class, that Multan Singh was not the son of Laiq Ram or brother of Bhai Singh, Dewan and Ranjit, that Multan Singh belonged to the Dasa class of Taga Brahmins and was married in that community and that the plaintiff was not entitled to claim any share in the property of Ranjit or Dewan deceased.

The Court below found that Multan Singh was one of the sons of Laiq Ram, that the plaintiff was the son of Multan Singh by a Dasa woman, whom Multan Singh had married and that as no valid marriage could be effected between a Dasa and a Bisa the plaintiff was not entitled to inherit any share in the estate of his uncles.

We have examined the evidence adduced in the case and agree with the Court below in finding that the plaintiff is the son of Multan Singh by a Dasa women of Qutubpur, whom Multan Singh had married, and that Multan Singh was one of the sons of Laiq Ram, who was a Taga Brahmin of the Bisa class.

The Taga Brahmins form an important cultivating and land-owning tribe confined almost altogether to the Upper Duab country and Rohilkhand. The Tagas claim to be of Brahmanical origin and are divided into two sub-divisions, known as Bisas and Dasas or the 'twenties' and the 'tens', and one of the important differences between the customs they observe is that while the Dasas allow widow marriage, the Bisas prohibit it. According to Crooke, if a Bisa allows this objectionable practice, he falls at once into the Dasa grade. The Dasa and Bisa form two endogamous groups, and within these groups they follow the usual rules of Brahmanical exogamy, (Crookes's Tribes and Castes Vol. IV, 354). The Bisas consider themselves to be purer and higher in grade. The Dasas are considered to be men of lower grade and possibly of mixed blood. According to the evidence, the Bisa Tagas do not smoke or interdine with the Dasa Tagas. The defendant Tara Chand states that there can be no marriage relations between them and this is probably true, though none of the witnesses produced by the defendants or those produced by the plaintiff were asked any question about it. There is nothing, however, to show that such a marriage would be illegal. If a man who belongs to the Bisa grade marries a woman belonging to the Dasa class the marriage may be considered reprehensible but would not be illegal. The only effect of such a marriage would be that the former and his children would no longer be treated as members of the Bisa community, or, in other words, they would be degraded and reduced to the position of Dasas among whom they would have in future to intermarry.

The evidence adduced shows that Multan Singh was married to the daughter of Kanhaiya, resident of Qutubpur. The plaintiff states that he was married to the sister of Chhajju of Qutubpur and that Chhajju was a Bisa Taga, but no person belonging to the family of Chhajju or residing at Qutubpur has been produced. On the other hand two witnesses who belong to Qutubpur have given evidence on behalf of the defendants and sworn that Multan Singh was married with the daughter of Kanhaiya, who belonged to the Dasa community. The evidence of Baldeo Singh goes to show that the plaintiff himself is married to the daughter of Ram Prasad who similarly belongs to the Dasa community. The Court below assumes that a marriage between a Dasa and a Bisa would be illegal, because the two could not smoke or dine together or inter-marry, but there is nothing to show that

there is any custom making such a marriage illegal or involve the forfeiture of all rights of inheritance.

A man may marry a women of a lower class or grade within his caste and may in a case like the present, by such a marriage fall into the class or grade to which his wife belongs, but in the absence of any clear and definite evidence to show that such a marriage would not be recognised as valid by the custom of the community to which either the husband or the wife belongs neither he nor his issue can lose their right of inheritance in the family property. No such evidence has been adduced in this case. Both the Dasas and the Bisas really are members of the same caste and community. The former simply belong to a lower grade and are looked down upon by the latter and a marriage between persons belonging to these two different social orders cannot be regarded as illegal. The claim of the plaintiff ought therefore to succeed. The appeal is accordingly allowed and the claim decreed with mesne profits from Kharif 1328 Fasli till the recovery of possession which will be determined by the Court below under O. 20 rule 12 of the Code of Civil Procedure. The plaintiff will get his costs here and hitherto from the defendants-respondents who will bear their own costs throughout. The costs in this Court will includefees on the higher scale.

The counsel for the appellant will make good the deficiency of Rs. 36-6-6 due on account of translation and printing before the decree is prepared.

Appeal allowed.

1925 ALLAHABAD 28

DANIELS, J.

B. Bhagwan Das—Defendant—Appellant

v.

Allan Khan — Plaintiff— Respondent.

S. A. No. 1451 of 1922, Decided on 27th February 1924, against the decree of the District Judge of Buduan, D/- 19th April 1922.

(a) *Hindu Law—Alienation by coparceners-Legal necessity may be presumed from concurrence of adult members and presence at the transaction.*

The concurrence of all the adult members of a family in a transaction is sufficient to raise a presumption of legal necessity where the other members are living away and the property is managed by such adult members 8 Bom. 602 Foll. [P. 29, C. 1]

(b) *Evidence Act, S. 101—Onus.*

Onus is liable to shift on proof of particular circumstances. [P. 29, C. 1.]

M. L. Agarwala and S. B. Johari—for Appellant.

S. A. Haider—for Respondent.

Judgment.—This appeal arises out of a suit for sale on mortgage. The mortgage was executed in 1909 by Dalpat Rai and his younger son Shadi Lal. The suit was contested by Dalpat Rai's elder son, the appellant Bhagwan Das, on the ground that it was executed without legal necessity. It has now been found that the property was joint family property. The plaintiff produced evidence which the learned Munsif accepted as proving the existence of legal necessity. The learned District Judge was unable to rely on this evidence because in his opinion it proved nothing more than a representation by the mortgagors of the existence of the necessity. This does not appear to be strictly accurate. The evidence of one of the witnesses as quoted by the learned Munsif shows the existence of actual necessity at the time. This witness who was an Honorary Magistrate gave evidence that the mortgagors at the time of execution of the deed were in straitened circumstances and in need of money for their subsistence and in order to carry on their cultivation.

The learned District Judge goes on to hold, accepting the finding of the learned Munsif on this point, that the appellant was working away from home and that his father and brother were left at home and were in charge of the family affairs and property. It appears that the appellant was employed on the Railway and had been away at Allahabad for a long period leaving the family property in charge of his father and younger brother. The learned Judge considered that this state of affairs was sufficient to

shift the burden of proof on to the appellant. In my opinion, this view is not inconsistent with the law on the subject. It has been held by the Privy Council that no invariable rule can be laid down but that the onus is liable to shift on proof of particular circumstances. Looking at the matter from a common sense point of view, it is highly unlikely that the father and the younger brother who were in charge of the property would combine, in the absence of the plaintiff, to alienate it without any necessity in order to defraud him. The concurrence of all the adult members of a family in a transaction has been more than once held sufficient, *e. g.*, *Balwant Santaram* v. *Babaji* (1), to raise a presumption of legal necessity and in the particular circumstances of this case the Court below was, in my opinion, justified in holding that the concurrence in the transaction of Shad Lal who was of age and was the only son present at home at the time of the transaction has the same effect.

I accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) [1884] 8 Bom. 602.

1925 ALLAHABAD 29

KANHAIYA LAL, J.

Syed Zahur Hasan and others—Defendants—Appellants.

v

Mt. Shaker Banoo and others—Plaintiffs—Respondents.

S. A. No. 509 of 1922, Decided on 30th July 1925, against the decree of the Judge of Small Cause Court Allahabad.

(a) *Evidence Act, S. 116—Subsequent licensee can sue a prior licensee for injunction.*

A subsequent licensee can sue a prior licensee who had abandoned his rights in the land of which the licensor had then granted a subsequent license to the plaintiff. 38 A. 178 Dist. [P 30 C 1, 2]

(b) *Landlord and Tenant—Abadi—Rights of proprietor in village site become equal to those of any other person when his proprietary rights are sold in auction.*

On the sale of the proprietary rights of a proprietor in auction the entire land appertaining to the property sold passes to the auction purchaser and by operation of law the proprietor becomes a ryot and his rights in respect of the site occupied by his dwelling house are reduced to the position of the other persons residing in the village. [P 30 C 2]

Iqbal Ahmad and *K. N. Katju*—for Appellants.

Abu Ali, *P. N. Banerji* and *Majid Ali*—for Respondents.

Judgment.—The dispute in this appeal relates to a plot of land situated in Jhansi which was at one time occupied by a house belonging to Muhammad Zahur. Muhammad Zahur was a *ryot*. The *zemindari* rights of his father in the village were, it is said, sold some time before 1882. Muhammad Zahur worked as a *karinda* of his father-in-law, who had a *zemindari* share in Busgit, his wife and children lived in Busgit, while he kept up his connection with Jhansi. He died in 1887. The house in question fell into ruins sometime afterwards and the question for consideration in this case is whether the defendants, who are the heirs of Muhammad Zahur, had abandoned the house after the death of Muhammad Zahur and allowed it to fall into ruins so as to entitle the *zemindar*, namely, the defendant No. 9, to rusume the land on which the said house stood and grant the right of occupancy thereof to the present plaintiff-respondent. The plaintiff-respondent owns a house adjacent to the land in dispute; and her allegation is that license to build a house on the land so abandoned was granted to her by the defendant No. 9 in September 1919. She complains that when she wanted to build a house on the said land the defendants-appellants interfered and prevented her from making constructions over the same. It is also said that the said defendants then hurriedly collected some materials and built certain walls and a room in order to keep the plaintiff out of the enjoyment of that site.

The defendants deny having abandoned the site. The Court of first instance found in their favour but the lower Appellate Court held otherwise. The question at issue is really one of fact depending very largely on the evidence of intention afforded by the conduct of the plaintiffs since 1887.

The lower Appellate Court has referred in details to the various facts established by the documentary evidence produced, tending to show that the defendants had abandoned their residence in the house in dispute and settled elsewhere, that from 1889 onwards they described themselves as residents of Busgit, and that though three members of their family had been buried at Jhansi, one having come their to live with his wife and the other two temporarily on account of plague, none of them is shown to have occupied the house in dispute which was lying in ruins from long before. The lower Appellate Court has also pointed out that if any of the members of the family did come to Jhansi for temporary purposes, they came and stopped in other houses with other people and showed no intention of either retaining the site of the house in dispute under their control to rebuild and maintain the house after it had been allowed to fall into ruins.

The learned Counsel for the defendants-appellants contends that the plaintiff as a licensee had no right to sue; that the inferences drawn by the lower Appellate Court from the facts found to have been established were not justified, and that in any case the defendants should be deemed to have continued to be the owners of the site in question and to have a right to build thereon. The right of the plaintiff to stop the defendants-appellants from interfering with her constructions was denied by the defendants-appellants on the ground that the latter had not abandoned the site; but her right as a licensee to file a suit was never questioned in any of the Courts below or in the Memorandum of Appeal filed in this Court. In fact, if the finding of the lower Appellate Court that the defendants-appellants had abandoned the site and allowed the house to fall into ruins so as to entitle the *zemindar* to resume the same is correct, the right of the *zemindar* to grant a license to the plaintiff to occupy the site and build a house thereon cannot be questioned. The decision in *Busdeo Rai* v. *Dwarka Ram* (1) has no application because that was a suit between a licensor and a licensee, and the question was what was the proper remedy in a case where the licensee has been ousted by the wrongful revocation of the license. The finding arrived at by the lower Appellate Court on the question of abandonment is based not so much on inferences as on the conduct of the defendants since 1889 onwards and the intention to be gathered therefrom. In *Hazari Lal* v. *Nimar* (2) it was held in somewhat similar circumstances in respect of land occupied by a grove, the trees whereof had been cut, that the land having been abandoned by the original grove holders and having remained waste for over 12 years and reverted to the *zemindars*, and the successors of the original holders could not presume possession and plant a new grove thereon without the permission of the *zemindars*. As regards the site, there can be no question that on the sale of the proprietary rights, if any, possessed by the father of Muhammad Zahur, the entire land appertaining to the property sold passed to the auction-purchaser; and by operation of law the judgment-debtor became a *ryot* and the rights of the judgment-debtor in respect of the site occupied by his dwelling house were reduced to the position of the other persons residing in the village.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) [1916] 38 All. 178=32 I. C. 346=14 A.L.J. 137.

(2) 1923 All. 295=45 All. 386=21 A.L.J. 277=4 L. R. A. Rev. 147.

1925 ALLAHABAD 30

SULAIMAN AND MUKERJI, JJ.

Ghuriya and others — Plaintiffs — Appellants.

v.

Baneswar and others—Defendants—Respondents.

L. P. A. No. 139 of 1923, Decided on 28th July 1924, from a judgment of Kanhaiya Lal J. reversing a decree of District Judge of Cawnpore.

Agra Tenancy Act, S. 177—Plea by tenant that he holds the land as khudkasht raises question of proprietary title.

Plaintiff brought a suit for ejectment against the defendants on the allegation that the defendants were his sub-tenants. One of the defendants pleaded that he was not a sub-tenant at all but that he held possession of the land as R is khudkasht being himself a proprietor. [P. 31, C. 1, 2.]

Held: the plea raised a question of proprietary title.

Saila Nath Mukerji—for Appellants.

The respondents were not represented.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit brought for ejectment against the defendants on the allegation that the defendants were his sub-tenants.

Baneshwar, one of the defendants, pleaded that he was not a sub-tenant at all and that there was no relation of landlord and tenant between the plaintiffs and him. He asserted that he held possession of this land as his khudkasht, being himself a proprietor.

The first Court framed two issues:—

(1) Does the relation of landlord and tenant exist between the parties?

(2) Is the defendant No. 3 himself a zamindar and the plots in dispute his khudkasht?

It came to the conclusion that the defendant No. 3 was not a sub-tenant but was in possession as proprietor, and that the claim having been brought more than six months after dispossession, was barred by time.

The plaintiffs preferred an appeal to the District Judge who held that the possession of the zamindar was in collusion with the ostensible lessee, his karinda, who was not the real lessee of the plot. He held that the zamindar himself was the real lessee and that his karinda was a mere benamidar. On this finding he naturally decreed the suit.

On an appeal by the defendant to this Court, a learned Judge of this Court has allowed the appeal and directed that the memorandum of appeal be returned to the plaintiff for presentation to the proper Court inasmuch as in his opinion no appeal lay to the District Judge. The view taken by the learned Judge was that in a case of this kind no question of proprietary title was raised.

This view is in direct conflict with the pronouncement of the Full Bench in the case of *Bindesri Pande* v. *Gokul* (1), which apparently was not cited before the learned Judge. The case is on all fours with the case decided by the Full Bench and cannot be distinguished.

We accordingly allow this appeal and setting aside the order of the learned Judge of this Court restore the decree of the lower appellate Court with costs.

Appeal allowed.

(1) [1914] 36 All. 183—22 I. C. 964=12 A. L J. 251.

1925 ALLAHABAD 31

KANHAIYA LAL, J.

Pandit Shyam Lal—Defendant—Appellant.

v.

Badri and another — Plaintiffs—Respondents.

S. A. No. 367 of 1922, Decided on 22nd June 1923. against the decree of the Subordinate Judge, Shahjahanpur D/-22nd August 1921.

Contract Act, S.16—2 p. c. per mensem compound interest was held unconscionable—Usurious Loans Act., S. 3

Where the mortgagors were illiterate persons and ignorant of the technicalities of law and legal expressions.

Held: that a stipulation to pay the interest at the rate of 2 per cent per mensem compound interest with monthly rests was unusual, hard and unconscionable. [P. 32, C. 1.]

Harnandan Prasad—for Appellant.

N. P. Asthana—for Respondents.

Judgment.—This appeal arises out of a suit for the redemption of a mortgage effected by the plaintiffs, Badri and Kidar, in favour of the defendant on the 23rd of December 1915. The mortgage was effected for a sum of Rs. 135, which was re-payable with interest at 2 per cent. per mensem compoundable with monthly rests. The plaintiffs pleaded that they never agreed to pay interest at 2 per cent. per mensem with monthly rests, and that the above term was entered in the bond without their knowledge. They further pleaded

that the interest claimed was, in any case, hard and unconscionable. The Trial Court found that there was no proof of undue influence exercised by the creditor and that the terms entered in the bonds were binding on the plaintiffs. It decreed the entire claim of the plaintiffs accordingly. The lower Appellate Court, however, refused to allow interest at the stipulated rate with monthly rests. It observed that the plaintiffs were illiterate persons and ignorant of the technicalities of law or legal expressions, and that they could not be expected to have fully realised the stipulation entered in the mortgage in regard to the payment of compound interest with monthly rests. The stipulation was undoubtedly unusual, hard and unconscionable; and probably had its effect been fully realised by the plaintiffs at the time the mortgage-deed was written they would not have agreed to the transaction. It cannot be said that the debtor entered into it with open eyes for the lower Appellate Court finds, that he was, by reason of his illiteracy and ignorance of legal technicalities, unable to realise the effect of the same. A Court of Equity may, therefore, relieve him and grant such relief as the circumstances of the case may require. The decision in *Ghansham Singh* v. *Bhola Singh* (1) does not apply, because the question here is whether the executants understood and realised the effect of the terms entered in the mortgage-deed, the finding on which is against the plaintiffs. The appeal, therefore fails and is dismissed with costs.

Appeal dismissed.

(1) 1923 All 490=45 All. 505=21 A. L. J. 465=4 L. R. A. Civ. 265 (F. B.)

✱ 1925 ALLAHABAD 32

NEAVE, J.

Santu and others—Defendants—Appellants.

v.

Abhainandan Prasad and others—Plaintiffs—Respondents.

S. A. No. 995 of 1922, Decided on 24th June 1924 against the Decree of the 2nd Addl. D. J. Gorakhpur, Dt. 21st February 1922.

✱ (a) *Civil P. C., O. 32 R. 7—Compromise—A paternal uncle signing on behalf of himself and his nephews major and minor, and on behalf of one of the major nephews as guardian of his minor brothers—Court's sanction is necessary.*

Where compromise was signed by the paternal uncle on behalf of all his nephews and it was stated that he also signed on behalf of one of the nephews acting as guardian of his minor brothers,

Held that he recognised that the minors were being represented for the purposes of the litigation, by their elder brother and that he did not profess to be representing them as manager and head of the family. And that in these circumstances the leave of the Court should have been obtained and recorded.

[P. 33 C 1]

✱ (b) *Decree-Direction that rent provided in compromise be entered in revenue papers is not incorporation of compromise into decree.*

The mere fact that the the decree directed that entries should be made, in the revenue papers, of the rent provided in the compromise cannot be regarded as equivalent to the embodiment of the terms of the compromise in the decree. [P. 33 C 2]

N. Upadhia—for Appellants.

Sankar Saran—for Respondents.

Judgment.—This appeal arises on a suit brought for arrears of rent for the years 1326 and 1327 Fasli against Lochan his four, nephews Jamna, Jaisri, Santu and Chatardhari. The two last named are minors. The plaintiff claimed rent at the rate of Rs. 275-8 a year basing his claim on a compromise entered into between the parties in a previous suit brought by him for the ejectment of the defendants in the Revenue Court in 1919. Until that year the rent of the holding had been Rs. 95. But in this compromise it was agreed that, if the ejectment proceedings were given up, the defendants would in future pay at the rate of Rs. 275-8.

The principal argument adduced in this Court on behalf of the appellants is that the compromise was invalid, inasmuch as two of the present appellants were at the time minors and the provisions of Order 32 rule 7, C. P. C. were not observed by the Court before the decree was passed. It is contended that, though it appears that Jaisri acted as guardian *ad litem* in the first suit for his younger brothers Santu and Chatardhari, he did not obtain the leave of

the Court to enter into the compromise on their behalf, and the Court's leave was not expressly recorded in the proceedings. It is further contended that the compromise was not for the benefit of the minors. A further point taken is that the compromise is inadmissible in evidence, inasmuch as it is unregistered and was not incorporated in the decree of the Revenue Court.

It is not clear whether Jaisri was ever actually appointed guardian *ad litem* of his younger brothers by the Court, but the compromise has been signed by Lochan on behalf of all his nephews and it is specifically stated that he also signs on behalf of Jaisri, who was acting as guardian of Santu and Chatardhari. The lower appellate Court has taken the view that, as Lochan and his nephews formed a joint Hindu family of which Lochan was the manager and head, he sufficiently represented all his nephews including the minors. The learned pleader for the appellants refers to *Ganesha Row* v. *Tuljaram Row* (1) in which their Lordships of the Privy Council held that in a case where the father and manager of a joint Hindu family was appointed by the Court guardian *ad litem* of one of his minor sons, he could not without leave of the Court do any act in his capacity of father or managing member of the joint family which he was debarred from doing as guardian *ad litem*, and that, therefore, a compromise made without the leave of the Court by the father was not binding on his minor son. In that case, however, their Lordships declined to express any opinion on the extent to which the acts of a father or managing member might affect a minor who was a party to the suit represented by another person as next friend or guardian *ad litem*. The ruling, therefore, does not directly cover the facts of the present case. In *Badri Prasad* v. *Gopal Bihari Lal* (2) it was held that, where a compromise in a suit is entered into on behalf of minors appearing by a next friend, it is necessary to the validity of such compromise that there should be on the record a specific order giving leave to the next friend to enter into the compromise on behalf of the minors. Here again it was the next friend appointed by the Court who executed the compromise. In the present case it would seem from the way in which the compromise was signed by Lochan that he recognized that the minors were being represented for the purposes of the litigation by their elder brother, and that he did not profess to be representing them as manager and head of the family. In these circumstances the leave of the Court should certainly have been obtained and recorded.

S. 47 of the Tenancy Act requires that any document recording an enhancement of rent shall be registered. It is argued on behalf of the respondents that this necessity is dispensed with as the terms of the compromise were incorporated in the decree of the Revenue Court. This, however, does not appear to have been the case. All that the Court did was to dismiss the suit. In *Dat Prasad Singh* v. *Gopal Ram* (3) the facts were similar, and it was there held that the necessity for registration had not been dispensed with. The mere fact that the decree directed that entries should be made in the revenue papers, of the rent provided in the compromise, cannot be regarded as equivalent to the embodiment of the terms of the compromise decree.

The lower Appellate Court has held that the compromise was for the benefit of the minors as they escaped ejectment. On the other hand, they were penalized by an enhancement of rent to the extent of nearly 300 per cent for in excess of what could have been obtained by a regular procedure under the law.

The appeal will succeed to this extent that the decree granted by the Courts below is altered to one for rent at the rate of Rs 95 for the two years in

(1) [1913] 36 Mad. 295—40 I. A. 132—17 C. W. N. 765—11 A. L. J. 589—18 C. L. J. 1—15 Bom. L. R. 626=14 M. L. T. 1—19 I. C. 515—1913 M. W. N. 575—25 M. L. J. 150 (P. C.)

(2) [1919] 41 All. 553—17 A. L. J. 789—50 I. C. 752.

(3) [1916] 14 A. L. J., 57—34 I. C. 234.

suit with proportionate costs. Interest pending and future on this amount is allowed at the rate already decreed. The appellant's costs will include fees in this Court on the higher scale.

Appeal allowed partially.

1925 ALLAHABAD 34

DANIELS AND NEAVE, JJ.

Ram Ganesh Rai—Defendant—Appellant.

v.

B. Rup Narain Rai and others—Plaintiffs—Respondents.

S. A. No. 1226 of 1922, Decided on 22nd May 1924 from a decree of the District Judge, Ghazipur.

(a) *Evidence Act, S. 93—Necessity to add or subtract words to give a clear meaning causes patent ambiguity—Other evidence is not admissible.*

Where a mortgage deed was admittedly ungrammatical and could not be read literally so as to give any clear meaning and in order to arrive at the construction both the parties had to supply or remove some words from the document as it stood.

Held: there was a patent ambiguity in the deed and under S. 93 of the Evidence Act no evidence was admissible to supply the defect.

[P. 35, C. 1]

(b) *T. P. Act, S. 60—Period of 82 years with condition that redemption be allowed only on one particular day and the money for redemption not to be borrowed constitute clog.*

Where not only was the mortgage one for a period of 82 years but even at the end of that time only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and the mortgagor was to lose his title altogether and there was a further covenant that the mortgagor was to pay the money from his own pocket and that he was not at liberty to redeem the mortgage with borrowed money.

Held: the case is very similar to *Sarbadman Singh* v. *Bijai Singh* 36 A. 551 in which similar conditions were held as a clog on the equity of redemption and hence not enforceable.

[P. 35, C. 2]

(c) *Adverse possession—Mutation of mortgagee's name as proprietor does not constitute.*

A mere mutation entry of the mortgagee as proprietor cannot convert his possession as mortgagee into adverse possession.

[P. 35, C. 2]

M. L. Agarwala and *Krishna Narain Laghate*—for Appellant.

Uma Shankar Bajpai for Respondents.

Daniels, J—This is an appeal in a suit for redemption of a mortgage. The suit has been decreed by both the Courts below. The defendant appeals on the following grounds:—

1. That the Court below should have come to a finding on the title of the plaintiffs,

2. That the suit is premature and that the mortgage was not redeemable until the full moon of Jeth in Sambat year 2039 corresponding to 1982 A. D.

3. That the suit is barred by S. 238(k) of the Land Revenue Act.

4. That the suit is barred by adverse possession.

5. Because the mortgage money should include revenue with interest thereon paid by the appellant.

No argument was addressed to us on the last point and we have therefore to consider the first four grounds only.

Plea 1.—The learned Judge refused to go into the question of plaintiffs' title because he said it had not been seriously contested in the trial Court or raised in the grounds of appeal to him. The plaintiffs set out their title in para 3 of their plaint. The defendant entered a formal denial of this paragraph and in his further pleas set out in considerable detail an alleged oral sale by the original owner Parmeshwar Upadhia in his favour. There was nothing further in his written statement to indicate that the plaintiffs' title was challenged on any other ground. The learned Munsif framed an issue, "Are the plaintiffs entitled to redeem? If so on payment of what amount?" In the earlier part of his judgment he gave reasons for rejecting the alleged oral sale. In dealing with this issue he merely set out the facts constituting the plaintiffs' title without any indication of any arguments which had been put forward challenging it, and then went on to discuss the amount on which redemption should be granted. In the grounds of appeal to the Court below the first ground, and the only one relied on as containing this objection, runs as follows:—

"It is fully proved from the entire evidence on the record that Parmeshwar Upadhia sold his interest in the

mortgaged property in favour of the appellant and got the mutation of names effected accordingly and that the appellant is since then in the proprietary possession of the property. The plaintiffs are by no means entitled to sue for redemption."

Reading this ground as a whole it is clear that while it challenges the plaintiffs' title it does so on the ground that the title is done away with by the alleged previous sale to the defendant and on no other ground. We are of opinion, therefore ,that the learned Judge was right in the conclusion at which he arrived on this issue. We may note that before us the appellant does not rely on the alleged oral sale.

Plea 2.—The learned Judge finds that the deed is ambiguous on the face of it. It is admittedly ungrammatical and cannot be read literally so as to give any clear meaning. In order to arrive at the construction they desire to place on it the appellant and the respondents alike have to supply or remove some words from the document as it stands. The appellant suggests that the words "Jeth Sudi Puranmasi Sambat 2039" have been written once where they should have been written twice and by repeating these words it is possible to read the documents as meaning :

"The mortgagee shall remain in possession and take the produce of both shares and spend it year by year in lieu of his interest from to-day up to the full moon of Jeth Sambat 2039. On that date if I, the executant, or my heirs pay the money from my own pocket I shall get back the land and the document."

On the other hand by simply omitting the particle "*ko*' it is capable of being read as meaning:

"The aforesaid mortgagee shall take possession and expend the produce year by year in lieu of his interest. If from to-day up to the full moon of Sambat 2039, I the executant, or my heirs pay the money, etc, I shall get back the land and the document:"

There is therefore a patent ambiguity in the deed and under S. 93 of the Evidence Act no evidence is admissible to supply the defect. The learned Judge was right in holding that under these circumstances the mortgage money must be taken to be repayable at any time. We may add that even if we were prepared to place on the deed the construction for which the appellant contends we should hold that the conditions of the deed amounted to a clog on the equity of redemption and were unenforceable. Not only is the mortgage, on this view, for a period of 82 years but even at the end of that time only one day was allowed for redemption and unless the money was paid on that particular day the mortgage was to become a sale and the mortgagor was to lose his title altogether. There is a further covenant that the mortgagor is to pay the money from his own pocket and that he is not at liberty to redeem the mortgage with borrowed money. The case is very similar to *Sarbadwan Singh* v. *Bijai Singh* (1), in which similar conditions were treated as a clog on the equity of redemption and as not being enforceable.

Plea 3.—The plea based on S. 233(k) of the Land Revenue Act is fully dealt with by the learned Munsif whose views are adopted by the learned Judge and are sufficient to dispose of this plea. The plea is based on the fact that in the partition record the mortgagee is shown as proprietor of a share equal to the share in dispute. As the learned Munsif has shown this share was interpolated in the khewat in addition to the original shares, which made up the total area. The mortgagor retained his original share unimpaired and his name continued to be recorded in respect of it. S. 233 (k) cannot possibly apply to circumstances like these.

Plea 4.—The plea of adverse possession loses all force in face of the appellant's admission that he cannot rely on the oral sale in his favour. He has nothing in support of it except the mutuation entry. A mere mutation entry of the mortgagee as proprietor clearly cannot convert his possession as mortgagee into adverse possession.

(1) [1914] 36 All. 551 = 24 I.C. 705 = 12 A.L.J. 927.

For these reasons the appeal fails and we dismiss it with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 36

STUART AND MUKERJI, JJ.

Ganeshi Lal—Plaintiff—Appellant.

v.

Nobin Chandra Bose and others—Defendants—Respondents.

S A No. 677 of 1922, Decided on 5th December 1923, against the decree of the Additional District Judge of Cawnpore, D/- 6th March 1922.

Mahomedan Law—Guardianship—De facto guardian cannot alienate minor's property even for necessity or benefit to minor.

A *de facto* guardian of a Muhammedan minor is a pure and simple out-sider or *fazuli* and he cannot bind the property of the minor by any act of his whether there be any necessity or benefit to the minor 45 C. 878 (P. C.) Foll. [P. 36, C 2]

K. N. Katju—for Appellant.

S. C. Das—for Respondents.

Judgment.—The property claimed by the plaintiff-appellant is 5/6ths of a certain property once owned by one *Mt.* Chanda. She mortgaged the whole of it in 1914 and died a year later. She left her surviving two heirs, her mother *Mt.* Nasiban and her son Siddiq. The son was a minor. The mother sold the entire property in 1915 to the respondent No. 1 in this appeal for a sum of Rs. 500. She received in cash a sum of Rs. 100 and left with the transferee the sum of Rs. 400 for the purpose of payment of the mortgage which had been executed by *Mt.* Chanda in 1914. Siddiq attained majority sometime in 1919 and in 1921 sold the property to the appellant. The appellant brought the suit out of which this appeal has arisen for recovery of 5/6ths of the property being the share of Siddiq in it.

The Court of first instance held that the appellant was entitled to recover the 5/6ths of the property but subject to payment of 5/6ths of the sum of Rs. 400 that went to pay off the mortgage created by *Mt.* Chanda.

The learned Additional District Judge reversed the decree and dismissed the suit *in toto.* He held that the suit was barred by time. He also recorded a finding to the effect that, in any case, the appellant could not succeed without paying 5/6ths of a sum Rs. 900, and not of a sum of Rs. 400 only.

Two points have been urged before us in this appeal. First, it has been contended that the act of the mother Nasiban could not bind the son Siddiq at all. It is urged that it is immaterial whether there was any necessity for the sale or not. The second point that has been urged is that the suit was not time-barred. Taking the second point first it appears that the sale having been made in 1915 the suit was amply within time for ejectment of the purchaser.

To take up the first. The point raised is really concluded by the judgment of the Privy Council in *Imambandi* v. *Mutsaddi* (1). As we read the judgment, their Lordships have authoritatively laid it down that a guardian of a Muhammedan minor, who is not a guardian under the law is a pure and simple out-sider, or *fazuli*, as he has been described, and he cannot bind the property of the minor by any act of his whether there be any necessity or benefit to the minor. In view of this Privy Council case it is not necessary to go into any of the rulings of this Court in which it may have been held that a *de facto* guardian of a Muhammedan minor could bind his property by a transaction by which the minor has been benefited.

A third question arises in this case. It appears that there was a decree against *Mt.* Chanda and several other persons for the sale of certain properties. It has been found as a fact by the Court below that the property now in question was one of the properties dealt with by the decree. We have not got any copy of the decree on the record. It appears from the judgment that, besides the pro-

(1) [1919] 45 Cal. 878=45 I.A. 73=9 L.W. 518=35 M.L.J. 423=16 A.L.J. 800=24 M.L.T. 330=28 C.L.J. 409=23 C.W.N. 50=5 Pat. L. W. 276=47 I.C. 513=20 B.L.R. 1022=1919 M.W.N. 91 (P. C.)

perty in question in this appeal, there were other properties involved. It is clear that the whole of the liability for the decretal amount cannot be laid on the property in question. At any rate, the respondent No. 1 was bound to contribute to the extent of his own liability. The Court below, therefore, was not justified in holding as a matter of law that the appellant was bound to pay 5/6ths of the sum of Rs. 900. The Court of first instance allowed 5/6ths of Rs. 400 or a sum of Rs. 333-5-4. This decree the appellant accepts.

The result is that we allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs which will include fees on the higher scale.

Stuart, J.—In view of the fact that the plaintiff agrees to pay Rs. 333-5-4 to Babu Nobin Chandra Bose the question does not arise whether if he had insisted he would not have been able to escape all liability. I note that we are allowing the amount without expressing an opinion as to whether he is liable to pay under the law We are allowing it because he agrees to pay it.

I concur in allowing the appeal with costs including fees on the higher scale.

Appeal allowed.

✱ 1925 ALLAHABAD 37

WALSH AND PIGGOTT, JJ.

Phool Singh—Plaintiff—Appellant.

v.

Mt. Gobind Koer and others—Defendants—Respondents.

L. P. A. No. 98 of 1922, Decided on 1st April 1924, from the judgment of Gokul Prosad, J.

✱ *Specific Relief Act, S. 42—Revenue Court's decision declining to eject defendants unless lease was adjudicated upon by Civil Court whether right or wrong legalises declaratory suit.*

Where the Revenue Court had decided that the defendants could not be ejected unless the validity of the lease was adjudicated upon by a Civil Court.

Held: that whether the decision was correct or not, a declaratory suit in the Civil Court was not barred under S. 42. [P 38 C 2]

P. L. Bannerjea and *Baleshwari Prosad*—for Appellant.

N. P. Asthana—for Respondents.

Judgment—This is an unfortunate case on the facts found. The plaintiff was the minor son of one Gitam Singh. During his minority his father granted a perpetual lease of certain agricultural land on terms highly favourable to the lessee and unfavourable to himself. It seems to have been also found by two Courts that undue influence was used by two of the defendants in obtaining this lease from the plaintiff's father. After the death of his father the plaintiff acting through his next friend endeavoured to obtain from the Revenue Court the ejectment of the defendants, admitting them to be his tenants, but claiming that they had no higher right than those of tenants at will. When this lease was set up the attempt at ejectment in the Revenue Court failed. The plaintiff then brought the present suit asking for a declaration that the lease is not binding upon him either on the ground that it was obtained by undue influence exercised upon his father, or, even if that plea should fail, on the ground that it amounted under the circumstances to an alienation of joint ancestral family property in the hands of the plaintiff's father, which the latter was not competent by law to make. Two Courts found in favour of the plaintiff on all points and granted him the declaration prayed for.

There was a second appeal to this Court and in this appeal the first two points taken related to the question whether the land covered by the lease was joint ancestral property and whether there had been a clear finding on the question of undue influence. On the first point the learned Judge of this Court held that there was a finding of fact in favour of the plaintiff. At any rate, the learned Judge found definitely that the property in dispute was ancestral property belonging jointly to the plaintiff and to his father. On the second point the learned Judge of this Court held that

the finding of the lower Appellate Court to the effect that the terms of the lease were clearly prejudicial to the plaintiff's interests was sufficient in itself to make the contract of lease voidable at the plaintiff's instance.

There was, however, taken in this Court a further point which had been overruled in the two Courts below. This was based on the proviso to S. 42 of the Specific Relief Act; that is to say, it was contended that the plaintiff ought in this present suit to have claimed the ejectment of the defendants and actual possession over the disputed land. The two Courts below had discussed this point, but had come to the conclusion that there had certainly been an agricultural tenancy in favour of the defendants and the latter could only be ejected by a proceeding in the Revenue Courts, and that consequently the proviso to S. 42 of the Specific Relief Act had no application inasmuch as the plaintiff could not have sought relief by way of ejectment from the Civil Court in which this suit was instituted. On this ground alone the learned Judge of this Court reversed the decision of the lower Appellate Ccurt and dismissed the plaintiff's suit.

The question is one which comes up from time to time in one form or another and is always likely to give some little trouble. The real difficulty to our minds is whether the Revenue Court, that is to say, the Court of the Assistant Collector was not really competent to have adjudicated upon the entire question raised by the pleadings before it, whether it could not have tried out the plain issue whether the defendants were mere tenants at will in respect of this land, or whether they were holding under a covenant of perpetual lease, valid and enforceable against the plaintiff. It seems, however, to have been conceded, in the course of the abortive proceedings attempted by the plaintiff in the Revenue Court, that the said Court would not eject the defendants unless and until the question of the validity of this lease had been adjudicated upon by a competent tribunal, that is to say, by suit in the Civil Court. It seems to us, therefore, whether that decision was right or wrong, it must be treated as a decision *inter partes* and which neither party is now entitled to challenge in argument. If it be once assumed that the Assistant Collector could not have ejected the defendants, then in our opinion this suit was clearly maintainable in the form in which it was brought. The Civil Court could not have undertaken to eject the defendants from this agricultural holding. Any such decree by an Assistant Collector would have offended against the clear provisions of S. 167 of the Tenancy Act. The learned Judge of this Court seems to have assumed that on the facts set up by the plaintiff himself the Civil Court could, if it found those facts proved, have treated the defendants as mere trespassers. This however, is not a correct statement of the plaintiff's position. He admitted that there had been a letting of this land by his father to the defendants. His father was perfectly competent to let even joint ancestral land for a reasonable period and on reasonable terms. What the plaintiff complained of was that there had been what amounted in effect to an alienation of joint ancestral property, which his father was not competent to make to the prejudice of the plaintiff's interest. It was those terms in the covenant of lease under which the defendants claimed to be entitled to hold, (a) in perpetuity and (b) at a low rate of rent, which the plaintiff was assailing. In our opinion relief by way of declaration could and ought to have been granted in this case. The question whether the suit as brought did not offend against the provisions of S. 167 of the Tenancy Act was never raised in the trial Court, and could not be raised at any subsequent stage.

We set aside the decree of the learned Judge of this Court and restore that of the lower Appellate Court with costs of both hearings in this Court to the plaintiff, including fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 39

SULAIMAN, J.

Gupta Nand Bharthi—Defendant—Appellant.

v.

Hari Shanker and another—Plaintiffs—Respondents.

S. A. No. 1479, of 1923, Decided on 11th December 1923, against the decree of the Subordinate Judge of Bulandshahr, D/- 11th of August 1923.

Civil P. C., S. 100—Question of inferences from documents other than documents of title is one of fact.

A question as to inference of fact from voluminous documentary evidence, not being documents of title, is one of fact. 1923 P. C 187 Foll. [P. 40, C. 1]

G. Agarwala—for Appellant.

Judgment.—This second appeal arises out of a suit brought for possession of the site of a house by removal of the materials standing thereon. The main question in the case was one of fact whether the plaintiffs were or were not the owners of the land. Both the Courts below have decreed the claim holding that the plaintiffs' title is fully established. The lower Appellate Court has found as follows: "From the voluminous documentary evidence referred to in the judgment of the lower Court it was conclusively proved that plaintiff No. 1, who is respondent No. 1 was the purchaser of all the rights of the appellant in Sarai Goshain, a Mohalla in which the house in dispute was situated and the plaintiff No. 2 was the auction-purchaser of the rights of the other *zemindar* Tikam Bharti in this house and, therefore, neither the appellant nor the other *zemindar* had any right left in themselves in respect of the site or the materials." It is contended on behalf of the defendant-appellant that the Court below has drawn wrong inference from the documentary evidence on the record. The Court of first instance had set forth the documentary evidence in detail and showed that the house in dispute was mentioned as item No. 17 in the sale certificate which was granted after an execution sale on the basis of a simple money decree in 1916. It also referred to a number of other documents showing that the entire title had passed to the plaintiffs and nothing had remained with the defendants. It is, however, contended on behalf of the appellant that, when a number of documents have to be construed, the question as to what proper inference can be drawn from them is one of law and not of fact and can, therefore, be gone into in second appeal. Reliance is also placed on the case of *Mathar Singh* v. *Ranbaz Singh* (1), and it is urged that in that case the learned Judges went into whole of the evidence on the ground that the findings, which were apparently those of fact were not based on evidence but upon evidence which had been misread or misunderstood. It may be possible to distinguish that case on the ground that the question of fact raised in that second appeal was one which had nowhere been put up as a plea in the written statement. That was a circumstance which very probably influenced the learned Judges in going through the evidence once again. However that may be, I am bound by the recent pronouncement of their Lordships of the Privy Council in the case of *The Midnapur Zemindary Co., Ltd.* v. *Uma Charan Mandal* (2), where it was laid down that, "where documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It it is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights." It cannot be suggested that the sale certificate referred to by the Court of first instance which expressly contains a recital that the house now in dispute was sold, has in any way been misconstrued. The learned Vakil for the appellant also is not able to show which of the particular documents referred to by the first

(1) [1921] 19 A. L. J. 149 = 61 I. C 65.
(2) 1923 P. C. 187 = 21 A. L. J. 723 = 4 L. R. P. C. 184 = 25 B. L. R. 1287 = 45 M. L. J. 683 = 33 M. L. T. 291 = 1923 M. W. N 832 = 4 Pat. L. T. 627 (P. C.).

Court has been wrongly interpreted. The question really is not one of misinterpretation of any document or documents of title but one of inference of fact from voluminous documentary evidence. I am, therefore of opinion that the question, being one primarily of fact, cannot be challenged in second appeal. The appeal is without force and is hereby dismissed.

Appeal dismissed.

✱ 1925 ALLAHABAD 40

SULAIMAN, J.

Sital Prosad and others—Defendants—Appellants.

v.

Dukhi Lal and others—Plaintiffs and Defendants—Respondents.

S. A. No. 604 of 1922, Decided on 17th July 1923, from the Decree of the Small Cause Court, Allahabad D/- 25-1-1922.

(a) Provincial Sm. C. Courts Act. Sch. II cl. 19—Suits of a declaratory nature are not Small Cause suits.

L. died leaving certain ornaments of the value of Rs. 280 claimed by plaintiffs as heirs. Owing to disputes, the ornaments were handed over by the police to the defendant No. 3 as stake-holder. When the plaintiffs claimed jewels from the defendant No. 3 the latter replied that he would hand over the jewels to them if they satisfied him as to their title thereto. The plaintiffs filed a suit for the recovery of the jewels. Defendants 1, 2 and 4 were included as *pro forma* defendants.

Held: that the suit was of a declaratory nature and cognizable by a Civil Court on the regular side. [P. 41, C. 2.]

✱ *(b) Prov. Sm. C. Courts Act, Sch. II cl 28—Applies only to a suit for a share of the estate and not to suit for only an item thereof.*

Clause 28 Sch. II contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party.

Where plaintiffs claimed as heirs certain jewels worth Rs. 280 left by a deceased person.

Held: that cl. 28, second schedule did not apply. [P 41, C, 2.]

P. N. Sapru and M. N. Raina—for Appellants.

P. L. Bannerjee—for Respondents.

Judgment.—This is a second appeal arising out of a suit for recovery of possession of certain ornaments and jewellary which were valued at Rs. 280. The Courts below have decreed the claim.

Defendants Nos. 1, 2 and 4 have come up in second appeal and on their behalf the main point that is taken is that the suit was instituted in the wrong Court. It is their contention that the suit was of a nature cognizable by a Court of Small Causes and that therefore the Munsif in whose Court the suit was instituted had no jurisdiction to try it. If this contention were to prevail there would be the initial difficulty in the way of the appellants that no second appeal would lie. Under S. 102 of the Code of Civil Procedure no second appeal lies in any suit of this nature cognizable by Courts of Small Causes when the amount or value of the subject matter of the original suit does not exceed five hundred rupees. Therefore on the appellants' own showing no second appeal would lie and this appeal must be dismissed.

The learned Vakil for the appellants has therefore been forced to ask this Court to convert this second appeal into an application in revision and to exercise its powers on the revisional side. If a clear case of the absence of jurisdiction had been made out I would have willingly treated this as a revision. The present however is not such a case.

The plaintiffs claimed to be the heirs of one Mt. Lalti deceased. Their case was that after her death she left certain ornaments belonging to her about which the defendants Nos. 1 and 2 raised some disputes before the police. The police handed over these ornaments to defendant No. 3 who held them as a stake-holder. The plaintiffs served a notice on defendant No. 3 and as remarked by the learned Judge of the lower appellate Court the defendant No. 3 replied saying that he was willing to deliver the ornaments to the rightful owner and that the plaintiffs should satisfy him that they were the rightful owners. On this the plaintiffs instituted the suit out of which these proceedings have arisen. In their written statement the defendants did not deny the genealogical tree set up by the plaintiffs, but

disputed that the ornaments and jewels belonged to the deceased. They pleaded *jus tertii* and said that one Mt. Kanwar was the real owner of these ornaments which had only been lent to Mt. Lalti deceased. On this plea having been raised Mt. Kunwar was made a *pro forma* defendant. It is true that the plaint was not further amended and no express relief for a declaration was added

The learned Munsif overruled the objection of the defendants as to want of jurisdiction, being of opinion that the suit was in essence a suit of a declaratory nature and was therefore cognizable by a Civil Court on the regular side. On the merits he found that the ornaments had in fact belonged to the deceased and the plaintiffs were entitled to recover them. The learned Judge of the lower appellate Court on appeal has confirmed the findings of the first Court. The reasons for holding that the Munsif had jurisdiction to try the case given by him are slightly different. He was of opinion that the case fell under clause 28 of the second schedule to the Provincial Small Cause Courts Act. On the merits he agreed with the first Court holding that the ornaments were proved to have belonged to Mt. Lalti Bibi and that the plaintiffs were entitled to recover them.

On the pleadings it is clear that defendants Nos. 1, 2 and 4, who are the applicants before me, were mere *pro forma* defendants. They were not in actual possession of the ornaments in question and were obviously impleaded in the suit with a view to make the decree binding on them. Although no relief for a declaration against them is sought it is obvious that the chief reason for impleading them was to have it declared as against them that the property belonged to the plaintiffs, so that no further dispute might arise in future. It is also quite apparent that the defendants Nos. 1, 2 and 4 could not possibly have been impleaded in a suit brought in the Court of Small Causes. Those persons if impleaded would very naturally have contended that the plaint disclosed no cause of action as no relief was claimed against them. If I were to interfere now and set aside the decrees of the Courts below and direct the plaint to be returned in order that it may be filed in the Court of Small Causes the result would be that the suit as against defendants Nos. 1, 2 and 4 would not be maintainable there at all. I must therefore consider whether the plaint, as it stood, having impleaded all the defendants in the suit, was one which could properly be filed in the Court of Small Causes. In my opinion this was not so. I agree with the Munsif that the suit must be deemed to be one of a declaratory nature which is expressly exempted under clause 19 of the second Schedule.

I must however point out that the reason given by the Judge of the Court below for holding that the Munsif had jurisdiction is not correct. His view was as I have said that clause 28 of the second Schedule was applicable. That clause exempts a suit for the whole or a share of the property of an intestate. It has been held in a number of cases that that clause contemplates a suit between rival claimants when the relief claimed is to recover a share of the estate and not only an item of the estate as against a third party. This was the view accepted in the cases of *Chedi* v. *Galabo* (1) and *Tika Shalm* v. *Chirkat Shalm* (2). Clause 28 therefore was not applicable. But in view of the opinion expressed by me above the Munsif had jurisdiction to try it.

Further more there is this additional difficulty in the way of the defendants. They have not presented a proper application for revision before me and the jurisdiction to interfere under S. 115 of the Code of Civil Procedure is after all only discretionary. The case has been fought out on the merits and both the Courts below have come to a concurrent finding against the defendants. It is an accident that the appeal was actually heard by the Judge of the Small Cause Court in whose Court the suit ought to have been filed as contended

(1) [1905] 27 All. 632=2 A. L. J. 383=1905 A. W. N. 134.
(2) [1915] 19 C. W. N. 614=27 I. C. 773.

by the defendants. He on the merits too has agreed with the finding of the first Court. Under all the circumstances therefore I decline to interfere even on the revision side. The result therefore is that this appeal fails and is hereby dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 42

MUKERJI, J.

Narain and another—Defendants—Appellants.

v.

Jagan—Plaintiff—Respondent.

S. A. No. 97 of 1923, Decided on 20th June 1924, against the decree of the Sub. J. of Jaunpore.

T. P, Act, S. 60—Redemption must not be allowed within term fixed though term is 60 years and though deed says mortgage should not be redeemed even after the term.

Where a term of mortgage has been fixed, there can be no redemption within that period. The rule is not affected by the fact that the term fixed is such a long period as 60 years or that it is provided in the deed that even after the expiry of the term there should be no redemption. 36 All. 551 Dist. 36 A. 195 foll. [P 43, C 1, 2]

Haribans Sahai—for Appellants.

Shiva Prasad Sinha—for Respondent.

Judgment.—This appeal arises out of a suit for redemption. The plaintiff is the son of Parothan. who had a brother Angnu, and Angnu's son was Manogi. The plaintiff respondent came to Court on the allegation that 24 to 25 years before the institution of this suit his father, and Angnu mortgaged the property in suit, which is a plot of occupancy holding with a small area of 37 acres, in favour of the appellants' father Bodh Ahir for a sum of Rs. 20.

The defence was that the original mortgage was one dated 1st Sawan on the dark side, 1295 Fasli, for Rs. 23-8. But subsequently the two mortgagors and Angnu's son Manogi sold the mortgagors' rights in the plot for a sum of Rs. 55-8 to Bodh Ahir. The result was that since the execution of this deed on 29th June, 1899, Bodh Ahir and after him his son and grandson have been in adverse possession of the land and no suit for redemption could be maintained. They also plead that if on a proper construction of the deed of 1899 the Court should find that it was really a deed of mortgage, then the period for redemption fixed by the deed was sixty years and the suit was premature. The appellants, of course, denied that there did not exist any mortgage with the incidents alleged by the plaintiff.

The Court of first instance dismissed the suit but the learned Subordinate Judge on appeal has decreed redemption on condition of payment of Rs. 58-8.

Several grounds of appeal have been taken, two of which are these:—

First, the plaintiff did not prove the mortgage to redeem which they came to Court.

The second is that, having regard to the deed of 1899, the lower Court was not justified in allowing redemption.

In view of the fact that the second point concludes the suit, it is not necessary to say much on point No. 1, which is no doubt another strong argument against the success of the respondent.

In the deed of the 29th June, 1899, the three executants say that they borrowed Rs. 35 from Bodh Ahir, that they previously borrowed on foot of the mortgage of 1295 Fasli a sum of Rs. 23-8 and had made a mortgage of the plot in suit, that the total amount came to Rs. 58-8, and they agreed that in lieu of this sum of Rs. 58-8 the mortgagee Bodh Ahir should continue to be in possession of the mortgaged land for a period of sixty years. They concluded the document with the additional covenant that even on the expiry of the period of sixty years the mortgagors would not ask for redemption.

The learned Judge of the Court below held that this was a deed which clearly showed that by some means or other Bodh Ahir was anxious to deprive the mortgagors of their right of redemption. The learned Judge held that it followed from this that the son and grandson of Bodh Ahir stood in the position of trustees towards the property. He accordingly decreed the suit for redemption on payment of Rs. 58-8. This sum was

offered on behalf of the plaintiff. In view of the circumstances, however, of the case he ordered that the parties must pay their own costs. This only means that, the mortgagee, who should always get his costs in a suit for redemption, unless his conduct disentitles him from getting the same, was punished by not being allowed any costs at all. I have read the document dated 29th June, 1899. It is clearly a deed of mortgage for the term of sixty years for the sum of Rs. 58-8. By this deed the earlier mortgage was wiped out and a fresh one was created. The term was sixty years. Under S 60 of the Transfer of Property Act a mortgagor has an absolute right of redemption after the expiry of the term of the mortgage, and any stipulation in the deed itself which is likely to nulify the right of redemption must be treated as a clog on redemption. The term, therefore, that there would be no redemption even after the period of sixty years would probably be treated as a clog on the right of redemption. Anyhow that is a point which does not arise at the present moment. The most favourable view, that can be taken in favour of the respondent, of the document in question is that, it is a deed of mortgage. The term of redemption is sixty years. The case of *Sarbadawan Singh* v. *Bajai Sing* (1) has been quoted as showing that, where the term of redemption is a long period, the stipulation must be regarded as a clog on the right of redemption, and, therefore, as unenforceable. It is contended on foot of this authority that the sixty years' term fixed by the mortgage must go and the property should be redeemable at any time.

In the case of *Sarbadawan Singh* v. *Bajai Singh*, (1) referred to above the mortgage deed provided forty years' time for redemption. It further provided that on the day after the expiry of the term of forty years redemption must be effected, and in default the mortgage would hold good for another term of forty years. The mortgage money was deposited in Court after the expiry of the term of forty years, but it was contended on behalf of the mortgagee that there could not be any redemption for a further period of forty years. The learned Judges held that, this latter agreement that the mortgage would enure for a further term of forty years was a clog on the right of redemption and was not enforceable. This is undoubtedly the right law. See *Mahomad Sher Khan* v. *Raja Seth Swami Dayal*, (2). Their Lordships did not hold that, where a mortgage provided for a term of forty years for redemption, that term, by itself, was to be regarded as a clog on the right of redemption simply because the term was long. The right of redemption is an absolute right provided by S. 60 of the Transfer of Property Act, and no contract which is designed to take away that right can be enforced. In the Privy Council case of *Bakhtawar Begam* v. *Husaini Khanam*, (3) their Lordships of the Privy Council held that, where a term of mortgage has been fixed, there can be no redemption within that period. In this case before me, therefore, there can be no redemption within the period of sixty years from 1899.

In the above view of the case I need hardly point out that the plaintiff sought the redemption of a mortgage of 1295 or about that time which was made for a sum of Rs. 20 or some such small amount. He has been granted by the Court below a decree for the redemption of a mortgage of 1899 for a sum almost thrice the amount for which the redemption was sought. This could not be justified in any case.

The result is that the appeal succeeds and the suit of the respondent fails and it is hereby dismissed with costs throughout. The costs in this Court will include counsel's fees on the higher scale.

Appeal dismissed.

(1) [1914] 36 All. 551=24 I. C. 705=12 A.L.J. 92'.

(2) 1922 P. C. 17=44 All. 185=49 I. A. 60=20 A. L. J. 476=9 O.L.J. 81=42 M. L. J. 584=25 O. C. 8=35 C. L. J. 468=1922 M. W. N. 278=21 Bom. L. R. 695=30 M. L. T. 220 (P. C.)

(3) [1914] 36 All 195—41 I. A. 84—18 C.W.N. 586—26 M. L. J. 474—12 A L J. 473—19 C. L. J. 477—1914 M. W. N. 411—23 I. C. 355=15 M. L. T. 389—16 Bom. L. R. 344=1 L. W. 813 (P. C.)

1925 ALLAHABAD 44

SULAIMAN AND KANHAIYA LAL, JJ.

Khazan Singh and another—Plaintiffs—Appellants

v.

Umrao Singh and others—Defendants—Respondents.

F. A. No. 60 of 1922, Decided on 10th June 1924, from the decree of the Sub. J. of Meerut.

(a) *Pre-emption — Custom — Wazib-ul-arz prepared in connection with settlement prevails against another not so prepared.*

The presumption arising from the entry in the *Wajib-ul-arz* prepared admittedly during a settlement period, cannot be negatived by a different entry contained in a *Wajib-ul-arz*, which though an earlier one was not so clearly a final record of enforceable custom or contract. [P 45 C 2]

(b) *Pre-emption*—Wazib-ul-arzes *prepared after 1897 don't contain entries as to pre-emption, because of new rules of settlement issued in 1897.*

A comparison of the directions issued in 1897 with the previous directions makes it clear that no specific authority was given to Settlement Officers to make an entry of custom like that of pre-emption, prevailing in the village other than those covered by certain specified clauses. Accordingly under the new rules no entry was ordinarily to be made by the Settlement Officers as regards a custom of pre-emption and it is on this account that in Wajib-ul-arzes prepared subsequent to 1897 there is no mention of any such rights either way. [P 46 C 1]

(c) *Pre-emption — Settlement — Rubkar — Absence of entry in.*

Settlement *Rubkar* is not complete *Wajib-ul-arz*. Absence of entry therein does not disprove custom of pre-emption. [P 45 C 2]

(d) *Pre-emption — Later* Wajib-ul-arz *restricting pre-emption to cases of sale while earlier* Wazib-ul-arz *allowing it in mortgage also—No discrepancy necessarily exists.*

Where under the first Wajib-ul-arz a right was given in the case of transfer by mortgages as well as sales, whereas in the later Wajib-ul-arz the right was confined to sales and it was expressly stated that there was no right of pre-emption as regards mortgages,

Held: there was nothing to prevent the co-sharers in the later Wajib ul-arz from abrogating that part of the custom and the two Wajib-ul-arzes were not necessarily conflicting. [P 46 C 2, P 47 C 1]

Nehal Chand and *Harendra Krishna Mukerji*—for Appellants.

Nehal Chand Vaish and *Surendra Nath Gupta*—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit for pre-emption. The defendants Nos. 1 and 2 by a sale-deed dated the 15th of July, 1920, transferred their shares in village Badnauli in Tahsil Hapur, district Meerut, in favour of two sets of defendants. Half of the property was transferred to defendants Nos. 3 to 7 and the other half to defendants Nos. 8 to 12. There is a clear specification of this in the sale-deed. The plaintiffs alleged in the plaint that under a custom of pre-emption existing in the village they were entitled to pre-empt as against the defendants who were strangers to the mahal. As to the sale consideration it was alleged that out of the sum shown before the sub-registrar a sum of Rs. 2,000 was actually returned afterwards and was a fictitious item. It was further asserted that the property sold covered standing sugarcane crop of the value of Rs. 1,500 which had since been appropriated by the vendees.

The defendants vendees denied the existence of any custom of pre-emption and also asserted that the sale consideration mentioned in the sale-deed was true.

We may note that a considerable portion of the sale consideration mentioned in the sale-deed was left in the hands of the vendees for payment to certain specified creditors.

The learned Subordinate Judge has held that the evidence produced by the plaintiffs is insufficient to establish that a custom of pre-emption existed in this village. On this finding the suit has been dismissed *in toto*. He has, however, gone on to record findings on the other issues which arose in the case and has come to the conclusion that it is not established by the plaintiffs that a sum of Rs. 2,000 was returned by the vendors after registration. He has also come to the conclusion that the value of sugar-cane crop was only Rs. 1,000 and not Rs. 1,500 and therefore Rs. 1,000 would have to be deducted from the sale consideration. There was also an allegation by the plaintiffs that the defendants vendees had cut

away certain trees of wild growth worth Rs. 150, but this was not substantiated by any evidence.

The plaintiffs have come up in appeal before us and two main points arise for consideration, (1) The existence or non-existence of the alleged custom of pre-emption and (2) the amount of sale consideration.

In support of the alleged custom of pre-emption the plaintiffs relied on the Wazib ul-arz of 1870 prepared by Mr. Nasir Ali, a Settlement Deputy Collector. They also relied on two suits for pre-emption instituted in 1886 and in 1892 respectively. The defendants on the other hand produced what purports to be a Wazib-ul-arz prepared by Mr. Mohar Singh another Settlement Deputy Collector, and of which the learned Subordinate Judge says the year is 1860. The document which is produced however bears no such date. The defendants also produced a Rubkar of 1836 drawn up by Sir Henry Elliot and the Dastur Dehi prepared by Mr. Gillan for 1303 Fasli. The last two documents do not contain any mention of the right of pre-emption.

The learned Subordinate Judge has made a great point against the plaintiffs by pointing out that there are some variations in the entries regarding the right of pre-emption as contained in the Wajib-ul-arz prepared by Mr. Mohar Singh and Mr. Nasir Ali respectively. It is necessary for us to consider as to the exact nature of the Wajib-ul-arz prepared by Mr. Mohar Singh. In this document, it is shown that the entire village had been settled with Girwar Singh, lambardar, from the year 1242 Fasli to the year 1262 Fasli (corresponding to 1835—1855 A. D.). It goes on to say that subsequently as sanctioned by the Board of Revenue the term of the settlement was extended by a further period of 10 years and the aforesaid revenue was maintained It is clear therefore that the settlement which was made by Sir Henry Elliot in 1835 continued till 1865. The Wajib-ul-arz prepared by Mr. Mohar Singh is said to have been prepared in the year 1860. A reference to the Gazetteer of the district of Meerut shows that after the settlement of Sir Henry Elliot the next regular settlement was made by Mr. Forbes and Mr. Porter between the years 1865 and 1870. It is quite clear that there was no settlement, in the strict sense of the word, in the year 1860. It is therefore impossible to regard the Wajib-ul-arz prepared by Mr. Mohar Singh as the final record of rights prepared at the settlement. There are no materials on the record to show when the settlement which was completed in 1870 actually commenced. It is possible that some preliminary operations may have been started in 1860 in course of which the Wajib ul arz drawn up by Mr. Mohar Singh might have been prepared The clause containing the verification is not filed and it is difficult to say whether that Wajib-ul-arz represents a final record of a custom or contract enforceable in the village. It is possible that the Wajib-ul arz of 1870 may be the revised and corrected record.

In this view of the nature of the document it cannot be seriously urged that the presumption arising from the entry in the Wajib ul-arz of 1870 which was admittedly a settlement period, has been negatived by a different entry contained in Mr. Mohar Singh's document.

The defendants have also produced a Rubkar issued by Sir Henry (then Mr. Henry) Elliot, dated the 25th of February, 1836, which contains no reference to any right of pre-emption. That, however, is not the complete Wajib-ul-arz. The defendants further relied on the absence of any entry of a right of pre-emption in the Dastur Dehi prepared by Mr. Gillan in the subsequent settlement. As to this we may point out that Mr. Gillan's settlement was completed in the year 1901 and the settlement of tahsil Hapur came into effect in 1898 (*vide* page 132 of the Gazetteer). On the 19th of November, 1897, however a fresh set of settlement rules had been issued by the Board of Revenue under which directions were given to Settlement Officers to make certain entries in the record of rights. A comparison

of the directions then issued with the previous directions makes it clear that no specific authority was given to Settlement Officers to make an entry of custom like pre-emption, prevailing in the village, other than those covered by certain specified clauses. Accordingly under the new rules no entry was ordinarily to be made by the Settlement Officers as regards a custom of pre-emption and it is on this account that in Wajib-ul-arzes prepared subsequent to 1897 there is no mention of any such rights either way. The omission therefore is not so conclusive.

We are, therefore, left with the entry in the Wajib-ul-arz of the year 1870, which was of the second regular settlement, and which contains a clear recital of a right of pre-emption. Paragraph 17 states that if any share-holder wishes to sell his share he can do so first to his *bhai hakiki* (own brothers), then to *qaribi* (near) and then to share-holders in the *thok*. If the share-holders in the *thok* refuse to purchase it the vendor is at liberty to transfer it to any share-holder of the village. Then follows a clause regarding the settlement of price by arbitration in case of a dispute. This entry raises a *prima facie* presumption of the existence of a custom of pre-emption. This Wajib-ul-arz was prepared at the time when the Board's Circular No. 24 of 1868 had come into effect, under which the Settlement Officers were expressly authorised to make entries as regards customs prevailing in the village. We are, therefore, entitled to presume that this entry is a record of custom. There is nothing in the previous or subsequent history of the village which necessarily negatives the existence of such a custom. All that is shown is that the village was settled with Girwar Singh, lambardar. There may have been many other co-sharers besides Girwar Singh and in any case he may have represented a joint Hindu family. There is, therefore, no ground for holding that during this period the entire village was owned by a single proprietor. As to the circumstance that various other proprietors became co-sharers between 1860 and 1870 we may point out that the Gazetteer at page 130 mentions that in Hapur old proprietors were replaced to the extent of 40 per cent. mainly by money-lenders, that no less than 69 estates were confiscated owing to the action of proprietors during the Mutiny, and of these 49 were sold by auction and 16 were given away in reward while 4 were held for a time under the direct management. Therefore it might well have been that some of these strangers became co-sharers by purchases at auction.

The learned Subordinate Judge has been influenced by two main points. The first is that the preamble of the Wajib-ul-arz indicates that it was a record of an agreement. The inference is not quite correct because all Wajib-ul-arzes are in stereotyped forms and contain similar preambles. *Vide Returaji Dubain* v. *Pahlwan Bhagat* (1). They are primarily records of engagements of co-sharers with the Government for payment of Government revenue. The second circumstance relied on is a supposed variation between the Wajib-ul-arzes of 1860 and 1870. As to this we have already stated that the Wajib-ul-arz of 1860 cannot be regarded as a complete and final record of any regular settlement. In any case the variation does not make the two Wajib-ul-arzes necessarily contradictory. In the wajib-ul-arz of Mr. Mohar Singh the right of pre-emption was given first to the true brother, then to a near brother, but not specifically to a co-sharer. It is, however, to be noted that in that year there might have been no other co-sharers but the three brothers Beldeo Singh, Jagdish Singh and Gurdayal Singh, sons of Girwar Singh, whose names are entered in the opening portion of the Wajib-ul-arz. This circumstance might explain the omission of a reference to co-sharers. The other discrepancy relied upon is that under the first Wajib-ul-arz a right was given in the case of transfer by mortgages as well as sales, whereas in the Wajib-ul-arz of 1870 the right was confined to sales and it was expressly stated that there was

(1) [1910] 33 All. 196=7 I.C. 680=7 A.L.J. 1040. (F.B.)

no right of pre-emption as regards mortgages. We may say that even if a custom of pre emption as regards mortgages had existed in 1860 there was nothing to prevent the co-sharers in 1870 from abrogating that part of the custom.

The plaintiffs relied on two pre-emption suits in order to show that claims of pre-emption had been asserted. In 1886 a suit was instituted for pre-emption and in paragraph 3 of the plaint it was expressly alleged that according to the terms of the Wajib-ul-arz and the custom of the village the plaintiffs were entitled to claim pre-emption. In the written statement which was filed the substantial plea taken was that the plaintiffs were not proprietors at all and there was no express denial of the existence of a custom of pre-emption. This suit is said to have been ultimately withdrawn and is, therefore, not of very great importance. The second suit was instituted in the year 1892 where the plaintiff merely asserted that he had a right of pre-emption, not expressly mentioning that there was a custom under which this right existed. That suit also was ultimately dismissed on the ground that the plaintiff was not the absolute proprietor by virtue of which she was claiming pre-emption. As the settlement of 1870 was then in force no conclusive inference can be drawn from this litigation also. Having regard however to the entry in the Wajib ul-arz of 1870 which, in our opinion, stands unrebutted, we must hold that the custom of pre-emption exists in this village.

As regards the sale consideration, the finding of the learned Subordinate Judge that there is no satisfactory evidence that Rs. 2,000 were returned after registration, cannot be seriously challenged. We are satisfied that that finding must be accepted. The learned Vakil for the plaintiffs has not challenged the finding that there is no satisfactory evidence to prove that *dhak* and other kind of timber worth Rs. 150 had been removed by the defendants vendees. Therefore this finding must also stand.

On behalf of the defendants there is no cross-objection with regard to the finding that out of the sale consideration, sugar-cane crops worth Rs. 1,000 had been appropriated by the vendees. So this finding of the learned Subordinate Judge also must stand.

There is, however, some dispute between the parties as to the exact amount which has been paid by the vendees to the creditors named in the sale-deed, for whom money had been left in the hands of the vendees. The vendees are entitled to claim from the plaintiffs pre-emptors only that much of the amount which they have actually paid to the vendors or to the prior creditors named in the deed. If there is any sum still left in their hands for payment the plaintiffs will make this payment as they have stepped into the shoes of the vendees.

We, accordingly, allow this appeal and setting aside the decree of the Court below, decree the plaintiffs' claim for pre-emption subject to the payment of Rs. 21,000 to be deposited in the Court below within two months from this date. Out of this sum Rs. 1,000 will be paid to vendees, and out of the balance of Rs. 20,000 the vendees will be entitled to get as much as they have actually paid to the prior creditors mentioned in the sale-deed. The balance will be paid to the creditors themselves directly. In case of default of payment by the plaintiffs within the time specified the suit shall stand dismissed with costs in all Courts. In case of payment within the time allowed the plaintiffs will get their costs in both the Courts. The fees in this Court will include fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 47

NEAVE, J,

Jambu Dass—Plaintiff—Appellant.

v.

Jai Prakash and another—Defendants—Respondents.

S. A. No. 288 of 1923, Decided on 30th June 1924, against the decree of Addl. D. J., Saharanpur, D/- 11th November 1922.

Civil P, C., S. 66,—The section is not a bar when the certified purchaser does not contest plaintiff's claim.

S. 66 of the Code of Civil Procedure only applies when the plaintiff attempts to assert his secret title as against a certified purchaser. But where the certified purchaser does not contest the plaintiff's claim the suit is not barred. 1923 Cal. 302, Fol. [P. 48, C. 2]

P. L Banerji—for Appellant.

Nehal Chand—for Respondent.

Judgment—This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in a house The plaintiff Jambu Dass and the first two defendants Jai Prakash and Jai Chandan are brothers. A dispute over the ancestral property was referred to arbitration and in 1906 the share now in suit was awarded to the plaintiff by the arbitrator. This award was confirmed by a decree of a Civil Court on the 18th June 1908. In 1916 the share in suit was sold in execution of a decree to one Konwal Nain who has been impleaded in the present suit as defendant No. 3. He has not appeared throughout the proceedings and has not contested the plaintiff's claim

The present suit was instituted on the 14th of June, 1920. The plaintiff's case was that five or six years previously he had permitted his two brothers to live in his part of the house. The purchase at auction by Konwal Nain was merely *benami* on his own account. His brothers now refused to surrender possession to him and he accordingly brought the suit to compel them to do so.

The trial Court held that the suit was barred by limitation. It doubted the plaintiff's story of permission to his brothers to take possession and considered that limitation should be held to run from the date of the private award and not from the date of the decree confirming that award. If the latter is the correct date then in any case the suit was in time by four days.

The lower appellate Court expressed considerable doubt as to the correctness of the first Court's finding on the subject of limitation pointing out that the only evidence on the point consisted of the two conflicting statements of the plaintiff and one of the defendants. It, however, did not come to a positive decision on the question as it held that S. 66 of the Civil Procedure Code barred his suit. This section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff. No doubt it would be a complete answer to the suit so far as Konwal Nain is concerned, but the latter has not chosen to contest the claim. In *Saradindu Chakarvarti* v. *Gosta Behari Pramanik* (1), on almost identical facts, where the heirs of the auction purchaser did not appear and deny the plaintiff's *benami* purchase, it was held that S. 66 of the Code of Civil Procedure only applies when the plaintiff attempts to assert his secret title as against a certified purchaser. This view of the law appears to be a correct one and in the circumstances of the present case S. 66 is no bar.

The only point which has been strongly urged on behalf of the respondent is that the plaintiff no longer has any subsisting title. On his own showing he had given up possession of the property a year or more before the auction sale and was not in possession when that took place, and had therefore no right to sue at the time when the suit was brought. But the title was in him from the date of the award and unless the defendants' statement is accepted it was under permission from him that the defendants had taken possession. The burden of proving adverse possession was unquestionably on the defendants. The somewhat hesitating finding of the lower appellate Court is to the effect that they have failed to discharge this burden. They produced no evidence in support of their contention beyond the statement of one of themselves. I agree with the lower appellate Court. The appeal, therefore, must succeed and the plaintiff will get a decree for recovery of possession of the property in suit with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

(1) 1923 Cal, 302=37 C.W.N, 208=37 C.L.J. 403.

1925 ALLAHABAD 49

DALAL, J.

(*Syed*) *Siddiq Ali*—Plaintiff—Appellant.

v.

Chanda—Defendant—Respondent.

S. A. No. 124 of 1923, Decided on 25th June 1924, against the decree of the D. J. of Bulandshahr, dated 1st November 1922.

Agra Tenancy Act, S. 194(1)—Lambardar suing for rent or ejectment is presumed to act as co-sharers' agent—But presumption is rebuttable.

If a lambarder sues a tenant either for the recovery of rent or for ejection, the presumption would be that he is appointed as agent to act on behalf of all the co-sharers. But it would be open to the tenant to prove that in that particular mahal the arrangement between the co-sharers was such that lambardar cannot be treated as an agent of all the co-sharers. 36 All. 441, Dist. 18 A.L.J. 435. Foll. [P. 49 C. 2]

Iqbal Ahmad—for Appellant.

S. Abu Ali—for Respondent.

Judgment.—The plaintiff *lambardar* sued a tenant for recovery of rent and his defence was that he had paid it in good faith to one of the co-sharers Mt. Fatima. The trial Court of the Assistant Collector accepted the defence and dismissed the suit. On appeal the learned District Judge held that the rent was not paid and even if paid the defendant did not do so in good faith. The learned Judge disagreed with the first Court and found that the defendant was a tenant of the proprietary body in general of the *khata khewat* in which the land in suit was included. He also disagreed with another finding of the first Court that the defendant was a tenant of Mt. Fatima alone. He then went on to discuss whether the plaintiff as *lambardar* was entitled to collect the entire rent from the defendant.

In the written statement the defendant had specifically pleaded that the *lambardar* had no right to realise rent in the mahal in suit. The learned Judge found as a fact by reference to entries in the settlement records that in this particular mahal there was a provision that each co-sharer collected his own rents. On this ground the plaintiff's suit was dismissed and he has come here in second appeal.

His learned counsel argued that the point in controversy was concluded by the Full Bench ruling in the case of *Gulzari Mal* v. *Jairam* (1). This view does not appear to me to be correct. What was held in that case was that where a *lambardar* has a right to collect rents from tenants in the village, he is entitled to maintain a suit for ejectment of a tenant without joining the other co-sharers as parties. Their Lordships observed (page 609 of report), "we think that it is extremely improbable that S. 194 was intended to apply to the case of a lambardari village. If, however, it does apply, in our opinion, where the suit is brought by the *lambardar* in a *lambardari* village, strictly as lambardar, then the co-sharers must be deemed to have acted jointly through the person who is declared by law to be their representative." This means that in the absence of any evidence to the contrary, a *lambardar* must be presumed to have been appointed an agent by the rest of the co sharers to act on behalf of them all under S. 194(1) of the Tenancy Act. It cannot convey the meaning that even where the lambardar is specifically debarred from collecting rents on behalf of all the co-sharers, he can against the wishes of the other co-sharers, act as their agent under S. 194(1). In my opinion the point decided is one of presumption. If a *lambardar* sues a tenant either for the recovery of rent or for ejection, the presumption would be that he is appointed as agent to act on behalf of all the co-sharers. But it would be open to the tenant to prove that in that particular mahal the arrangement between the co-sharers was such that the *lambardar* cannot be treated as an agent of all the co-sharers. In *Mt. Fatima* v. *Ali Akbar* (2) Piggot, J in delivering the judgment of a Bench observed at p. 438 "Under clause (1) of S. 194 the obligation imposed upon all co-sharers to sue jointly for any arrears of rent due to them jointly is made subject to this exception, that if they have appointed an agent to act on behalf of them, the suit may

(1) [1914] 36 All. 441=24 I.C. 178=12 A.L.J 606.

(2)1920] 18 A,L.J. 435=56 I.C. 11*i*

be maintained by the said agent. In a *lambardari* mahal, the *lambardar* is from the date of his appointment the agent appointed to act on behalf of the co-sharers and is the only person who under S. 191(1) aforesaid has a right to institute a suit against a defaulting tenant for the recovery of any rent not statute barred."

This will be the case when the contest lies between the *lambardar* and the tenant and there is no evidence of the appointment of the *lambardar* by all the co-sharers as their agent. This Court cannot have intended to hold that in spite of arrangements to the contrary between the co-sharers and the refusal of the co-sharers to appoint the *lambardar* as their agent, the *lambardar* should in virtue of his office be entitled to act as agent of principals who repudiate him. In every case the question will be one of burden of proof. The *lambardar* in virtue of his office shall he presumed to be an agent under S. 194(1) until the contrary is proved. The learned Judge of the lower Court was not justified in criticising the reasoning of a judgment of this Court that for a *lambardar* there was no necessity of specific evidence of his appointment as agent.

At the same time I do not agree with the arguments of the appellant's learned counsel that every *lambardar* is entitled to act as agent of all the co-sharers of the mahal in spite of a contrary arrangement between the co-sharers, who have agreed to collect rent separately and not to appoint the *lambardar* an agent on their behalf.

It was suggested to me on behalf of the appellant that an issue should be remitted to discover whether the *lambardar* in this particular mahal had a right to collect rents or not. I think, however, that this point has been carefully gone into by the Judge of the lower appellate Court and decided against the appellant.

There is an arrangement in this village that every co sharer shall collect his own rent. Under the circumstances in this particular case the *lambardar* is not an agent of all the co-sharers.

The plaintiff may be entitled to recover his share of the rent but that question has not been brought into issue here, nor is it one of the grounds of appeal. Under the circumstances I am not prepared to remand the suit for a trial of that issue

I dismiss this appeal with costs.

Appeal dismissed.

1925 ALLAHABAD 50

MEARS, C. J. AND PIGGOTT, J.

Jwala Prasad—Plaintiff—Appellant.

v.

Irshad Muhammad Khan — Defendant—Respondent.

L. P. A. No. 145 of 1922, Decided on 15th February, 1924, from the judgment of Gokul Prosad, J. in S. A. No. 200 of 1921 reported in 1923 All. 344.

Agra Tenancy Act, S. 201 (1)—Suit against person in actual possession, by person who by mistake in record, was compelled to pay former's revenue, comes under S. 201 (1).

The suit was one brought under the provisions of S. 160 of the Tenancy Act. The plaintiff during the years to which the suit referred stood recorded as the usufructuary mortgagee of a share of 16 biswas and odd in a certain mahal. By reason of this record he was compelled to pay the whole of the land revenue demand in respect of the said share. As a matter of fact a portion of the mortgage had been redeemed and the plaintiff was really in possession as mortgagee over a share of 8¼ biswas only. The defendant was the co-sharer in possession of remainder.

Held: that what the plaintiff had to show was that as a matter of fact he was a co-sharer who had paid arrears of revenue on account of another co-sharer. Because the revenue record during the years in suit was incorrectly framed, the plaintiff did not on the face of that record appear to have paid any revenue except that which was due from the share recorded in his name as usufructuary mortgagee. His position therefore, was that of a co-sharer now recorded as having the particular proprietary right which would entitle him to maintain the suit brought by him. In reality his case fall under the first clause, and not under the third clause of S. 201 of the Tenancy Act. The Court had jurisdiction to inquire into this matter and to determine the question of possession. [P. 51, C. 1]

Munshi Gulzari Lal—for Appellant.

Judgment.—This appeal has been heard *ex-parte*. The suit was one brought under the provisions of S. 160

of the Agra Tenancy (Act No. II of 1901). The plaintiff during the years to which the suit refers stood recorded as the usufructuary mortgagee of a share of 16 biswas and odd in a certain mahal. By reason of this record he was compelled to pay the whole of the land revenue demand in respect of the said share. As a matter of fact a portion of the mortgage had been redeemed and the plaintiff was really in possession as mortgagee over a share of 8¼ biswas only. The defendant was the co-sharer in possession of the remainder. The Courts below differed on the plain question of fact, namely, whether the plaintiff had or had not during the years in suit enjoyed possession over the entire share of 16 biswas and odd. We do not agree with the learned Judge of this Court, where he appears to hold that the lower appellate Court failed to determine this point. We have no doubt that the learned District Judge has decided that the plaintiff during the years in suit was in possession only of a share of 8 biswas 5 biswansis. The learned Judge of this Court, however, in reversing the decision of the lower appellate Court, was influenced by a curious argument addressed to him with respect to the wording of S. 201 of the Agra Tenancy Act (No. II of 1901). What the plaintiff had to show was that as a matter of fact he was a co-sharer who had paid arrears of revenue on account of another co-sharer. Because the revenue record during the years in suit was incorrectly framed, the plaintiff did not on the face of that record appear to have paid any revenue except that which was due from the share recorded in his name as usufructuary mortgagee. His position, therefore was that of a co-sharer not recorded as having the particular proprietary right which would entitle him to maintain the suit brought by him. In reality his case fell under the first clause, and not under the third clause of S. 201 of the Tenancy Act. The learned District Judge had jurisdiction to inquire into this matter and to determine it. His finding on the question of possession is final.

We accept this appeal, set aside the order of the learned Judge of this Court and restore the decree of the lower appellate Court. The costs of both hearings in this Court must be borne by the defendant.

Appeal allowed

1925 ALLAHABAD 51

BOYS, J.

Raghuraj Singh—Plaintiff—Applicant.

v.

Sham Dei and another—Defendants—Opposite Parties.

Civil Rev. No. 72 of 1924, Decided on 26th June 1924, against the order of the Judge of the Court of Small Causes at Jhansi, D/- 11th January, 1924.

Provincial Small Cause Courts Act, Sch. II Art. 35 (g)—Suit for recovering jewels etc. given for marriage arranged, which had fallen through, is not cognizable by Small Cause Court. But when it has been fully tried on merits, High Court can't interfere in Revision—Civil P. C., S. 115.

Paintiff sued for return of ornaments and for certain money expended. The ornaments were said to have been given and the money was said to have been expended in consequence of a marriage which had been arranged and the suit for recovery was due to the fact of that marriage having fallen through.

Held: that the suit was not cognizable by a Small Cause Court in view of the fact that part of the claim was for money which it was alleged had been expended in preliminary marriage ceremonies; but that as the suit was tried out fully by that Court on the merits without any objection by either party and without the point having come otherwise to its notice the High Court should not interfere. 25 All., 135. Foll. [P. 52, C. 1]

K. N. Laghate—for Applicant.

N. P. Asthana — for Opposite Party.

Judgment.—In this case the plaintiff sued for return of ornaments and for certain money expended. The ornaments are said to have been given and the money is said to have been expended in consequence of a marriage which had been arranged and the suit for recovery was due to the fact of that marriage having fallen through. The learned Judge of the Small Cause Court dismissed the suit on the merits, having heard it fully.

This application in Civil revision is now made by the plaintiff urging that the jurisdiction of the Court of Small Causes was ousted by clause 35 sub-clause (g) of Schedule 2 of the Provincial Small Causes Courts Act. That clause bars the trial of suits for compensation for breach of contract of betrothal or promise of marriage. In view of the fact that part of the claim was for money which it was alleged had been expended in preliminary marriage ceremonies I think that the clause in question would, if appealed to, by either party or if it had come to the notice of the learned Judge earlier, have been a bar to the trial of the suit by the learned Judge of the Small Cause Court. On the other hand, the suit was tried out fully by him on the merits without any objection by either party and without the point having come otherwise to his notice. Under these circumstances I think that this Court should not interfere and in that view I am supported by the case in *Ram Lal* v. *Kabul Singh* (1). The application is dismissed with costs.

Application dismissed.

(1) [1902] 25 All. 135=(1902) A.W.N. 219.

1925 ALLAHABAD 52

NEAVE, J.

Mahomed Abbas Ali Khan—Defendant—Appellant.

Sahu Gokul Chand, and Others—Plaintiffs—Respondents.

S. A. No. 59 of 1923, Decided on 25th June 1924, from a Decree of Sub. J. of Bijnor at Moradabad.

Limitation Act, Art, 109–Auction-purchaser letting land and receiving rent–Subsequent sale of same land in execution of prior mortgage decree–Suit by the second auction purchaser to recover the rent received by the first one–Limitation runs from date of receipt.

M purchased certain land at an auction sale in exeeution of a mortgage decree. On the 19th of June, 1917. he leased this property to certain persons for one year at a rental of Rs. 200. Out of this Rs. 100 was paid to him on the same day and apparently Rs. 32–8 a few days later.

On the 3rd of July 1917, the same land was sold in execution of a prior mortgage decree and purchased by P. Rs. 67–8 was paid by the lessees to him as the balance of the rent due for the year 1325, Fasli. On the 30th of April, 1921, he brought the suit against the lessees and lessor to recover the Rs. 132–8 paid to the latter with interest.

***Held*: that Art. 109 applied and that the suit was barred by time, as the time began to run from the date of receipt of the rent.**

[P. 52, C. 2]

Mukhtar Ahmad—for Appellant.

Peary Lal Banarji—for Respondents.

Judgment.—The defendant-appellant, Muhammad Abbas Ali Khan purchased certain land at an auction sale in execution of a mortgage decree. On the 19th of June, 1917, he leased this property to the other four defendants for one year at a rental of Rs. 200. Out of this Rs. 100 was paid to him on the same day and apparently Rs. 32-8 a faw days later.

On the 3rd of July, 1917, the same land was sold in execution of a prior mortgage decree and purchased by the plaintiff-respondent. Rs. 67-8 was paid by defendants 1 to 4 to him as the balance of the rent due for the year 1325, Fasli. On the 30th of April, 1921, he brought the present suit against all the defendants to recover the Rs. 132-8 paid to the present appellant with interest. The plaint, as framed, does not disclose at all clearly the nature of the suit. The first Court held that the claim was barred by limitation and it dismissed the suit. The lower appellate Court, however, has found that the cause of action did not arise till the end of the Fasli year 1325, and that, therefore, the suit was within time.

The only point taken in appeal is that of limitation, and it is contended that time must run from the date of payment of the Rs. 132-8 to the appellant. The only Article, which appears to apply to the case is Art. 109: "for the profits of immoveable property belonging to the plaintiff which has been wrongfully received by the defendant." Under this Article the period of limitation begins to run when the profits are received. The suit is clearly barred by time, and the appeal must succeed. The order of the Court below is set aside and the plaintiff's suit is dismissed with costs in all Court including fees in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 53

DALAL, J.

Ghasi and others—Defendants—Appellants.

v,

Mt. Bharto and others—Plaintiffs—Respondents.

S. A. No. 159 of 1923, Decided on 26th June 1924, against the decree of the Addl. D. J. of Meerut, D/— 15th November, 1922.

Agra Tenancy Act., S. 32 (2)—Suit for possession of specific plots, against co-tenants is not barred when the holding has been divided among themselves. But such suit does not lie against landlord.

When once co-tenants are in separate possession of separate plots out of the holding and one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord—33 All., 143. Foll. 29 All. 66, 30. All. 90, 31 All. 348. Dist. [P. 53 C, 2 P, 54 C, 1]

K. N. Katju—for Appellants.

Iqbal Ahmad—for Respondents.

Judgment.— The plaintiffs, occupancy tenants to the extent of 1/3rd in the occupancy holding sued for possession of specific plots on the ground that the holding had been divided between them and the defendants and they had been in possession of these specific plots from which they had been unlawfully ejected. The learned Munsif was of opinion that such a suit for specific possession was barred under the provision of S. 32 (2) of the Tenancy Act and granted to the plaintiffs joint possession with the defendants to the extent of 1/3rd of the entire holding. On appeal by the plaintiffs the learned District Judge was of opinion that a suit for possession in pursuance of existing facts and previous separate possession of co-tenants was not a suit or other proceeding for the division of a holding or distribution of rent thereof and was not barred by any provision of the Tenancy Act. The matter is concluded by a decision in Letters Patent of a Bench of this Court in *Raghunath Kalwar* v. *Bala Din Kalwar* (1). The case was first heard by one learned Judge and afterwards by another learned Judge as the first Judge omitted to sign the judgment. The Letters Patent Appeal was heard by two other Judges. So in reality the opinion to that effect was confirmed by four learned Judges of this Court. In that case a former decree was pleaded as *res judicata* and the defence was that the decree was inoperative as having been passed contrary to the provisions of S. 32 (2). The judgment pleaded as a bar was delivered in a case similar to the one here. The learned Chief Justice observed :—

" There is no objection to joint tenants agreeing among themselves to occupy and cultivate distinct parts of the joint holding, provided, that their so doing in no respect prejudices the rights of the land-holder."

The other learned Judge (Banerji, J.) said :—

" The former suit was not one for partition of a holding or the distribution of the rent thereof but was a suit for exclusive possession of certain plots of land which the then plaintiff claimed to be separate property. The Court which tried that suit had jurisdiction to entertain it."

The learned counsel for the defendant-appellant referred to three former rulings of this Court:—*Achhey Lal* v. *Janki Prasad* (2) *Ashiq Husain* v. *Asgari Begam* (3) *Najib Ullah* v. *Gulsher Khan* (4).

In the Full Bench case the case reported in 3 A. L. J., was distinguished because the parties in that case had only the shadowy right of the mortgagees of an occupancy holding. The case reported in 4 A. L. J. did not depend upon any previous division but desired the Court actually to divide the holding. Such a suit would naturally offend against the provisions of S. 32 (2) I do not think that the ruling in 33 All. 143 is in any way in conflict with former rulings of this Court. When once co-tenants are in separate possession of separate plots out of the holding and

(1) [1911, 33 All. 143=7 I.C. 398=7 A.L.J 918.

(2) [1906] 29 All. 66=3 A. L. J. 735=1906 A. W. N. 274.

(3) [1908] 30 All. 90—4 A. L. J. 809—1908 A. W. N. 21.

(4) [1909] 31 All. 348—1 I. C. 594—6 A. L. J. 343 (F. B.)

one of the co-tenants is dispossessed, he is entitled to sue for specific possession of the plots from which he is dispossessed so long as the suit is instituted against the co-tenants and not the landlord. Such possession does not in any way interfere with the rights of the landlord.

I dismiss this appeal with costs which shall include here counsel's fees on the higher scale.

Appeal dismissed.

✱ 1925 ALLAHABAD 54

DALAL, J.

Sikandar Singh and another—Plaintiffs—Appellants.

v.

Bachchu Pande and another—Defendants—Respondents.

S. A. No. 200 of 1923, Decided on 27th June 1924, against the decree of Dist. J., Benares, D/-1st November, 1922.

✱ *Hindu Law—Joint family—Alienation—Minor born or conceived after the expiry of limitation against all the co-parceners existing at time of sale cannot revive, cause of action—Limitation Act, S. 6.*

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession (see Art 126 Limitation Act), and a new cause of action does not accrue upon the subsequent birth of a son in the family. [P. 55, C. 1]

The after born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and when he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of S. 6 of the Limitation Act He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth. 8 W. R., 285; 4 All., 120. Foll. 24 O. C. 330; 1 Lah. 558 Ref. to. [P. 55, C. 1]

Mushtaq Ahmad—for Appellants.

S. N. Sen—for Respondents.

Judgment.—The plaintiffs (Hindu sons) sued for the setting aside of an alienation by their grand-father, one Ajudhia Singh. Both the subordinate Courts held that the suit was time-barred. This second appeal is filed in consequence.

The youngest son of Ajudhia Singh was Ram Iqbal and the eldest son of Ram Iqbal is the plaintiff Sikandar Singh. The learned Subordinate Judge of the trial Court held that when Sikandar Singh was born and also before he was conceived Ram Iqbal had lost his right to question the alienation, being at the time 24 years of age. It was argued on the basis of a slip in the judgment of the learned Subordinate Judge that Sikandar Singh was conceived before Ram Iqbal's right to sue had become time-barred. In one portion of the judgment he observed.

"Mahabir Singh the next witness said that Ajudhia had died at the age of 60 or 65. This seems correct. He further says that Ram Iqbal was 9 or 10 years old when Ajudhia died, so according to this calculation Ram Iqbal would be 21 years old when Sikandar was born, and this seems correct."

Here 21 is a slip for 24. The learned Judge goes on to observe.

"The fact is that Ram Iqbal is now 32 years old. He was 11 years old when his father died. He was 24 years old when his first son was born."

This 24 is correct because according to the lower Court Ajudhia died in 1901, Ram Iqbal was 11 years old at the time and Sikandar was born in 1914. So on the date of the birth of Sikandar Ram Iqbal would be 24 according to the finding of the trial Court and not 21. This finding has been upheld by the lower appellate Court.

The more interesting argument is that even granting that all the sons of Ajudhia Singh and every other member of the joint family at the time of the birth of Sikandar Singh had lost their right to sue for the setting aside of the transfer by reason of limitation, Sikandar Singh, as soon as he was born would acquire the right to bring a suit such as the present.

Various rulings were quoted stating general principles but not dealing exactly with the point of limitation. According to this argument even if the plaintiffs had not sued, their great grand-children could have come to

Court to question the title of the then owner of the property on the ground that Ajudhia Singh had transferred the property without the consent of the other members of the joint family and the then owner was not able to prove legal necessity for the transfer. I am not prepared to countenance such a proposition of law, which would offend against every principle of the law of limitation. A Hindu son when he is born in a family is born to all the rights which exist at the time in the family and not to rights which existed in the family a century before. No title derived from a Hindu would be safe under such a contingency.

Adopting the view of law of the lower Courts, if when Sikandar Singh was born there had existed in the family a right to question the transfer on the ground of its being made without the consent of the other coparceners and without legal necessity Sikandar Singh may have been entitled to bring a suit up to three years after attaining majority even though at the time when he brought the suit a similar suit by older members of the family had been time-barred. The right to sue must however be alive at the time of the birth or at the time of the conception of the Hindu son in order to entitle him to such a right. Once every member of a particular Hindu family had lost by efflux of time the right to question an alienation, a son concieved and born subsequent to the loss of the right to sue by the family cannot revive a time-barred right.

So far I have discussed the facts of the case with reference to the view of law adopted by the lower Courts. My own view of the law on the point is more restricted: it is that a son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession (see S. 126 Limitation Act) and a new cause of action does not accrue upon the subsequent birth of a son in the family. This was held as early as 1867 in *Raja Ram Tewary* v. *Lachman Prasad* (1) and the same principle of law was laid down by the Privy Council in *Ujagar Singh* v. *Pitam Singh* (2). Applying this principle of law the after born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of S. 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth.

Confusion of thought arises in the discussion of the present question from fixing it up with two other propositions of law more of less alike :—

1. That after born sons have a vested interest co-extensive with that of previously born sons of the family. If a minor son is in existence at the time of the alienation, he can sue within three years of his majority and an after born son can take advantage of this extension of time. *Ramkishore Kedarnath* v. *Jainarain Ramrachpal* (3).

2. That the minority of one son will save limitation for all sons under S. 7 of the Limitation Act. If A, B and C major sons and D minor son, were in existence at the time of the alienation, limitation (if it has not expired earlier) will be saved for all until D attained the age of 21.

These propositions of law however have no bearing on the inquiry whether S. 6 of the Limitation Act is applicable to an after born son or not. A learned Judge of this Court Mr. Justice Daniels has elaborately discussed this question in the judgment of a Bench delivered by him in Oudh *Chotey Singh* v. *Hardeo*

(1) 8 W. R. 285.
(2) [1882] 4 All, 120=8 I. A. 190=4 Sar. 275 (P. C.)
(3) [1913] 40 Cal. 966 = 40 I. A. 213=1913 M. W. N. 661 = 14 M. L. T. 163 = 17 C. W. N. 1189=18 C. L. J. 237=15 Bom. L. R. 867=11 A. L. J. 865=25 M. L. J. 513=20 I. C. 958=10 N. L. R. 1 (P. C.)

Singh (4) and arrived at the same in conclusion. He has quoted there support of his view a recent authority of the Punjab High Court (*Lachmandas* v. *Sundardas* (5).

I dismiss this appeal with costs which shall include fees on the higher scale.

Appeal dismissed.

(4) [1922] 24 O. C. 330=64 I. C. 757.
(5) [1920] 1 Lah. 558=59 I. C. 678.

1925 ALLAHABAD 56

DALAL, J.

Sheikh Karimullah—Plaintiff—Appellant.

v.

Gudar Koeri and others—Defendants -Respondents.

S. A. No. 201 of 1923, Decided on 27th June 1924, from a decree of the D. J. of Benares, D/- 10th November 1922.

(a) *Mortgage—Suit for possession on redemption—Plaintiff assignee from mortgagor—Suit is based on mortgage and not on title and mortgage must be strictly proved. though contest is really between mortgagor and third party, not mortgagee.*

Plaintiff was transferee from the alleged mortgagor. The suit was for possession on redemption of the mortgage. It appeared that the contest lay between the alleged owner and one of the defendants (other than the alleged mortgagee) as to the ownership of the property. But in the plaint no relief was claimed specifically against the defendant referred to, as apart from the mortgage.

Held: that the suit was entirely on the mortgage, as even the nature of the conflict between the alleged mortgagor and the third party defendant mentioned above was not indicated in the plaint. It could not be said that the suit was one for possession by the transferee of an owner against all possible persons who were keeping him out of possession. Hence the mortgage must be strictly proved. [P. 57 C. 1]

(b) *Evidence Act, S. 68—Evidence of Attestors to mortgage deed is indispensable unless it is impossible to produce them.*

Failure to call as witnesses, any of the persons who had attested mortgage deed where it was not shown that they had died or were not subject to the process of the Court or were incapable of giving evidence, was held to be fatal. [P. 56 C. 1]

(c) *Evidence Act. S. 68—Section must be observed even when secondary evidence is given—Evidence Act. S. 63.*

A certified copy is sufficient secondary evidence under S. 63 of the existence, conditions and contents of the deed but not of its execution, which must be proved as required under S. 68. [P. 57 C. 1]

M. L. Agarwala—for Appellant.

K. N. Katju—for Respondents.

Judgment.—The plaintiff Sheikh Karimullah is purchaser of the alleged rights, and interests of defendant No. 4 Mital. His allegation was that Mital and others had mortgaged the property to defendant No. 1 Gudar and he desired to redeem that mortgage of 9th May 1917. Another important party defendant in the suit was defendant No. 6 *Mt.* Deokali.

In para 10 of the plaint it is stated that defendant No. 6 Mt. Deokali was made a party though she had no concern in the property because of the allegation of the mortgagee, Gudar, that he had made over possession to her. Defendant No.7 is a transferee from *Mt.* Deokali. It appears that contest lies between Mital and *Mt.* Deokali as to the ownership of the property. In the plaint however no relief is claimed specifically against *Mt.* Deokali as apart from the mortgage. In para 12 possession is desired on redemption of mortgage.

A copy of the registered mortgage deed was produced and the mortgagee Gudar did not produce the original. Gudar denied the existence of any mortgage. Both the subordinate Courts have held that the mortgage was not proved because no attesting witness was called for the purpose of proving its execution as laid down in S. 68 of the Evidence Act. It is admitted that both the attesting witnesses are alive and no attempt was made to prove that they were not subject to the process of the Court or incapable of giving evidence. The argument of the learned counsel for the plaintiff-appellant was two fold (1) that the suit was not based on the mortgage and that therefore it was not necessary to prove the document strictly and (2) that when the mortgagee Gudar failed to produce the original document the evidence of the mortgagor Mital and of the scribe of the

document was sufficient to prove the document by secondary evidence.

As I have already pointed out the suit is based entirely on the mortgage. The nature of the conflict between Mital and *Mt* Deokali is not even indicated in the plaint. It cannot therefore be said that the suit is one for possession by the transferee of an owner against all possible persons who are keeping him out of possession. I am of opinion that the mortgage is required to be strictly proved having regard to the nature of the plaint.

The next argument was that the admission by the mortgagor of having executed the document was sufficient evidence of execution and that the existence, condition and contents of the document were proved by the production of a certified copy of the document. A certified copy is sufficient secondary evidence under S. 63 of the existence, condition and contents of the deed but not of its execution. The ingenious argument was advanced that S. 67 and those which follow up to S. 73 deal with primary evidence and not with secondary evidence. I do not think that such an argument can hold when in S. 65 there is no mention of secondary evidence being given of the execution of a document. S. 67 follows the mention of primary and secondary evidence in Ss. 61—66 and would presumably govern both kinds of evidence. The submission was made that if the mortgagee suppressed the original document and won over the attesting witnesses it would be impossible to prove a deed of mortgage if the provisions of S. 68 were insisted upon. This difficulty however can be overcome by the application of the provisions of S. 71. If the plaintiff had summoned the two attesting witnesses and they denied execution either through colusion or absence of recollection it would have been open to the plaintiff to prove the execution by any other evidence.

In my opinion the two subordinate Courts were correct in insisting upon the due observation of the provisions of S. 68 and refusing to use the mortgage deed as evidence on non-compliance by the plaintiffs of the terms thereof. I do not think that the present plaint can be turned into a conflict between the plaintiff and *Mst.* Deokali, so it will not be a proper course to remand the suit to the trial Court to decide the question of possession by right of title.

I dismiss this appeal with costs which shall include here fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 57

WALSH, AG. C. J. AND RYVES, J.

Girdhari Lal—Applicant.

v.

Zorawar Singh—Opposite Party.

F. A. F. O. No. 164 of 1923, Decided on 12th June 1924, from an order of the Sub. J. of Muttra, D/- 11th August 1923.

Civil P. C. O. 47. R. 3.—A refusal to restore an application for review when the application to restore has been heard on the merits, is not appealable—Civil P. C., O. 43. R. 1. (t).

The marginal note to O. 47, rule 3 describes the rule as one really relating to the form of application and the rule itself says that the provisions of the appellate rules shall apply to forms in applications for review. That does not extend the right of the party who goes for a review and give him a right of appeal simply because, under R. 1. (t) O. 43, an order under R. 19 of O. 41, *i e.*, an ordinary appellate order, is made appealable. [P. 58 C. 1]

N. P. Asthana—for Appellant.

Gopi Nath Kunzru—for Respondent.

Walsh, Ag. C. J.—This is an appeal from a refusal to restore an application for review, the application to the lower Court to restore the application for review having been heard out on the merits. The disappointed party wants this Court to rehear in appeal the application, which has been heard in the Court below and refused, and to restore the application in review. A preliminary objection is taken by the respondent. Mr. N. P. Asthana for the appellant takes the only point which he can in defence of the right of appeal, and on the face of it, it looks like a good point. He approaches it in this way. Order 43, rule 1 sub-section (t) gives

a right of appeal from an order made under rule 19 of Order 41, which is the ordinary appellate order. He then refers to rule 3 of Order 47, which is the review order, and says that he gets into the appellate order by reference to it, namely by the provisions of rule 3 of Order 47, which provides that the provision as to the from of preferring appeals shall apply *mutatis mutandis* to applications for review. But on turning to rule 1 of Order 41, it is quite clear that by the provisions contained in that rule, a specific form is required when a party decides to appeal. The marginal note to Order 47, rule 3 describes the rule as one really relating to the form of application, and the rule itself says that the provisions of the appellate rules shall apply to forms in applications for review. We do not think that extends the right of the party who goes for a review. It merely defines the method by which the form shall be adopted and ascertained. It does not relate to the right of appeal. This appeal must be dismissed with costs.

Appeal dismissed.

✱ 1925 ALLAHABAD 58

WALSH, AG. C. J. AND RYVES, J.

Sakalraj Dube and another—Plaintiffs-Appellants.

v.

Mt. Jadu Rani—Defendant — Respondent.

F. A. F. O. No. 193 of 1923, Decided on 19th June 1924, from an order of the 2nd Addl. D. J., of Gorakhpur.

✱ *Legal Practitioner—Absence of, vakil is client's default, though client is present—But case must be heard though subject to some penalty.*

When a vakil represents his client the right of audience is, for the time being, vested in him. For the purpose of continuing the hearing or commencing the hearing, he is the appellant. If he is absent there is default. Even if the client is corporeally present, in the eyes of the law he is not present in such a sense as to prevent the absence of the vakil from being a default. If a Judge is anxious to assist a party in distress he can give him a little time to obtain the assistance of a new vakil, or adjourn the case, and make him pay costs or something of that sort, but for a default of this kind, subject to the penalty usually inflicted, the client should not be deprived of the right of having his appeal heard. [P. 58 C. 2]

Peary Lal Banerji—for Appellants.

Harnandan Prasad — for Respondent.

Judgment.— We think that the learned judge who has disposed of this application has missed the point. When a vakil represents his client the right of audience is, for the time being, vested in him. For the purpose of continuing the hearing or commencing the hearing, he is the appellant. If he is absent there is default. According to the entry in the order-sheet the appellant was absent as well as his vakil. Possibly he was running after him to see if he could find him, but even if he had been corporeally present in the sense in which the judge whose order is appealed from appears to mean, we think that in eyes of the law he was not present in such a sense as to prevent the absence of the vakil from being a default. If a judge is anxious to assist a party in distress he can give him a little time to obtain the assistance of a new vakil, or adjourn the case, and make him pay costs or something of that sort, but for a default of this kind we do not think that, subject to the penalty usually inflicted the client should be deprived of the right of having his appeal heard. We, therefore, allow this appeal though not as a matter of right. The appellant must deposit in the Court below the costs of the successful application for restoration and of the appeal, and when he has deposited those costs either in cash or by way of security so that they can be paid out to the other side on the order of the judge, the case must be restored to the pending file and the appeal reheard on the merits.

Appeal allowed.

1925 ALLAHABAD 59

NEAVE, J.

Bhola Singh — Plaintiff — Appellant.

v.

Banwari and others— Defendants--Respondents.

S. A. No. 250 of 1923, Decided on 30th June 1924, from the decree of the Sub. J. of Meerut, D/- 6th November 1922.

Practice—Suit on lease—Lease not proved question of,— Court can enquire into plaintiffs title and award possession on basis thereof.

The plaintiff made it clear that the suit was founded only on the *Kirayanama* which contained a condition for ejectment. The cause of action was said to have arisen at the expiry of one year from the execution of this document. There was no prayer for a declaration of the plaintiff's title and the Court fee was not the correct one in a suit for title.

***Held*: the Court must confine itself to the question of the relationship of landlord and tenant between the parties and must not go into the question of title of plaintiff and decree the suit for possession on the basis of plaintiff's title to the land.** [P. 59, C. 2]

N. C. Vaish—for Appellant.

Durga Prasad—for Respondents.

Judgment—This is a plaintiff's appeal arising out of a suit to eject the respondents Mirchi and Banwari from a house which the plaintiff acquired under a sale deed of the 27th June, 1921. The plaintiff came into Court on the allegation that the house had originally been purchased in execution of a decree by one Hira Lal who had leased it to Mirchi under a *Kirayanama*. The plaintiff bought the house from Hira Lal's heir. He alleged that Mirchi had sub let the house to Banwari whom he also impleaded.

Banwari denied that any relationship of landlord and tenant existed between him and the plaintiff and set up his own title on the ground of adverse possession.

The first Court found that Mirchi had never obtained possession of the house and was therefore not a tenant and could not be called upon to pay rent, that Banwarti was in occupation as a trespasser but has not acquired an adverse title. The suit was accordingly decreed for possession.

The lower appellate Court has accepted the finding that Banwari was in possession as a trespasser and has held that as the plaintiff only came to the Court paying Court fee on one year's rent and founding his suit on the *kir yanama*, the first Court ought not to have gone into the question of title at all, but only determined whether the parties were to one another in the relation of landlord and tenant. A reference has been made to *Balasidhantam* v. *Perumal Chetti* (1).

In appeal it is contended that the question of title was raised by the plaintiff in his plaint and that the Court was competent to decide it. The appellant's counsel claims that he should have been allowed to make good any deficiency in Court fee in the present suit. This contention cannot be accepted. The plaint makes it perfectly clear that the suit was founded only on the *kirayanama* which contained a condition for ejectment. The cause of action is said to have arisen at the expiry of one year from the execution of this document. There was no prayer for a declaration of the plaintiff's title and the Court fee was not the correct one in a suit for title. In addition to the ruling cited by the lower appellate Court reference may be made to *Pramatha Nath Gangoly* v. *Amiruddin Sheikh* (2). The appeal was properly rejected by the lower appellate Court and must fail here. The appellant's Counsel desires to withdraw his appeal with permission to file a fresh suit. This is allowed. The appellant will pay the respondents' costs including in this Court fees on the higher scale.

Appeal rejected.

---

(1) [1914] 27 M.L.J. 475=27 I.C. 162=1 L. W. 641.

(2) [1920] 24 C.W.N. 151=55 I.C. 178.

1925 ALLAHABAD 60

DANIELS AND NEAVE, JJ.

Mahadeo Prasad — Defendant—Appellant.

v.

Anandi Lal and others—Plaintiff—Respondents.

S. A. No. 1594 of 1922, Decided on 8th July 1924, from a decree of D. J. of Allahabad.

T. P. Act., S. 100—Charge not amounting to mortgage operates against purchaser without notice.

The position of a charge-holder, under the T. P. Act is stronger than that of a person holding a merely equitable charge under English Law, and though there may be cases in which a mere equitable claim will not be enforced against *bona fide* transferees for value without notice yet it is much too broad a proposition to state that in all cases where by act of parties or operation of law, immovable property of one person is made security for payment of money to another and the transaction does not amount to a mortgage, the security will not be enforced even against such transferees. [P. 61, C. 3]

The general rule is that where the owner of property creates successive rights by different transactions entered into at different times, the rights will, in the absenbe of special circumstances take effect in order of priority. On the other hand, S. 40 of the Act lays down that a right arising out of contract and not amounting to an interest or an easement, cannot be enforced against a transferee for value without notice. But where the right of a charge on immovable property was not a merely contractual right but was an obligation embodied in a decree, and where the purchaser was an execution purchaser,

Held: that he bought the interest of the judgment debtor as it stood on the date of the decree and that the charge was available against him. 28 All. 655.—Foll. 23 Cal. 985 43 Cal. 625 Not Followed. [P. 61, C. 2]

M. L. Agarwala—for Appellant.

K. N. Katju and *S. S. Sastry*—for Respondents.

Judgment.—The question of law which is raised in this appeal is whether a charge which does not amount to a mortgage can be enforced against a transferee for value without notice of the charge. The Court below, relying on the decision in *Maina* v. *Bachchi* (1) has held that it can. The appellant contests this proposition. The plaintiff-respondent supports it, but in addition contends that on the finding of fact of the Court below the question does not really arise. He relies also on the fact that the appellant's title was acquired at execution sale and not by private conveyance.

The property in dispute consists of a half share in three houses Nos. 29, 45 and 66, situated in the city of Allahabad. The plaintiff, Anandi Lal, was at the institution of the suit the holder of a decree for Rs. 704-9-0 against first defendant, Sham Lal, and seeks to enforce by the sale of these houses. The houses originally belonged to the plaintiff and his cousin, Kalyan Chand, in equal shares. One Sheo Nath obtained a decree against Kalyan Chand and attached his half share in the houses before judgment on 5th February, 1918. The suit was finally decreed on 13th June, 1918 on the basis of a compromise which provided that the amount decreed in favour of Sheo Nath should constitute a charge on the property already under attachment. As an additional precaution the decree was registered. The rights of the decree-holder were purchased by the plaintiff Anandi Lal, who proceeded to put the decree in execution. The houses were put up to sale and purchased by one Badri Prasad, but the sale was set aside on the application of Sham Lal, and the plaintiff has in consequence brought the present suit to establish his right to have the half share in the houses attached and sold under his decree.

The claim of the appellant arises out of proceedings taken by Bulaki another creditor of Kalyan Chand, who brought a suit, No. 189 of 1918, against the latter and obtained a decree on 30th April, 1918. Before judgment Bulaki got an injunction, on 21st January, 1918, from the Small Cause Court restraining the judgment debtor from transferring the property It is said by the learned District Judge that the issue of this injunction was *ultra vires*, and it has not been relied on in argument in this Court. In execution of this decree, Kalyan Chand's interest in the houses was attached and brought to sale and was ultimately purchased by Sham Lal on 22nd March, 1919. Sham Lal got possession of the property on 27th March, 1920. He subsequently

(1) [1906] 28 All. 655=1906 A. W. N. 165=3 A.L.J. 551.

sold his rights to the appellant, Mahadeo Prasad. The latter was added as a defendant after the institution of the suit. The question for decision is whether Sham Lal's purchase was or was not subject of the charge created by the decree of 13th June, 1918, in Sheo Nath's case, the benefit of which has now passed to the plaintiff.

According to the definition in S. 3 of the Transfer of Property Act, a person is said to have notice of a fact not only when he actually knows it but when he could have been aware of it but for wilful abstention from such inquiry or search as he ought to have made. Now in this case the purchaser, Sham Lal, knew that a previous suit had been filed against Kalyan Chand for he had actually been summoned as a witness in that suit. He was summoned for the very day on which the compromise decree was passed. As he professes not to know whether he attended the Court or not (a fact which he could not possibly have forgotten), the probability is that he really was there. In any case he knew enough to make it incumbent on him to ascertain before buying the property, what had happened in the previous suit and whether the creditor having got decree had taken any steps against the property which would affect the title of a subsequent purchaser. This is substantially what the District Judge finds, though he has put his finding in the somewhat indefinite form that the facts "strongly suggest" that Sham Lal knew more about the proceedings in the former case than he is now prepared to admit. The learned Judge further points out that the decree-holder, by registering his decree, had done everything possible to give notice to any one who might contemplate buying the decree. On the findings of the District Judge it must be held that there was sufficient to put the original defendant, Sham Lal, on enquiry, and that, if he had made any enquiry, he could not have failed to learn the true state of the case. He must, therefore, be held to have notice of the plaintiff's charge within the meaning of the definition in S. 3 of the Act.

This really concludes the case. But we may say that we are not disposed to differ from Sir Henry Richards' view, in *Maina* v. *Bachchi* (1), that the position of a charge-holder, under the Transfer of Property Act, is stronger than that of a person holding a merely equitable charge under English law, and that though there may be cases in which a mere equitable claim will not be enforced against *bona fide* transferees for value without notice, yet,

> 'It is much too broad a proposition to state that in all cases where by act of parties or operation of law, immovable property of one peron is made security for payment of money to another and the transaction does not amount to a mortgage, the security will not be enforced even against such transferees."

The general rule is that where the owner of property creates successive rights by different transactions entered into at different times, the rights will, in the absence of special circumstances, take effect in order of priority. On the other hand, S. 40 of the Transfer of Property Act lays down that a right arising out of contract and not amounting to an interest or an easement, cannot be enforced against a transferee for value without notice. In this case the right was not a merely contractual right but an obligation embodied in a decree. It is also to be remembered that Sham Lal was an execution purchaser who bought the interest of the judgment-debtor as it stood on the date of the decree. There are two Calcutta judgments, *Royzuddi Sheik* v. *Kali Nath Mookerjee* (2) and *Akhoy Kumar Banerjee* v. *Corporation af Calcutta* (3), both delivered by Mr. Justice Mookerjee, which lay down in general terms that a charge cannot be enforced against a transferee for value without notice. But in neither of these cases did the decision actually turn on this question. In the earlier case the document relied on as creating a charge was held to be invalid and in the later case the later transferee was found to have had notice of the charge. For the reasons given, we dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

(2) [1906] 33 Cal. 985=4 C.L.J. 219.
(3) [1914] 42 Cal. 625=21 C.L.J. 177=27 I. C. 61=19 C.W.N.37.

1925 ALLAHABAD 62

DANIELS, J.

Bhola and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 421 of 1924, Decided on 18th July 1924, from an order of S. J. of Budaun, D/-30th April 1924.

Penal Code, S. 402—Accused coming from different villages—Arrested on suspicion by villagers—Various circumstances showing their guilty intention—Conviction was upheld.

The accused were all residents of different villages and they mostly lived at a great distance from the village where they were caught. They gave a number of separate reasons, for the most part entirely improbable, to account for their being caught in the particular village. Different portions of the same manual on bayonet training were found in the possession of different accused who came from different villages. A lot of ammunition was recovered from some of the accused and they were all armed. A series of armed dacoities had occurred recently in the district. The accused were arrested by the villagers themselves on suspicion. [P 63 C 1]

Held: that under these circumstances, their conviction under S. 402 was proper.

Government Pleader—for the Crown.

Judgment.—The appellents Bhola Singh, Nanhe, Jurri, Sardar. Likha Singh and Ram Sahai have been convicted under S 402 of the Indian Penal Code of assembling for the purpose of committing dacoity and sentenced to seven years' rigorous imprisonment each, the maximum sentence permitted by the section. Two of the appellants, Bhola and Sardar have also been convicted under S 19 (f) of the Arms Act and given separate sentences of three years' rigorous imprisonment each.

On the afternoon of 8th March last three of the accused namely, Bhola, Nanhe and Ram Sahai, came to the village of Naigawan to the well for water. They were strangers to the village. Malkhan Singh, who was at his *chaupal* near by, became suspicious and noticed that Bhola had a pistol fastened round his neck under his clothing. He and others of the villagers seized them and tied them up. Malkhan Singh had himself been in trouble with the police at one time and had possibly been asked by them to render assistance in apprehending suspicious characters. Armed dacoity has been very prevalent in the Budaun district of recent years, and it appears that there had been twenty seven armed dacoities between 1st January 1924 and the date of this case. The *chaukidar* was at once sent off to give information at the *thana*. In the meantime three other men were noticed running away towards the east. The villagers gave chase and brought back one of them, the accused Likha Singh. Another band of persons ware found to be making off to the south. They were also pursued. After a time they separated. Two of them, the accused Jurri and Sardar, were captured after a chase of four miles and brought back to the village. At that time the Sub-Inspector had already arrived. At the time of his arrival he found four of the accused under arrest in the village. Jurri and Sardar were brought in while he was there. Sardar was searched and a quantity of shot and percussion-caps found on him. Bhola had already been searched and a pistol, six packets of gunpowder, five percussion-caps and two packets of shot were recovered from him. Bhola and Sardar came from widely separate villages, indeed Sardar is a resident, of the Shahjahanpur district, but different portions of the same manual of bayonet training were found in their respective possession. This fact is in itself very strong evidence that they were associated together and had not come to the village independently.

In addition to the evidenee of the capture and search of the accused there is the evidence of Tej Singh, who appears to have been examined by the police the same day. He deposes to seeing some fifteen men approaching the village from the south that afternoon. Outside the village they split up into three bands. Three of them went directly into the village, while the other separated off to the east and west. Tej Singh was too far to identify them, but on coming into the village he found that four of the accused had already been caught by the villagers. He told the villagers of the eight men who had separated from the others to the west,

and this led to the pursuit and capture of the two remaining accused Jurri and Sardar.

The only question in the case is whether the learned Judge was justified in concluding from this evidence that the accused were members of one party and that they had collected for the purpose of committing dacoity. It appears to me that when all the circumstances are taken into account this is the only conclusion to which the Court could reasonably come. The learned Judge has referred to the case of *Queen Empress* v. *Bhola* (1), which is in many respects similar. The accused are all residents of different villages and they mostly live at a great distance from the village where they were caught. The villages of Bhola and Nanhe are 18 miles distant, those of Ram Sahai and Likha four and a half miles distant, that of Jurri 15 miles distant, and Sardar is a resident of another district. They give a number of separate reasons, for the most part entirely improbable, to account for their being caught in the village of Naigawan. When the evidence of Tej Singh is considered in connection with what immediately followed, it is impossible to doubt that the accused were members of the party seen by Tej Singh which separated as it approached the village. Jurri and Sardar were captured after a long chase at a considerable distance from the village, but on Sardar being searched a portion of the same manual was found in his possession, another part of which had already been recovered from the accused Bhola. The circumstances under which the accused were found and the possession of arms and ammunition by two of them fully justify the presumption that their object was the commission of dacoity. If they were there for some innocent purpose, it would be easy for them to displace the presumption against them by stating what the purpose was. Instead of doing this they denied all association. I therefore uphold the convictions of all the accused. I do not think, however, that the learned Judge was justified in imposing the maximum sentence allowed by law. I accordingly reduce the sentences of all the accused under S. 402 to five years' rigorous imprisonment each, and the sentence on Sardar under S. 19 of the Arms Act to two years' rigorous imprisonment. As Bhola was in possession of a pistol, the sentence passed on him under the Arms Act will remain unaltered.

Sentences reduced.

(1) [1901] 23 All. 124=1901 A. W. N. 16.

1925 ALLAHABAD 63

KANHAIYA LAL, J.

(*Meer*) *Qurban Ali*—Defendant—Appellant.

v.

Shaikh Majid Husain and Others—Plaintiff and Defendants—Respondents.

S. A No. 361 of 1923, Decided on 9th July 1924, against the decree of the Sub. J. of Jaunpur, D/- 23rd November 1922.

Agra Tenancy Act, S. 20.-Settlement between zamindar and the tenant regarding the incidents of the tenure cannot override the section.

A fixed rate tenancy cannot be created by a contract with the zamindar; and any rights which can be granted by the zamindars must be consistent with the provisions of sec. 20 of the Agra Tenancy Act, which forbid the sale of a holding in execution of decree of a Civil or Revenue Court, and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy. [P 64 C 1]

The interest of a *thekedar* is not permitted by law to be transferable. [P 64 C 1]

A was the tenant of a certain holding from which the zamindars sought to eject him. A settlement was subsequently arrived at between him on the one hand and the zamindars on the other, whereby the latter granted a lease in perpetuity to him of the same holding, giving the lessee heritable and transferable rights. Some time after this lease was executed, *A* made a possessory mortgage of the holding in favour of the predecessor-in-title of the plaintiffs.

Held: that the mortgage was void even as against the zamindars who had succeeded to the interest of the mortgagor, *A*. 28, All. 747 Fol.

Iqbal Ahmad—for Appellant.

P. L. Banerji—for Respondents.

Judgment: — *Mt.* Naurasi was the tenant of a certain holding from which the zamindars sought to eject her. A settlement was subsequently arrived at between her and

her husband Mata Badal on the one hand and the zamindars on the other, whereby the latter granted a lease in perpetuity to Mata Badal of the same holding, giving the lessee heritable and transferable rights. Some time after this lease was executed Mata Badal and Mt. Naurasi made a possessory mortgage of the holding in favour of the prodecessor-in-title of the present plaintiffs for a sum of Rs. 200/-, out of which Rs. 12/- were taken for the payment of certain arrears of rent due to the zamindars. The validity of the mortgage forms the subject matter of contention in this appeal. The Court of first instance found that the mortgage was invalid in asmuch as it offended against the provisions of Sec.20 of the Agra Tenancy Act (II of 1901). The lower appellate Court however came to the conclusion that the mortgage was valid under Sec. 20. cl. 3 of the said Act. Sec. 20 provides that the interest of an occupancy tenant or a non-occupancy tenant, other than a *thekedar*, shall not be transferable in execution of a decree of a Civil or Revenue Court, or otherwise than by a voluntary transfer between persons in favour of whom, as co-sharers in the tenancy, such a right originally arose, or who have become by succession co-sharers therein; but the interest of a *thekedar* shall subject to the terms of his lease be heritable but not transferable. Both Mata Badal and Mt. Naurasi are dead. They left two sons who were impleaded as defendants to the present suit, but both of them died during the pendency of the suit, leaving no issue. The zamindars thereupon took possession of the tenancy and they resisted the claim of the plaintiffs to enforce their mortgage. In the plaint the tenancy mortgaged was described as a tenancy at a fixed rate, but the trial Court has found that the mortgagors were not tenants at fixed rates within the meaning of Sec. 8 of the U. P. Tenancy Act. It is immaterial whether Mt. Naurasi and her husband were non-occupancy tenants or occupancy tenants before they took a permanent lease of the holding from the zamindars. As observed in *Bachchi* v. *Bachchi* (1) a fixed rate tenancy cannot be created by a contract with the zamindar; and any rights which can be granted by the zamindars must be consistent with the provisions of Sec. 20 of the U. P. Tenancy Act, which forbid the sale of a holding in execution of a decree of a Civil or Revenue Court, and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy. It might be said that Mata Badal was a *thekedar* of transferable right under the lease granted to him by the zamindars, but the interest of a *thekedar* is not permitted by law to be transferale. The zamindars took no step to avoid the mortgage within the time allowed by law, but all the same the holding cannot be sold in execution of a decree, and as pointed out in *Ram Sarup* v. *Keshab* (2), the mortgage cannot, despite the contract contained in the lease, be enforced. The Zamindars claim the holding by right of escheat and despite the covenant entered in the original lease, if the mortgage was void and unenforcible as against the mortgagors it cannot be enforced against the zamindars after the escheat nor can the holding be put up to sale in enforcement of the mortgage. The mortgagees can only get a simple money decree against the assetss of their mortgagors in the hands of the defendants, if any. The appeal is therefore allowed and in lieu of the decree passed by the lower appellate Court a simple decree for money will be prepared with costs incurred by the mortgagees in the Courts below and future interest from the date of the suit till payment at 6 % per annum. against the assets of the deceased. Considering the peculiar circumstances of the case and the conduct of the zamindars who are seeking to deprive the mortgagees of their money after they had given the lessee transferable rights, I make no order as to the costs incurred by the defendants appellants here or any of the Courts below.

Appeal Allowed.

I. L. R., 28. All., 747.
I. L. R., 29, All., 327.

1925 ALLAHABAD 65

KANHAIYA LAL, J.

Sukhdeo and others—Defendants—Appellants.

v.

Ram Newaz and another—Plaintiffs—Respondents.

S. A. No. 265 of 1923, Decided on the 3rd July, 1924, against the decree of the Judge, Sm. C. C., exercising the powers of a Sub. J., Allahabad, D/-17th November, 1922.

T. P. Act, S. 14—Vendor can reserve an inalienable interest for himself and his descendants, reverting to vendee in absence of vendor's descendants.

There is nothing to prevent the vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and his lineal male descendants without any power of alienation subject to the reversion of that interest to the vendee in case there were no male descendants left to enjoy the benefit of that reversion. The reservation of such an interest does not offend against the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose; and the vendee becomes fully entitled to the whole, when the interest so created dies out. [P 65 C 2]

Gulzari Lal—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—The dispute in this appeal relates to two bighas of *nankar* land situated in the village Balakmau, which appertained to a 9 pies and odd share belonging to Ram Charan. On the 12th February 1884 Ram Charan sold his zamindari share aforesaid to Sheo Narayan, his son-in-law, reserving at the same time the said two bighas of *nankar* land for his use and for the use of his male descendants (*aulad khas*) without any power of alienation and free from any liability for the payment of rent subject to the condition that if at any time he had no descendant left the land shall revert to the purchaser.

Ram Charan accordingly remained in possession of the said land during his life-time. He was succeeded by his son Muazzam Ram, who died in the year 1918 without leaving any issue. The plaintiffs claim to be the nephews of Ram Charan and their contention is that the said two bighas of land had been permanently exempted from the sale and that the covenant restraining alienation and providing for the reversion of the property to the vendee in case Ram Charan had no male descendant left, was invalid. The defendants are the purchasers of the interest of Bindeshri and Rameshar, the nephews and legal representatives of Sheo Narain. The Courts below were of opinion that the reservation made in the sale deed was absolute and a provision made for the reversion of the land to the vendee in case Ram Charan left no male descendant was void.

There is nothing, however, to prevent the vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and his lineal male descendants without any power of alienation subject to the reversion of that interest in case there were no male descendants left to enjoy the benefit of that reservation. The intention of the parties to the deed evidently was to have a provision for the maintenance of the vendor and his lineal descendants who were not to be charged any rent for the occupation of the land so long as any such lineal descendants were in existence and to have the rights of the vendee otherwise unaffected. The reservation of such an interest does not offend against the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose; and the vendee becomes fully entitled to the whole, when the interest so created dies out, as has happened in the present case. The plaintiffs are not the lineal descendants of Ram Charan and are not entitled to the benefit of the reservation made in the instrument of sale. This appeal is therefore allowed and the claim of the plaintiffs dismissed with costs here and hitherto including fees in this Court on the higher scale.

Appeal allowed.

1925 ALLAHABAD 66

DANIELS, J.

Peare Lal and others—Plaintiffs—Appellants.

v.

Jhabba Lal and another—Defendants—Respondents.

S. A. No. 1667 of 1923, Decided on 24th June 1924. against the decree of the D. J. of Bulandshahr, D/- 16th May 1923.

(a) *Civil P.C.. S. 96—Order determining a party's right to be the representative of a deceased party is decree and appealable.*

Sub-section (3) of S. 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not representative of a party, and in view of S. 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. 36 All. 423, Ref. to. 20 All. 539 overruled. [P. 66, C. 2]

(b) *Succession Certificate Act S. 16—J, D. cannot resist execution by holder of succession certificate on plea of latter not being D. H's heir.*

S. 16 of the Succession Certificate Act declares that a succession certificate duly granted by the District Court is conclusive against the debtors of the deceased person. So it is not open to the judgment-debtors to raise any objection to the execution of a decree by persons who hold a succession certificate to the deceased decree holder irrespective of whether they are or are not the heirs of the deceased. [P. 66, C. 2; P. 67, C. 1]

(c) *Civil P. C., O. 22. R. 12—Decree capable of execution without final decree—Substitution of legal representatives need not be within 3 months of party's death.*

Substitution of legal representatives within 3 months of a party's death is not necessary for execution of a decree when it is not a preliminary decree but one which could be put in execution by applying for sale of the property. [P. 67, C. 1]

K. N. Laghate—for Appellants.

Panna Lal—for Respondents.

Judgment.—This is an appeal in execution proceedings. A decree for the recovery of a maintenance by the sale of immoveable property on which the maintenance was charged was held by Mt. Chandan Kuar against the judgment-debtors respondents. Mt. Chandan Kuar died on the 11th October 1921. A succession certificate in respect of the decree was obtained jointly by the appellants who are her sons and Mt. Saraswati who was her daughter. On the strength of this succession certificate these parties applied jointly to execute the decree. In their first application they treated the decree as a preliminary decree and asked for the preparation of a final decree, but in the alternative they also asked for execution of the decree as it stood in case no final decree should be necessary. The application was at first dismissed, but on a fresh application execution was allowed. The judgment-debtors appealed to the District Judge on the ground among others that Mt Saraswati alone was the heir of her mother Mt. Chandan Kuar and that the appellants were therefore not entitled to join in executing the decree. The learned District Judge has given effect to this contention and the appellants have filed the present second appeal to this Court objecting to the execution application being dismissed against them.

A preliminary objection is taken that no appeal lies and the appellant relies on the ruling in *Sheoraj Singh v. Aminuddin Khan* (1). That ruling was passed under the old Code of Civil Procedure and Mr. Agarwala remarks in his commentary (Indian Practice, 3rd edition, p, 189) that it requires reconsideration as it ignores sub-section (3) of section 47 and a number of rulings to the contrary which are cited in the commentary. Sub-section (3) of S. 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not the representative of a party, and in view of S. 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. The preliminary objection therefore fails.

On the merits the order of the learned District Judge cannot be upheld. The learned District Judge has not taken into account S. 16 of the Succession Certificate Act which declares that a succession certificate duly granted by the District Court is conclusive against debtors of the deceased person. The section is so clear that it is really superfluous to cite

(1) [1898] 20 All. 539=1898 A.W.N. 145.

any ruling in support of it, but *Rupan Bibi* v. *Bhagelu Lal* (2) may instance a case in which effect has been given to the provisions of the section. It may be noted here that there is no contest between Mt. Saraswati and her brothers. The judgment-debtors alone challenged the right of the appellants to join in executing the decree. In view of the S. 16 of the Suceession Certificate Act it is not open to the judgment-debtors to raise this objection.

The respondents have in this Court attacked the right of the appellant to execute the decree on the ground that the appellants did not apply to be substituted for the deceased within three months of her death. Even if this was a case in which the preparation of a final decree was necessary this objection would be untenable. It is clear, however, from a perusal of the decree, which has been read to me, that the decree was not a preliminary decree but one which could be put in execution by applying for sale of the property. It is therefore governed by Order 22, rule 12 and the three months period prescribed by rules 3 and 11 of the Order does not apply to it. I dismiss the cross-objections with costs. For reasons already given I allow the appeal and restore the order of the Munsif with costs in this Court and in the Court below.

Appeal allowed.

(2) [1914] 36 All. 423=25 I.C. 320=20 A.L.J. 524.

✱ 1925 ALLAHABAD 67

SULAIMAN, J.

Nagina Rai—Plaintiff—Appellant.

v.

Sangam Rai and Others—Defendants—Respondents.

S. A. No. 811 of 1922, Decided on 15th November 1923, against the decree of the D. J. of Ghazipur, dated 19th April 1922.

✱*Civil P.C., S. 11 Exp. 6—Suit by or against joint family operates as* res judicata *as against any member thereof though latter not impleaded as party.*

Where a suit is either brought by or against a joint Hindu family the other members of the family must be deemed to be parties to the suit through manager; 34 All. 549—34 All. 572.—Foll. P. 68, C. 1.]

M. L. Agarwala—for Appellant.

Haribans Sahai—for Respondents.

Judgment. — This is a plaintiff's appeal arising out of a suit for recovery of possession of a plot of land and a clump of bamboo trees. The Court of first instance decreed the suit but on appeal the suit has been dismissed. The main point which is raised in second appeal is that the finding of the lower appellate Court that the plaintiff's claim was barred by the principle of *res judicata* was not correct. What happened was that the present plaintiff used to live in Bengal far away from his village. In 1918 some of the present defendants brought a suit against the plaintiff's own brothers and uncle for the possession of the plot of land and certain trees including the property now in dispute. The members of the present plaintiff's family pleaded therein that the property then in suit belonged to their family. The suit was hotly contested and ultimately a decree was given to the plaintiff's relations. In that suit the present plaintiff was not impleaded at all. The reason probably was that he was absent from the village at the time. The learned Judge of the Court below has held that that decree operates as *res judicata*. In his judgment he has found that the plaintiff is a member of the joint Hindu family with his brothers and uncle and has also found that the previous suit was hotly contested, the plaintiff's family setting up their proprietary interest in the land and the bamboo clump. He has further remarked that all the members of the joint Hindu family who were living in the village were impleaded and the case was actually fought by them on behalf of the family. That being so, I am of opinion that the decree in the former suit, even though the present plaintiff was not personally impleaded, is binding on him. It has been laid down by two Full Bench cases of this Court, vide *Hosi Lal* v. *Miman Koer* (1) and *Madan Lal* v. *Kishen Singh* (2)

(1) [1912] 34 All. 549—15 I. C. 126—9 A. L. J. 819 (F. B.)

(2) [1912] 34 All. 572—15 I. C. 138—9 A. L. J. 844 (F. B.)

that where a suit is either brought by or against a joint Hindu family the other members of the family must be deemed to be parties to the suit through the manager. If therefore the former suit be deemed to be a representative suit brought against the family in its representative capacity it is obvious that under S. 11, Explanation 6 of the Code of Civil Procedure the present plaintiff must be deemed to have been a party. Under the circumstances the decree of the lower appellate Court was perfectly correct. I dismiss the appeal with costs.

Appeal dismissed.

1925 ALLAHABAD 68

DANIELS AND BOYS, JJ.

Harish Chandra and Others—Plaintiffs—Appellants.

v.

Mt. Kastola Kunwar and Others—Defendants—Respondents.

S. A. No. 944 of 1922, Decided on 1st May 1924, against the decree of the Dt. J. of Mainpuri.

Limitation Act, S. 19—"Prescribed" is not restricted to Sch. I.

The word "prescribed" is not defined in the Act. It means "prescribed by any law for the time being in force" and not only the periods in the Sch. 1 to the Act. [P. 68, C. 2.]

Surendra Nath Sen—for Appellants.

G. W. Dillon—for Respondents.

Judgment.—The question in this appeal is one of limitation. The mortgage was executed in the year 1889. Under the twelve years limitation laid down by the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), the suit would have been time barred. The Legislature, however by S. 31 of the Limitation Act of 1908 extended limitation to a period of sixty years from the date when the money became payable or two years from the passing of the Act whichever period first expired. This period expired in the case of the present mortgage on 8th August, 1910. Before its expiry, on 24th January 1910, the mortgagee made an admission of liability. He made a subsequent admission on 1st July 1916, within twelve years of the former admission. The suit was filed on 2nd January, 1919. The question is whether the acknowledgment of 24th January, 1910, was a good acknowledgment within the meaning of S. 19 of the Limitation Act. In our opinion it was S. 19 requires that the acknowledgment should have been made before the expiration of the period prescribed for the suit. The period prescribed for the suit did not expire till 8th August, 1910. The application was made before that date. It was, therefore, in time. Dr. Sen for the appellants has argued that the word "prescribed" in S. 19 of the Limitation Act, must be limited to the period prescribed in the First Schedule of that Act. There is no warrant for any such Limitation. The word "prescribed" is not defined in the Act. It means "prescribed by any law for the time being in force." The period of limitation for some classes of suits is not prescribed in the Limitation Act at all but in some other Act, as in the case of the Agra Tenancy Act. The word "prescribed" would certainly apply to any such period. The period "prescribed" for the institution of any suit mentioned in the First Schedule of the Limitation Act is, no doubt, ordinarily to be ascertained by reference to that Schedule, as is laid down in S. 3 of the Act. S. 31 is a special provision which, where it is applicable, overrides Article 132 of the Schedule. The section takes effect "notwithstanding anything contained in the Act." In cases governed by the section it is to the section and not to the Schedule that we must look in order to ascertain the period prescribed for the institution of a suit. No other question has been argued. The appeal therefore fails and we dismiss it with costs including in this court fees on the higher scale.

Appeal dismissed.

---

(1) [1907] 30 Mad. 426.

✱1925 ALLAHABAD 69

SULA MAN AND KANHAIYA LAL, JJ.

Ganesh Rai and others—Defendants—Appellants.

v.

Bhushi Rai—Plaintiff—Respondent.

S. A. No. 1521 of 1922, Decided on the 18th June, 1924, from the decree of the Dt. J., Ghazipur, D/- 8th September, 1922.

(a) *Occupancy holding—Mortgage.*

The mortgage of an occupancy holding is illegal. [P 76, C 1]

✱(b) *Specific Relief Act, S. 9—Suit based on title can't on failure of title be converted into suit based on possession.*

Where a plaintiff sues for possession on the basis of a title and fails to establish his title his suit for possession based on title cannot be converted into a suit for possession under S. 9 of the Specific Relief Act; and a decree for possession cannot be granted to him under the latter provision. 33 All. 174 and 8 A. L. J. 404 Foll. [P 70, C 2]

Mangal Prasad Bhargava—for Appellants.

U. S. Bajpai—for Respondent.

Judgment.—The question for consideration in this case is not one free from difficulty. On the 13th June 1908 Tilak Rai, Ganesh Rai and Mahabir Rai borrowed Rs. 160 from Bhusi Rai, the plaintiff respondent and mortgaged with possession certain occupancy plots. There was an agreement that in case the mortgagee was ejected from the occupancy holding or from any portion thereof by any act on the part of the mortgagors or his heirs or legal representatives, he will be entitled to claim possession of the occupancy holding or to recover damages at the rate of 10 maunds per bigha from the date of his ejectment, or to recover the entire money due to him with interest at the rate of 2 % p. m. from the date of his ejectment till the date of realisation from the person and the other property of the mortgagors, including two houses specifically described in the deed. There was a further covenant that the occupancy holding and the two houses aforesaid shall be deemed to be mortgaged and hypothecated for the repayment of the money secured by the mortgage. The occupancy holding in question was situated in *chak* Abdulla Khatib alias Mauza Raziapur. The houses in question were situated in Balapur.

On the 16th February 1910 a deed of further charge was executed for Rs. 99-15 which provided for the repayment of the money due thereon, including interest, at the time of the repayment of the above mortgage and also mentioned that the occupancy holding and one of the houses shall stand mortgaged and hypothecated for the above amount.

On the 5th October 1910 there was a second deed of further charge executed for Rs. 49-15 couched in almost identical terms, with this difference that the house hypothecated for the repayment of the money due on that deed was the other of the two houses.

The allegation of the plaintiff was that he was placed in possession of the mortgaged holding and that in 1328 F. the defendants wrongfully interfered with his possession and removed the *Bajra* crop, which he had sown over the mortgaged land. The plaintiff accordingly sued for a decree maintaining his possession as a mortgagee over the occupancy plots in question with the *Arhar* crop standing on a portion of it. He further prayed that in case he was found to be out of possession, such possession may be awarded to him. In the alternative he asked for the recovery of the money due on the mortgage and deeds of further charge by the sale of the houses mortgaged. He also claimed the price of the crop, which was alleged to have been sown by him and wrongfully kept away by the defendants.

The defendants contested the claim on various grounds. Their plea was that the mortgage and deeds of further charge were fictitious and without consideration, that they did not give possession to the plaintiff over the disputed plots, that the crops standing thereon had been sown and cut by them, and that the plaintiff was not entitled to get possession of the holding or to bring the mortgaged house to sale.

The Court of first instance dismissed the claim, holding that as the mortgage of an occupancy holding

was illegal, the mortgage of the houses could not be enforced because its enforcement was interdependent on the failure of the mortgage of the occupancy holding The lower appellate Court, however, was of opinion that although the mortgage of an occupancy holding was illegal, the mortgagors could not oust the mortgagee by force after he had already obtained possession without repaying the mortgage money. It then asked the trial Court to determine whether the plaintiff had obtained possession under the mortgage in question and when they had been dispossessed. The finding of the Court of first instance was that the plaintiff had remained in continuous possession of the mortgaged holding till 1326 F. and that he was subsequently ousted by the defendants who took possession of the *Bajra* crop sown by the plaintiff on a portion of the mortgaged holding, worth Rs. 15. The finding of the lower appellate Court was that the plaintiff had been dispossessed less than six months before the institution of the suit and that on the ground of equity he was entitled to a decree for possession of the occupancy holding unless the mortgagors were willing to repay the mortgage money. It proceeded accordingly to give the plaintiff a decree for possession but omitted to consider whether the plaintiff was entitled to a decree for damages on account of the crop said to have been cut away by the defandants or whether the other crop which is said to have existed on the date of the suit was still existing on the spot or had been removed.

There can be no question that the mortgage of an occupancy holding was illegal. The only matter which requires consideration is whether in that event the plaintiff is entitled to get back possession except by a suit brought under S. 9 of the Specific Relief Act or to sue for the recovery of his money by the sale of the houses. The suit was not brought under S. 9 of the Specific Relief Act. In fact if it had been brought no appeal from a decree passed in such a suit could have been maintainable. As has been pointed out in *Lachman* v. *Shambhu Narayan* (1) where a plaintiff sues for possession on the basis of a title and fails to establish his title his suit for possession based on title cannot be converted into a suit for possession under S. 9 of the Specific Relief Act; and a decree for possession cannot be granted to him under the latter provision. In *Pal Ahir* v. *Asghar Husain* (2) where certain property mortgaged by the defendants, as if it were a fixed rate tenancy, was sold as such and purchased by the plaintiff who remained in possession for a time and afterwards the plaintiff was dispossessed by the defendants, who were found to have been occupancy tenants, it was held that a suit for the recovery of possession by the plaintiff was not maintainable inasmuch as the holding was an occupancy tenancy, a mortgage or sale of which could not be recognized. It was further held in that case that when a plaintiff is dispossessed otherwise than in due course of law and wishes to take the benefit of S. 9 of the Specific Relief Act, he ought to institute his suit on that ground alone and not on title so that the nature of the enquiry therein may be limited to the question of the immediate right of each party to possession. The learned District Judge observes that it would amount to encouraging the use of violence, if the Court refuses to give the mortgagee possession in these circumstances. But the mortgagee has his remedy open to him to seek possession irrespective of his title. He did not adopt that remedy and sought to obtain possession on the strength of his title and in the alternative for the recovery of the mortgage money due on the mortgage and the deeds of further charge. To such a suit S. 9 of the Specific Relief Act has no application.

The other points raised in the appeal have not been tried. The appeal is therefore allowed and the case remanded to the lower appellate Court with a direction to reinstate the appeal under its original number

(1) [1911] 33 All. 174=7 I. C. 495=7 A. L. J. 1078 (F. B.)
(2) [1911] 8 A. L. J. 404=10 I. C. 145.

and to dispose of it after determining the other points raised in the suit and the appeal in the manner directed by law. Costs shall abide the result and will include fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 71

MUKERJI AND DALAL, JJ.

Dikshit and Co. Ltd.—Defendants—Appellants.

v.

Mathura Prasad — Plaintiff — Respondent.

S. A. No. 1644 of 1922, Decided on 9th July 1924, from a decree of the Sub. J, of Cawnpore, D/-10th July 1922.

Company—Director — Additional remuneration is not due for doing what is his duty as director.

A director of a company is not entitled to any remuneration beyond what has been sanctioned by the articles of association for doing an act which would be his duty as a director to do. [P 71, C 2]

M. A. Aziz and *Shambhu Nath Chaube*—for Appellants.

U. S. Bajpai—for Respondent.

Judgment.—This small case presents an interesting question of law.

The respondent to this appeal was the plaintiff in the Court of first instance. He sued for recovery, *inter alia*, of a sum of Rs. 551. He was one of the directors of the defendant company who are now appealing in this Court. In paragraph 2 of the plaint the respondent says :—

"The defendant company was constituted promoter and managing agent of the National Transport Service Company Ltd. In this capacity, the defendant company entrusted this work to the plaintiff that he should select other directors for the said company and perform all the work in connection with the registration and promotion of the said company. As regards remuneration for this work, it was settled that the defendant company would pay Rs. 551 to the plaintiff besides travelling allowance."

It is for recovery of this sum of Rs. 551 and for recovery of some other sums with which we are no longer concerned that the suit was brought.

Numerous grounds of defence were set out and among these, one was to the effect that the plaintiff himself being a director of the defendant company it was his duty to perform the work of the company and he could not therefore get any remuneration beyond what was sanctioned by the Articles of Association. The learned Judge in hearing the appeal did not frame express issues as to whether the work for doing which the plaintiff claimed remuneration over and above the remuneration fixed by the Articles of Association was or was not within the scope of the business of the company. But he remarked that the plaintiff was asked to do a work which was not within the scope of his general duties and he did it. We do not feel bound by this so-called finding of the learned Judge. We have alrealy mentioned that the plaintiff himself admitted that the company took it upon themselves to promote another company and it was to perform the duties in connection with the promotion of this new company that the remunerations are claimed.

The proposition of law that, a director of a company is not entitled to any remuneration beyond what has been sanctioned by the Articles of Association for doing an act which would be his duty as a director to do, has not yet been questioned by the learned counsel for the respondent. This is a clear proposition of law. The directors are agents of the company, *viz.*, all the share-holders who constitute the company, and therefore stand in the same position as an agent to the principal. Further, they stand in special fiduciary relations to the share-holders. The case might be slightly different if there were one agent and one principal. The share-holders leave all the business of the company in the hands of the directors and it is therefore highly incumbent on the directors that they should act without raising the slightest suspicion of dishonesty. On the facts, it is clear that, the plaintiff is claiming remuneration for doing something which it was the duty of the directors to do. We find in the evidence of Jagannath Prasad Dikshit that one of the purposes for which the company was formed was the promo-

tion of other companies. The plaintiff cannot, in our opinion, claim anything over and above what has been fixed as the remuneration by the Articles of Association and the claim was therefore not maintainable. Other points raised do not require decision.

We allow the appeal, modify the decrees of the Courts below and dismiss the claim as regards the sum of Rs. 551 with proportionate costs. The costs in this Court will include counsel's fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 72

MUKERJI AND DALAL, JJ.

Kirtarath Gir—Judgment-Debtor—Appellant.

v.

Muthara Frasad Ram and others—Decree-holders—Respondents.

E. F. A. No. 367 of 1923, Decided on 1st July 1924, against the decree of the Sub. J. of Gazipur, D/- 28th July 1923.

(a) *Agra Tenancy Act. S. 20 (3)–Appointment of receiver in execution proceedings against* thekadar, *to collect latter's arrears of rent and utilise them for satisfying decree is legal.*

In execution of a decree passed against a *thekadar*, a receiver was appointed to collect rents recoverable by the *thekadar* from occupancy and non-occupancy tenants, and to utilise them in satisfying the decree against the *Thekadar*.

Held : that the appointment of the receiver did not amount to the transfer of the property from the judgment-debtor to the receiver and hence was not illegal. [P. 72 C. 2]

(b) *Civil P. C., O. 40.—Execution Proceedings Receiver ; appointment of-No transfer of J. D's property takes place.*

Order 40 Civil P. C. does not specifically refer to execution proceedings. When in excution proceedings a receiver is appointed he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. [P. 72 C. 2

M. L. Agarwala—for Appellant.

Janki Prasad—for Respondents.

Judgment:—The judgment-debtor in this case is a permanent lessee or *thekadar* paying a certain rent to the zamindar. In the execution department in execution of a decree passed against him the learned Subordinate Judge has appointed a receiver to collect rents recoverable by the *thekadar* from occupancy and non-occupancy tenants. He has come here in appeal in consequence. It was argued on his behalf that he was in the position of a non-occupancy tenant and his interest in the holding cannot be transferred except by way of lease of one year.

It was contended that the order of the lower Court amounted to a transfer of the interest of a *thekadar* and was therefore invalid under the provisions of S. 20 (3) of the Agra Tenancy Act. Reference was also made to Order 40 rule 1 for the appointment of a receiver where a Court is given power to order the removal of any person from the possession or custody of the property. The inference sought to be drawn, was that the property has been removed from the possession and custody of this *thekadar* and receiver is appointed to be in possession and custody of the property. We do not take this view of the appointment of a receiver, Order 40 does not specifically refer to execution proceedings. When in execution proceedings a receiver is appointed we take it that he is put in the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. The arrears of rent which have once accrued are admittedly liable to attachment and recovery in satisfaction of a debt. All that Court has done is to appoint a person who shall, whenever rents have accrued, recover them and utilise them on behalf of the judgment-debtor in payment of the decree. There is no transfer of the interest of a *thekadar*. Taking this view we do not think that there is any prohibition, against the order of the lower Court, contained in the Tenancy Act.

We dismiss this appeal with costs which will include fe< here on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 73

BOYS, J.

Mt. Kumli—Applicant.

v.

King Emperor through Mr. Gardiner—Opposite Party.

Criminal Rev. No. 307 of 1924, Decided on the 17th June, 1924 against the order of S. J., Kamaun, D/-12th April 1924.

Criminal P.C., S. 488—Section includes application by wife or child—Mere receipt of money by the mistress is not binding composition of child's claim—Application by woman for the school fees of the child can be amended by Court on its own motion as one by her as guardian of child—Maintenance includes only food, clothing and lodging and does not include school fees—Application deliberately made for school fees cannot be amended by Court on its own motion as one for maintenance.

S. 488 contemplates application by a wife or a child. Where the widow alleged herself to be a discarded mistress, and the application was made by her for the school fees of her son.

Held: that this would require only a formal amendment of the application as one by the woman as guardian of the child and that the amendment might be made by the Court on its own motion. The payment of money to the child's mother by the alleged father could be weighed as evidence of an intimacy between the alleged father and the woman, but in no sense could it be regarded as a binding composition of the claims of the child. The object of proceedings for maintenance is to prevent vagrancy and that object is attained by the provision of lodging, food and clothing. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing; he is not bound to maintain her as his wife.' 16 Bom. 269 Referred to. 4 I.C. 758 Foll. [P 74 C 2; P 75 C 1, 2]

A Court ought to allow an application framed as one for educational expenses into one for maintenance only if it was satisfied that the application as framed was framed in error, that what the women really wanted on behalf of the child was maintenance, and not where the application had been deliberately and purposely framed. [P 75 C 2; P 76 C 1]

The applicant was not represented.

Sarkar—for Opposite Party.

Judgment—This is an application in revision from an order of the Sessions Judge Kumaun upholding an order of a first class Magistrate refusing to make an order under S. 488 at the instance of a woman called Musamat Kumli for the payment by one Gardiner of Rs. 15 a month for the education of a child, whom the woman alleges to be her illegitimate child by Gardiner.

The narrative of case is briefly as follows:—Musammat Kumli was engaged by Gardiner, whose wife was dead, to look after his children some time at the end of 1910 or beginning of 1911. Her husband was in Jail, and was released in 1913, in about July as the woman says. She belongs or belonged to the *dom* caste. She gave birth to a child, the date as alleged by her being November the 15th 1913. She apparently used to look after Gardiner's children during the winter months and, usually, if not always, return to her home, a village three miles outside Naini Tal, during the hot months, when the children were at Naini Tal. She left Gardiner's service in 1919, according to her own account, but more probably in the first half of 1916, as alleged by Gardiner. She at least is certainly wrong about the date because she admits that settlement was made with her at the end of 1918, admittedly also a long while after she was turned out. She says she was turned out because, as Gardiner said, she was now beginning to have children and she admits that not long afterwards she had a 4 months miscarriage. Towards the end of 1918 Gardiner paid her Rs. 300 in settlement of her claims. Four and a half years later she has lodged the present application, asking for payment of Rs. 15 a month to be made by Gardiner to some body she calls the "Rector of the school", for the education of the child. She has informed me in this Court that she is now a Roman Catholic and that the "Rector of the school" to whom her application refers is the Roman Catholic Bishop of Lucknow. Both Gardiner and the woman are agreed in asserting, whether truly or falsely, that the settlement made at the end of 1918 by the payment of Rs. 300 did not concern the child. Gardiner denies paternity and therefore, as must follow, denies that any settlement was made for the child. He denies that he ever had or accepted responsibility for it. The woman declares that the settlement did not include the child but was a payment

to herself and that Gardiner said he would be responsible for the future of the child.

The Magistrate disbelieved very much the woman's story and came to a definite finding that "in such surroundings it is impossible to say who may or may not have had sexual intercourse with Musammat Kumali who is a woman of loose character." In other words, he found it impossible to attribute paternity to Gardiner. He further appears to have attached some weight to the fact that if the woman got Rs.300"it is fairly obvious that this must have been done to prevent her making any sort of claim whatever again for maintenance." The learned Sessions Judge held :

(a) That S. 488 does not provide for education expenses.

(b) That the payment of Rs. 300 "appears to have satisfied all Musammat Kumli's claims."

(c) That the payment of Rs. 300 and the letters filed "strongly support her allegation of intimacy with Gardiner."

(d) And that he "would consider that the preponderance of probabilities strongly favour Musammat Kumli's claim that Mr. Gardiner is the father of the boy Harry."

He has not found definitely whether or not Gardiner is the father of the child.

Both Courts in dismissing her claim ordered the payment of Rs. 300 costs to Gardiner. The woman has applied in revision to this Court.

The learned Acting Chief Justice issued notice to Gardiner to show cause :

(1) Why the case should not be remitted to the Magistrate to hear according to law.

(2) Under what circumstances he alleges that any previous payment or gift of a house in 1918 was accepted by the lady as a composition for her claim under S. 488.

The only issues in the case really were :—

(1) Has the woman, Musammat Kumli, any right to make the application in her own name?

(2) Do "Educational expenses" (for which alone she asks) come within the term "maintenance" in S. 488 so as to permit of an order being made for the payment of such expenses?

(3) Is the child proved to be the child of Gardiner ?

As to the first question, it is clear that S. 488 contemplates applications by a wife or a child. In this case there is no question of a wife. Musammat Kumli only alleges herself to be a discarded mistress, and the application should have been made by the woman as guardian of the child and for the child. This would only have called for a formal amendment which could have been rightly permitted had the point been noticed in the Courts below, and I have in fact here treated the application as if it had been made by the woman not in her own name but as guardian of the child and for the child. This is not a mere technicality for had the point been noticed the lower Courts would not have fallen into the error of speaking of the payment of Rs. 300 by Gardiner as if it was a composition of the claims of the child and further the second portion of the rule issued to Gardiner by the learned Acting Chief Justice would not, as I think, have been issued in its existing form. Properly regarded the payment of the Rs. 300 could be weighed as evidence of an intimacy between Gardiner and the woman, but in no sense could it be regarded as a binding composition of the claims of the child. It is to be noted, however, that neither of the lower courts actually dismissed the application on the ground that there had been a final composition. The first court dismissed it on the ground that it was impossible with any certainty to attribute the paternity to Gardiner. The learned Sessions Judge upheld the dismissal but on the actual ground that S. 488 does not provide for ordering payment of educational expenses.

With any claim of the woman, then, in her own right we are not concerned. She has no claim. I deal with the claim as if it had been made by her as guardian of the boy for the boy. For the child, if he is in fact an illegitimate child disowned by his father everybody must feel sympathy,

but whatever it may be possible to do for him in other ways, that sympathy must not be allowed to have the smallest influence in determining the weight to be attached to the evidence produced by the woman who claimed to be his mother as against the alleged father. And similarly an appreciation of the unpleasantness of the position of the alleged father in such a case as this must be allowed no weight as against the child.

In this case the opposite party happens to be an Inspector or retired Inspector of Police, but it is right to say at the outset that that fact has had, so far as the record indicates, no bearing on the facts of this case either before or after it came into Court. There is nothing before me to show that Gardiner has in any way abused his position as a police-officer.

I have gone into the facts with very great care. The child was unrepresented here by any Counsel and the burden thrown on me was very much heavier in consequence.

I have examined more than once every word of the record and if the issue of paternity had to be decided, I should have been compelled to order the matter to be re-heard after taking further evidence on the ground that evidence was produced in the Sessions Court which was not fully sifted and that certain other points needed further inquiry, before the issue of paternity could be decided, particularly in reference to the evidence of 1913 and 1918. I will proceed to state my reason for not adopting that course. As I have said, the fact that the application is made in the name of the woman is a matter of form. The second point *viz.* whether such an application as the present can be made for the payment of educational expenses requires deeper consideration. S. 488 of the Code of Criminal Procedure says:

"If any person neglects to maintain his legitimate or illegitimate child unable to maintain itself, the Magistrate may upon proof of such neglect order such person to make a monthly allowance for the maintenance of such child.

It was on the ground that 'maintenance' does not include educational expenses that the learned Sessions Judge dismissed the case. He quoted no authority and gave no reasons in support of his opinion.

The object of proceedings for maintenance is to prevent vagrancy [compare *Sheikh Hakrulin In the Petition of* (1)] and that object is attained by the provision of lodging, food and clothing. A husband is bound to "maintain" his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her "as his wife." See *Gulabdas Bhaidas In re* (2). The specific question of schooling fees was very fully considered in the case of *Nga H'a* v. *Mi Hla Kya* (3), a case of the Upper Burma Report, decided on the 5th of January 1909. In that case an application was made for an increase in the amount of the maintenance that had already been allotted on, amongst other grounds "that costs of schooling fees and clothing will be increasing", as the child grew older. Mr. Shaw, J. C., who had made research among English and Indian authorities also came to the definite conclusion that maintenance "is not intended to go further than to insure to the wife or children food, clothing and lodging." I need not detail at greater length his reasons, which are set forth fully in the report for holding that maintenance does not include education. From those reasons I see no reason to differ and to that extent uphold the order of the Sessions Judge in this case.

A question that might arise is as to whether I should in any way facilitate, if I can do so, the amendment of the application so that it might take the form of an application for maintenance proper. I should at any rate have grave doubts as to whether I had any power to allow such a material alteration, but of one thing I am quite certain and that is that I ought only to allow it if I was satisfied that the application as framed was framed in error, that what the woman really wanted on behalf of the child was maintenance. But there are facts in this case which make it perfectly clear beyond the shadow of a doubt that the application was framed as it

(1) [1885] 9 Bom. 40.
(2) [1892] 16 Bom. 269.
(3) [1909] 4 I.C. 758.

was deliberately after advice being taken and in no way at all owing to ignorance.

It is only necessary to refer to the fact that on October 19th, 1919, Mt. Kumli on behalf of herself and the child purchased a house in Almora for the sum of Rs. 150. At first she told the Court that she had expended the Rs. 300 given her by Gardiner in settlement of her domestic expenses and said nothing about this purchase. Later when cross-examined further she said that she had purchased this house out of the sum of Rs. 300. When asked to produce the sale-deed she said she had none. Pressed again on the point she admitted that there was a sale-deed, but said that it was with her brother. Gardiner applied for and obtained a copy of the sale-deed. It showed that the purchase was made in her name and that of the boy "Harry, son of Jogia". She says now in explanation of that that she never saw the sale-deed or had anything to do with it and that Gardiner got the name of Jogia entered in the sale-deed. She had, however, further to admit that one Jogia Mistri was endeavouring to get her to become his mistress.

I need not enter now into the question of whether the settlement which was made at that time was a settlement intended to include the claims of the child or not. Whether Gardiner at that time was admitting, at any rate to the woman, the paternity of the child and the settlement was made on that basis, or whether he was denying it, or whether she was in fact then making no claim, one thing is certain and that is that she considered at that time that all claims of whatever sort or on whatever basis were being settled at that time, and so did Gardiner. This is clear for two reasons. No man would have settled the woman's claims and, if claims, true or false, were being made as regards the child, would have left those open. Similarly, if those claims as to the child were being made, truly or falsely, and if they were not settled, but, as the woman says, Gardiner promised to be responsible for the child, it is incredible that the woman should have waited for four and a half years to make any claim for the child. Therefore, it is certain that whatever claims may have been made in 1918 and whether they were admitted or not the woman thought that all claims to maintenance, even on behalf of the child, had been settled. That the child's claims, if he was Gardiner's child, could not be legally so concluded is immaterial. That is what she thought and what her advisers thought and that is why her application was deliberately framed by her and her advisers to ask for schooling expenses only and for those to be paid not to her but to the "Rector of the School." In these circumstances, I should feel wholly unjustified, even if I had the power, in suggesting or permitting any amendment. The result is that so far as this application asks for Rs. 15 for Schooling fees to be paid to the "Rector of the School", it must be dismissed.

The remaining question for consideration is the question of the costs allotted to Gardiner. I do not wish to say anything that may seem in any way to suggest any opinion of mine on the main question which was at issue and which as I have already said I am of opinion could not be satisfactorily determined without further enquiry. But in deciding the question of costs I have to consider the responsibility of each of the parties in connection with these proceedings and also the question whether the parties have put their cases frankly before the Court. For the reasons I have already given, it is undesirable to enter into particulars of some of the matters on which evidence was given. But as regards Mr. Gardiner's want of frankness I may instance the incident of the photographs. When he was shown two photographs, he denied having taken them, with the result that a commission had to be executed to the Magistrate at Saharanpur to ascertain whether or not the photographs had been taken in the compound of the bungalow, at that time occupied by Gardiner in Saharanpur. It was proved that the building appearing in the photograph was an out-house in that compound.

On the other hand I am satisfied that there was at least one most dis-

creditable incident in the case of the applicant. The Sessions Judge, before whom the photographs were first produced, asked the child whether he knew anything about them. The child is now 10½ years of age. He was born, if we are to believe the woman, on November 15th, 1913. The woman said, in November 1923, that the photographs were taken 8 years previously; in other words in the cold weather of 1915. I have no doubt that the learned Sessions Judge would not have asked the child any question about the photographs had he realised, as it is easy for me to do with the whole record before me, that the child was at that time two years of age. The child in reply said "Kamli is my mother. I know the Sahab (Mr. Gardiner). He is my father. I remember this picture (Ex. X). My father here took it. I do not remember the name of the dog. This (Ex. Y) is a photo of me, Dorothy (one of the children of Mr. Gardiner) and my mother. I cannot make out the fourth person. My father here took the photograph. What I have round my neck is the Miss *Sahib's Chaddar*, not my mother's. The others were wearing boy's clothes, my mother too". The photograph (Ex. X) referred to was one of a group in which this woman, Mt. Kamli, Gardiner's two little girls and his little boy Eric had been dressed up for fun. The boy in the photograph (Ex. X) was, as this woman admits, not the child before the Court but Gardiner's boy Eric. Nothing is more plain than that an endeavour had been made to coach this poor child to pretend that he knew all about and remembered the photographs. It was impossible that he should do so, as he could only have been two years old, on the woman's own saying. But this fact was overlooked with the result that the poor child made a hopeless mess of his statement. Comment on this incident is superfluous. Anything more disgraceful is difficult to imagine.

Taking into consideration such acts as these on both sides of the case I alter the order for costs from one for the payment of Rs. 300 to the payment of Rs. 150, the said 150 to include the doctor's fee, which had to be paid owing to another false statement made by this woman as to Gardiner having a birth-mark similar to that of the child. With the modification of the order as to costs I dismiss the application.

Application dismissed.

1925 ALLAHABAD 77

WALSH, AG. C. J. AND RYVES, J.

Alice Georgina Skinner—Plaintiff—Appellant.

v.

Kunwar Mukarram Ali Khan—Defendant—Respondent.

S. A. No. 14 of 1923, Decided on 28th May 1924, from an order of Sub. J. of Muzaffarnagar.

Limitation Act, Art. 177—Time given after Act XXVI of 1920, but prior to Act XI of 1923, was 6 months.

The amending Act 26 of 1920 did not touch Article 177. Therefore, after the Amending, Act, was passed the period in the column, according to law, opposite article 177, was still six months notwithstanding the use of the word "ditto". Subsequently in 1923, by act XI of 1923, the period has been altered to 90 days. [P. 78, C. 1]

B. E. O' Conor and Nehal Chand—for Appellant.

Surendra Nath Sen, Girdhari Lal Agarwala, Ponna Lal and Gopi Nath Kunzru—for Respondent.

Judgment.—In our opinion this appeal must succeed. The learned Judge says this ingnorance of the law is no excuse. It is a dangerous proposition. We think that almost any excuse for ignorance might be accepted under these circumstances if it were necessary for us to consider whether we ought to extend time. But we are of opinion that no extension of time, or concession of any kind, is required by the appellant. The difficulty has been to ascertain what the law is. It now turns out, that the appellant was right and the Judge was wrong. The Punjab Hight Court, (*Cf.* 1924 Lahore., 65), after an exhaustive enquiry have ascertained that when the Act of 1920 was enacted by the Government of India, the period pro-

vided in the appropriate column opposite to Article 177 was "six months." No slovenly use of the word "ditto," a word which ought to have no place in any statute at all, has anything to do with the matter. The period was six months.

The Amending Act, XXVI of 1920 did not touch Article 177. Therefore, after the Amending Act was passed, the period in the column, according to law, opposite Article 177, was still six months and that was actually the period provided when the appellant put in her application on the 28th June. That application was well within six months and was, therefore, in accordance with the existing law. Subsequently in 1923, by Act 11 of 1923, the period has been altered to 90 days, but that was susequent to this application. The appellant was, therefore, perfectly within her rights.

The appeal succeeds and the matter must be sent back to the lower Court with direction to re-hear the application according to law.

The appellant is entitled to her costs here and below. The costs in this Court will include fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD

NEAVE, J.

Nihora Khan and others — Defendants—Appellants

v.

Mathura Khan— Plaintiff—Respondent.

S. A. No. 191 of 1923, Decided on 26th June 1924, against the decree of the D. J. of Ghazipur, D/- 7th November 1922.

Contract Act, S. 74—Stipulation to pay compound interest at 1½ p. c. p.m. on default to pay simpele interest at 1 p. c. p. m. was held a penalty and the rate was oreduced to 1 p. c. compound interest.

The mortgage deed provided for the payment of simple interest at Re. 1 per cent per mensem with a clause that in case of default the already accumulated interest should be added to the principal and thereafter compound interest paid on the whole at Rs. 1-8 per cent per mensem.

Held: that the stipulation is a penalty and further that it was too high and must be reduced to compound interest at 1 p. c. p. m. 34. Cal. 150—Ref. to. [P. 78, C. 2.]

U. S. Bajpai—for Appellants.

A. P. Pandeya—for Respondent.

Judgment.—The only point taken in this appeal is that the rate of interest allowed by the Courts below is excessive. The mortgage deed provided for the payment of simple interest at 1 per cent per mensem with a clause that in case of default the interest already accumulated should be added to the principal and thereafter compound interest paid on the whole at Rs. 1-8 per cent per mensem. It is contended in appeal that this clause is a stipulation by way of penalty under S. 74 of the Contract Act and this is not denied by the opposite party It is, however, claimed by the latter that the penalty is not excessive. The principal money secured by the bond was Rs. 250, the amount now claimed is Rs. 638. Both the Courts below have held that the interest claimed is not excessive.

The appellant's learned pleader refers to *Sundar Koer* v. *Rai Sham Krishen* (1), but in view of the explanation now added to S. 74, it is quite clear that any such stipulation as that contained in this deed is a penalty. I am unable to agree with the Courts below that the interest charged for breach of the covenant to pay upon a certain date is not unreasonably high. Some compensation is no doubt due. I consider that compound interest at 1 per cent. per mensem would amply meet the case. The appeal is allowed to this extent that the interest allowed by the Courts below up to the date of suit is reduced to 1 per cent. per mensem compound interest with annual rests. The appellant will get proportionate costs including in this Court fees on the higher scale.

Appeal allowed.

---

(1) [1907] 34 Cal. 150—34 I. A. 9=9 Bom. L. R. 304 11 C. W. N, 249=17 M. L. J. 43—2 M. L. T, 75—4 A. L. J. 109—5 C. L. J. 106 (P. C.)

✱ ✱ 1925 ALLAHABAD 79

SULAIMAN AND KANHAIYA LAL, JJ.

Shib Deo Misra and others — Plaintiffs—Appellants.

v.

Ram Prasad and others — Defendants—Respondents.

F. A. No. 212 of 1921, Decided on 14th March, 1924, from the decree of the Sub J., Agra.

✱ ✱ (a) *Limitation Act, Art. 118—Suit by reversioners for possession against alleged adopted son within twelve years of Hindu widow's death is in time—Limitation Act, Art. 144.*

Reversioners suing for possession of property from an alleged adopted son and his transferees are not bound to bring a suit for declaration that the alleged adoption had in fact not taken place. They are entitled to wait till the lady died and then bring a suit for recovery of possession and therefore a suit brought within 12 years of the death of the widow cannot be held to be barred by the six years' rule. [P. 80, C. 2]

✱ ✱ (b) *Civil P. C., O. 6 R. 17—Omission to verify is a mere irregularity curable at a late stage.*

A plaint is not a void plaint merely because it does not contain the verification clause as required by the Code of Civil Procedure. The omission to verify it is a mere irregularity which could be cured even at a later stage and such a plaint therefore is deemed as presented on the date of actual presentation and not on the date of its verification. Merely on the ground of such a defect, the plaint cannot be treated as altogether invalid. The subsequent verification is not amendment of the plaint. 22 A. 1. 55 Ref. to. [P. 80, C. 2]

(c) *Evidence Act, S. 35—Death Register kept in Police station is official book.*

The Death Register kept at the police station is an official book and the entries in it are legally admissible. Such a register is an official book, register or record made by a public servant in the discharge of his official duty within the meaning of Section 35 of the Evidence Act, and an entry made therein would, therefore, be itself a relevant fact. 14 O. C. 68, 15 O. C. 321, 19 O. C. 221, 54, I. C. 166. Dist. 46 Cal. 152 and 22 O. C. 124 Fol. 41 Mad. 26 Referred to. [P. 81, C. 2]

✱ ✱ (d) *Civil P. C, S, 11—Explanation 6—Decision between Hindu widow and alleged adopted son regarding the ownership of the estate is binding on reversioners.*

A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely the reversioners in this case) must be deemed to have been represented through her under S. 11 Explanation 6 of the Code of Civil Procedure. [P. 83, C. 2.]

✱ ✱ (e) *Hindu Law—Adoption—Adoption of a boy belonging to another sub-caste of the primary caste was held valid.*

Adoption would not be invalid so long as the adoptive father and the adopted son belonged to a sub-caste of the same primary case especially when intermarriage between the two sub-castes is permissible. 17 O. C. 186 Ref. to. [P. 83, C. 2.]

✱ (f) *Hindu Law—Succession — Collateral reversioners take separately.*

In cases of collateral succession after the death of a Hindu widow the property inherited is the separate property of all the reversioners and does not go to the head of the family only. [P. 84, C. 1.]

✱ ✱ (g) *T. P. Act, S. 41—Transferee from Hindu widow is not protected by S. 41.*

A transferee from a Hindu widow who takes the property from her before the reversioner's right has accrued cannot successfully plead the bar of Section 41 of the T. P. Act, although he was a *bona fide* transferee for value who had taken the property after due enquiry. A Hindu widow enters into possession of her husband's estate by right and not with any express or implied consent of the reversioners. While she is alive the reversioners have no voice in the matter and have no right to intervene. She can continue in possession in spite of their protest. A transferee from such a person, who is in possession by her own right and as to whose possession no consent of the reversioner can be implied by law, cannot claim the protection of S. 41. [P. 84, C. 2.]

B. E. O'Conor and Lalit Mohan Banerjee—for Appellants.

Surendra Nath Sen, Mohan Lal Sanyal, Shiam Krishna Lal and Kailas Nath Katju—for Respondents.

Judgment.—This was a plaintiffs' appeal arising out of a suit for recovery of possession on the allegation that the plaintiff No. 1 is the reversionary heir of Kallu Misra, deceased, the last male owner of the property. Plaintiffs Nos. 2 and 3 are transferees from plaintiff No. 1. In the plaint it was alleged that on the death of Kallu Misra, his widow, Musammat Mohini, entered into possession as a Hindu widow for her life, that she unlawfully made various transfers and ultimately died on the 15th of December, 1907. The suit as brought was just within limitation of this date as the Courts were closed on the 15th and 16th of December, 1919. The defendant No. 1 claimed to be the adopted son of Kallu Misra. The other defendants were transferees either from Musammat Mohini or from the defendant No. 1, who are

now in possession of the bulk of the property in dispute.

On behalf of the defendants there were several pleas taken. There was a denial of the pedigree set up by the plaintiffs. There was a plea that the claim was barred by time, and there were pleas that Ram Prasad, defendant No. 1, was the adopted son of deceased, that the claim was barred by the principle of *res judicata* and that it was also barred by estoppel.

In the pleadings or at the time when the issues were settled there was no suggestion that the deceased Kallu Misra, had left any will. On the other hand, the plaintiffs' vakil admited that Shib Deo Misra, plaintiff No. 1, had other brothers alive and also stated that he would not amend his plaint. As matters stood on the pleadings, it was clear that in any event Shib Deo Misra, not being the sole surviving reversioner at the time of the death of Musammat Mohini, the entire claim could not be decreed. At a late stage in the case Ram Prasad, defendant No. 1, filed a number of papers among which there was a document purporting to be a will of Kallu Misra and bearing the date, 4th of October, 1887. Under it with the exception of a temple and rights connected therewith which were to go to Ram Prasad himself, the rest of the property was, on the death of Musammat Mohini, to go to Shib Deo Misra to the exclusion of his other brothers.

The learned Subordinate Judge came to the conclusion that the plaintiff's pedigree was established, that Ram Prasad's adoption had not been established, and that the claim was not barred by *res judicata*. He however, found that the plaintiffs had failed to prove that Musammat Mohini died within 12 years of the suit, that the will produced by Ram Prasad was a forgery and that the claim was barred by the principle of estoppel.

The plaintiffs appealed and challenged the findings arrived at against them.

[After stating facts as set out above judgment continued.] The learned advocate for the respondents has not only supported the decree on the findings in his favour but has also supported it on the other pleas raised. Thus all the important issues of fact and law have been re-argued before us and we propose to dispose of all of them.

The first question is one of limitation. This plea was based on three grounds (1) that the alleged adoption of Ram Prasad not having been set aside within six years, the claim was barred by time, (2) that the plaint when originally filed was not varified at all and this defect was not cured till long after the expiry of the period of limitation, and (3) that Musammat Mohini had not died on the 15th of December, 1907 but died either on the 9th or 10th of December of that year and the claim was beyond time.

We agree with the learned Subordinate Judge that the six years rule has no application to this case. The reversioners were not bound to bring a suit for a declaration that the alleged adoption had in fact not taken place. They were entitled to wait till the lady died and then bring a suit for recovery of possession. The present claim is not one for mere declaration but is for possession. If it is brought within 12 years of the death of Musammat Mohini, it cannot be held to be barred by the six years rule.

We, however, do not agree with the view taken by the learned Subordinate Judge that the verification having been made after the expiry of 12 years, the suit itself was barred by time. It appears that the plaint was actually presented in Court on the 17th December, 1919, but though it bore the signatures of all the plaintiffs, it did not contain any verification by them. This defect was brought to the notice of the munsarim by one of the defendants and subsequently to that of the Court. Under an order of the Court the verification was ultimately made, but it was some months afterwards. We are, however, of opinion that the plaint was not a void plaint merely because it did not contain the verification clause as required by the Code of Civil Procedure. In our opinion the omission to verify it was a

mere irregularity which could be cured even at a later stage. Merely on the ground of such a defect, the plaint cannot be treated as altogether invalid. The subsequent verification was not an amendment of it. This has been the view consistently followed in this Court, and we may refer to the cases of *Rajit Ram* v. *Kalesar Nath* (1) and *Basdeo* v. *John Smidt* (2), which follow the case of *Mohini Mohun Das* v. *Bengsi Budan Saha* (3).

The main point to consider in connection with the plea of limitation is the exact date on which Mt. Mohini died. There can be no doubt that the burden lies on the plaintiffs to prove conclusively that her death took place within 12 years of the suit. [The judgment after discussing oral evidence dealt with the contention of the respondent that a certain Daily Death Register was not admissible in evidence, as follows :—]

He has relied on a number of cases decided by the Oudh Court in support of his contention. In all these reported cases, however, the book in question was the Chaukidar's pocket book and not the Death Register kept at the police station. The cases of *Sampat* v. *Gauri Shanker* (4). *Habibullah* v. *King-Emperor* (5), *Bisheshar Dayal* v. *Hira Lal* (6) and *Mohammad Jafar* v. *Emperor* (7), are thus distinguishable. On the other hand, it has been laid down in the case of *Tamijuddin* v. *Tazu* (8), and in the case of *Zait-un-nissa* v. *Hasrat-un-nissa* (9), that the Death Register kept at the police station is an official book and the entries in it are legally admissible. A somewhat similar view has been expressed in the case of *Ramalinga Reddi* v. *Kataiya* (10).

Under the Police Act (No. V of 1861), S. 12, the Inspector-General of Police is authorised to frame orders and rules relative to, amongst others, the collecting and communication by them of intelligence and information etc. Under the Police Regulations, Chapter 24, paragraph 274, sub-clause 4. the Head Muharrir of every police station officer has to keep registers of births and deaths and make entries therein as reported by the village chaukidars. There are prescribed forms, Nos. 1 and 5, which have to be used for that matter. The register in question contains printed pages of the form No. 5 and it was manifestly kept at the police station and latter on forwarded to head-quarters. The mere fact that the entries in it are made in chronological order would not show that this document is not an official book. We are clearly of opinion that this register was an official book, register or record made by a public servant in the discharge of his official duty within the meaning of S. 35 of the Indian Evidence Act. An entry made therein would, therefore, be itself a relevant fact,

Mr. Dar, who argued the case on behalf of another set of respondents, has strongly contended that even if the Register is an official book within the meaning of S. 35 and even if an entry in it is a relevant fact, the register must either be proved by some evidence or be shown to come within the scope of S. 81 of the Indian Evidence Act. It cannot be denied that there is no oral evidence on the record that this was the identical register which was kept at the police station, Etmadpur, in which circle village Brijnath, where Mt. Mohini died, is situated. All that is known is that this was brought in Court from the Record Room at head-quarters by a clerk named Abdul Ghani. Mr. Dar has, therefore, contended that the Court can presume its genuineness under S. 81 of the Evidence Act only when it is shown that this is a document directed by any law to be kept by any person and if such document is kept substantially in the form required by law and is produced from proper custody. His argument is that the Police Regulation No. 274,

(1) [1896] 18 All. 396—1896 A.W.N. 102.
(2) [1899] 22 All. 55—1899 A.W.N. 172 (F. B.)
(3) [1890] 17 Cal. 560 (P.C.)
(4) [1911] 14 O.C. 68—10 I.C. 713.
(5) [1912] 15 O.C. 351—18 I.C. 653—14 Cr. L.J. 93.
(6) [1916] 19 O.C. 221—36 I.C. 941—4 O.L.J. 49.
(7) [1919] 22 O.C. 250—6 O.L.J. 577—54 I.C. 166—21 Cr. L. J. 22.
(8) [1918] 46 Cal. 152=46 I.C. 237=22 C.W. N. 822.
(9) [1919] 22 O.C. 124—52 I C. 162.
(10) [1917] 41 Mad. 26—22 M.L.T. 17—33 M. L. J. 60=(1917) M. W. N. 558—41 I. C. 136—6 L.W. 246..

sub-clause 5 enjoins the keeping of a register with separate pages assigned for each village and that, therefore, this register is not kept substantially in the form required by law, assuming that the law requires it to be kept. He has argued that it was, therefore, incumbent on the plaintiffs to lead evidence to prove the identity of this register and to show that it is this very register which has come from the Record Room and which was the register kept at the police station. The answer to this objection is that in addition to the original register, the plaintiffs have produced a certified copy of its entry, and a certificate is endorsed on it purporting to have been given by an authorised officer. The correctness of the copy must, therefore, be presumed under S. 79 of the Evidence Act. This copy removes all doubt as to any possible mistake in the identity. We have already said that the entry in the Daily Death Register is corroborated by the statement contained in the plaint of 1908. These two pieces of evidence, even excluding the other register, are very strong evidence of the exact date of the death of Mt. Mohini. As against this we have no rebutting evidence whatever except the solitary statement of Jhamman Lal, the brother of Mt. Mohini. We have already said that Jhamman Lal, when sued in 1908 by Ram Prasad, did not specifically deny the correctness of the date. In the witness box he did not appear to be a man possessing a retentive memory.

There is of course always a possibility that the date given by Ram Prasad in his plaint might not have been the exact date or that the date as reported by the chaukidars was not correct date. But in the absence of any other reliable evidence, there is no reasonable ground for doubting that the statements contained in these two independent documents, which corroborate each other, were, inaccurate.

We accordingly hold that the plaintiffs have established that Mt. Mohini died on the 14th of December 1907 and that therefore, the present claim was in no way barred by time. The next point which we propose to consider is the question of Ram Prasad's adoption.

The plea of *res judicata* is raised in connection with this issue and is passed on the following circumstances. Kallu Misra had admittedly brought up Ram Prasad in his house from his childhood. It is the defendants' case that he even performed Ram Prasad's *Janeo* ceremony and marriage ceremony, but the evidence as to this consists of the solitary statement of Jhamman Lal and is, therefore, not necessarily strong. There can be no doubt, however, that Ram Prasad had been living in Kallu Misra's house when he died and continued to live for some time longer. On the 20th of August, 1897 he executed a bond in which he asserted that he was the adopted son of the deceased Kallu Misra. Mt. Mohini promptly instituted a suit on the 26th of November 1897, for a declaration that Ram Prasad was not the adopted son of Kallu Misra and that the bond referred to above was altogether invalid and ineffectual, Ram Prasad filed a written statement on the 18th of December, 1897, in which he put forward his claim of a valid adoption. The parties, however, entered into an agreement to refer all their disputes to arbitration and the Court referred the matter to the arbitration of three arbitrators. Two of these three arbitrators are proved in this case to have been residents of the same mohalla, Kachhri Ghat, where Kallu Misra used to live and one of these two, namely Ganga Prasad, used to live in a house which was in front of Kallu Misra's house, the two houses being separated only by a road. Ganga Prasad's son, Mahabir Prasad, proves this. On the 24th of February 1898 the arbitrators delivered their award in which they stated that they were empowered under the agreement to decide the dispute between the parties, without having regard for the issues and without taking any evidence. They expressed the opinion "Ram Prasad is the son and the proper heir of Kallu Misra deceased." Then they proceeded to direct that out of the entire estate left by him, one house was to remain in the possession of Mt. Mohini for

life and to go to Ram Prasad after her death and that two houses were to vest absolutely in her with full power of alienation. Ram Prasad filed objections to this award on the 14th March 1898. The Court, however, disallowed these objections on the 25th of March 1898 and ordered that a decree be prepared in accordance with the award. A decree was accordingly prepared which bears the date 25th of March 1898.

The learned Subordinate Judge has held this decree not to be binding on the ground that, in his opinion, it was not passed after a fair trial, but merely embodied a private settlement of the dispute, the arbitrators having been given power to decide the case without taking any evidence and without having regard to the issues framed. There is not much evidence on the record to indicate any peculiar circumstances under which the proceedings had been conducted. All that we know is that there was one sitting of the arbitrators. At least two of the arbitrators were residents of the same mohalla and there is nothing strange if they had been given power to decide the case on their own personal knowledge without taking any further evidence. The suit was a contested one and the award was made after the case had been referred to the arbitrators under an order of the Court. Objections were also filed to the award and they were disallowed. We are, therefore, entitled to presume, in the absence of any satisfactory evidence to the contrary, that the Court at that time was satisfied that it was a *bona fide* litigation and not a collusive or fraudulent one. We find it impossible to fix upon any particular circumstance which would justify us in holding that there was not a fair trial at all. Decrees of Courts are not to be lightly treated on a mere suspicion and on a mere supposition based on no substantial evidence, that they are collusive. We are, therefore, unable to agree with the view which the learned Subordinate Judge has taken of the arbitration proceedings.

Mt. Mohini represented the whole estate for the time being. The reversioners had then no rights in *in praesenti*. Her claim was to avoid the adoption set up by Ram Prasad. The suit was, therefore, brought not only in her own interest but in the interests of the whole body of reversioners who would be entitled to the property after her death. If the adoption were to be upheld, the line of the reversioners would be altogether cut off. The suit brought by Mt. Mohini must, therefore, be treated as a representative suit and all persons having a common interest must be deemed to have been represented through her under S 11, Explanation 6 of the Code of Civil Procedure. The defendants Nos. 7 and 8 are claiming through Ram Prasad, whereas the plaintiff No. 1 must be deemed to have been then represented by Mt. Mohini. The award and decree, therefore, operate as *res judicata* between them.

Defendants Nos. 2 and 3 and defendant No. 9. as will be shown later claim title under Mt. Mohini and, therefore, the plea of *res judicata* cannot be successfully urged on their behalf.

[The question of adoption was next taken up and it was held that the adoption was proved. Then referring to the objection to the validity of the adoption on the ground of the adopted son and adoptive father belonging to different sub-castes the judgment proceeded :—]

Nor can the adoption of a boy belonging to the same sub-caste be held to be invalid. In the case of *Narain Singh* v. *Mt. Sham Kali Kunwar* (1) the Oudh Bench, of which one of us was a member, held that for the purposes of inheritance each primary caste must adopt from within its own limits and that the adoption would not be invalid so long as the adoptive father and the adopted son belonged to a sub-caste of the same primary caste. We, therefore, think that there is no force in this objection.

We have already indicated that so far as the pleadings went, Shib Deo Misra and his transferees would in no case be entitled to the entire property left by Kallu Misra, as it is admitted that at the time of the death of Mt. Mohini when succession open-

(1) [1914] 17 O. C. 186 = 25 I. C. 45.

ed to the reversioners, there were more than one person entitled to it. In cases of such collateral succession the property inherited is the separate property of all the reversioners and does not go to the head of the family only. In order to get over this difficulty, the appellants relied on a will which was produced by Ram Prasad at a very late stage in the case.

[The judgment held the will to be a forgery and then referring to the question of estoppel, continued :—]

We are satisfied that Har Dayal and Raj Narain were *bona fide* transferees for value after due enquiries. The claim as against them is barred by S. 41 of the Transfer of Property Act.

Defendants Nos. 7 and 8 derive title from Ram Prasad. After the death of Mt. Mohini, Ram Prasad remained in possession of the house which is now in their possession. He mortgaged it on the 18th of May 1910, to Behari Lal and then on the 3rd of October 1911, contracted to sell the equity of redemption to Badri Prasad. On the 16th of April, 1912 he sold the equity of redemption to Badri Prasad the mortgagee. Defendants Nos. 7 and 8 are the sons of Badri Prasad. We are satisfied that Badri Prasad was a *bona fide* transferee for value and he had made due enquiries and acted in good faith on the strength of the award of the arbitrators which was recited in the previous title-deed. The reversioners allowed Ram Prasad to remain in possession as ostensible owner and the transferees are protected.

Defendants Nos. 4, 5, 6 and 10 are also transferees but they have compromised their disputes and we are not now concerned with their rights in this appeal.

The case of defendant No. 9, Khubi, stands on a slightly different footing. He took a mortgage from Mt. Mohini herself on the 17th of July of 1898, and then took a sale-deed of the equity of redemption from her on the 11th of March 1899. He, therefore, derived title from Mt. Mohini herself and the deeds in his favour were executed in her life-time. We are of opinion that a transferee from a Hindu widow who takes the property from her before the reversioner's right has accrued cannot successfully plead the bar of S 41 of the Transfer of Property Act. Assuming that he was a *bona fide* transferee for value who has taken the property after due enquiry and believing on the validity of the award, it cannot be held that he has taken it from an ostensible owner who was in possession with the consent express or implied of the reversioners. A Hindu widow enters into possession of her husband's estate by right and not with any express or implied consent of the reversioners While she is alive the reversioners have no voice in the matter and have no right to intervene. She can continue in possession in spite of their protest. A transferee from such a person, who is in possession by her own right and as to whose possession no consent of the reversioner can be implied by law, cannot claim the protection of S. 41 of the Transfer of Property Act.

The only point that remains now is the question of costs. The suit is failing substantially on a ground common to all the defendants, namely, the *factum* of the adoption of Ram Prasad. We think, therefore, that it is a case in which one set of costs only should be allowed to the defendants against the plaintiffs. The learned Subordinate Judge has not allowed separate costs though the decree that has been prepared gives the defendants separate costs on account of pleaders' fees.

We accordingly dismiss this appeal with this modification that the plaintiffs suit shall stand dismissed as against all the defendants. The plaintiffs will bear their own costs and pay the costs of all the defendants other than Ram Prasad in both Courts. The defendant Ram Prasad shall bear his own costs throughout. The total legal fee allowed will be the maximum taxable fee both in this Court and in the Court below. Fees in this Court will include fees on the higher Scale.

Appeal rejected.

925 ALLAHABAD

LINDSAY AND SULAIMAN, J.

Gopal Das—Plaintiff—Appellant.

v.

Goswami Banmali Lal another—Defendants—Respondents.

F. A. No. 90 of 1921, Decided on 7th June 1923, from a decision of the Addl. Sub. J., Benares, D/-3rd January 1921.

Limitation Act, S. 19—"Signing" may be without putting actual name-Subscription in method usual with the party is enough.

Under S. 19 of the Limitation Act, the actual signature of the acknowledger is not necessary. Acknowledgment in the acknowledger's handwriting and signed by him in a manner which is customary with him in his communications is enough. Where the habitual method of a Guru while sending communications to his disciples is to subscribe the communication with the words 'Sree Hari Sharanam" and not to affix his signatures, any communication of this form and written by the Guru himself personally will be regarded as signed by him even though it may not contain his actual name; so that, any acknowledgment of liability signed in this manner and made in the Guru's own handwriting will save limitation under S. 19.

[P. 86, C. 2; P. 87, C. 1]

Judgment.—The suit out of which this appeal has sprung was brought by the plaintiff-appellant to recover a sum of Rs. 16,990 and certain ornaments alleged to be worth Rs. 8000.

The two defendants to the suit are two brothers, Goswami Banmali or Banwari Lal and Goswami Damodar Lal. According to the allegations in the plaint these two defendants are members of a joint Hindu family, the second defendant being the managing member. The plaintiff alleged in his plaint that he was the spiritual disciple (*chela*) of the defendant No. 1 while his wife is the disciple of the second defendant. The case for the plaintiff was that at various times he had advanced sums of money to these defendants and in particular to the second defendant. He also alleged that on the occasion of a *gauna* ceremony he had lent certain valuable ornaments and utensils to the defendants which they had not returned.

The first defendant denied ever having received any money from the plaintiff. The second defendant, while admitting that there had been money dealings between himself and the plaintiff did not admit that he had received from the plaintiff the sums which are specified in the plaint. He further denied that he had ever borrowed any ornaments or utensils from the plaintiff as alleged.

It is necessary to examine in some little detail the allegations in the plaint, for the important question which arises in the suit is the question of limitation.

The claim of the plaintiff may be divided into three parts. He first alleged in paragraph 3 of his plaint that, between the months of December 1903 and December 1911, he had lent to the defendants a sum of Rs. 4,112. His story was that he had, on the 16th December 1911, received part-payment to the extent of Rs. 1,112 and that, therefore in respect of the dealings of this period there was due to him a sum of Rs. 3,000.

The plaintiff next alleged that, on the 14th and 15th December 1911 he had raised a sum of Rs. 8,000 by way of mortgage and had advanced this money to the defendant No. 2.

Lastly, with respect to the ornaments, the case for the plaintiff was that these had been lent to the defendants for a *gauna* ceremony in or about the month of February 1915.

This suit was not filed till the 29th October 1918 and on the allegations made in the earlier paragraphs in the plaint it is clear that the suit for recovery both of the money and the ornaments would have been time-barred. However, in paragraph 10 (A) of the plaint the plaintiff described certain documents upon which he relied for the purpose of showing that his claim was still within time.

The suit failed in the Court below. The learned Subordinate Judge appears not to have believed the plaintiff's story either as regards the advance of these monies or the loan of the ornaments. In any case, he was of opinion that the plaintiff had failed to prove by any satisfactory evidence that the claim, even if true, was still within limitation.

The plaintiff has now appealed and the findings of the Court below on all the points found against the plaintiff have been attacked here.

We proceed to deal, in the first instance, with the claim relating to the sum of Rs. 3,000.

We have already mentioned that in the 3rd paragraph of the plaint it was stated that certain loans had been made to the defendants between the months, December 1908 and December 1911.

The plaintiff alleged that he had no accounts to produce for the purpose of showing the various dates on which these advances had been made. In his evidence the plaintiff began by stating that the first sum of money which he advanced to the second defendant was sent in consequence of a letter, Ex. 1, page 105, which bears a date corresponding to the 28th December 190-. That letter was written from Naudip or Nadia where the second defendant is alleged to have been residing at the time. The plaintiff's story is that he borrowed the sum of Rs. 1,000 from a banker in Benares and sent the money by a messenger to the second defendant.

The plaintiff proceeds to state that at subsequent times, although no dates were specified, he advanced sums of Rs. 800, Rs. 300 and Rs. 200 to the second defendant. He winds up his statements on this part of the case by saying that in the month of December 1911 an account was taken between the parties and a sum of Rs. 4,112 was found to be owing to the plaintiff.

It has been strongly pressed againet the plaintiff that he has failed to produce his account-books in Court. The plaintiff's story is to the effect that, some time before these advances were made, he had given up keeping accounts, having separated from his brothers who were in business in Benares as money-lenders. We are not disposed to accept the statement of the plaintiff that no accounts were kept by him of the items advanced to the defendants, for there is evidence on the record which will indicate that in spite of a separation between himself and his brothers, the plaintiff still carried on a money-lending business and, in such circumstances, it would be reasonable to expect that he kept some account of his money dealings. However, we have to deal with the case on the footing that no accounts have been produced and we have to see on what evidence the plaintiff relies for the purpose of showing that this money was advanced.

Four papers are relied on by the plaintiff for the purpose of showing that this money was due to him. In the first place, we have a document marked Exhibit 3 which is printed at page 121 of the record. This is a memorandum which is alleged to be in the handwriting of the second defendant.

We may pause here to mention one fact which is to be taken into consideration in dealing with the various documents upon which the plaintiff relies for the purpose of saving limitation. It is the fact that none of the letters or memoranda upon which reliance is placed by the plaintiff bear the signature of the second defendant, Damodar Lal, that is to say, in none of these documents can we find the name of Damodar Lal.

It is claimed, however, that in his correspondence with his disciples this defendant is not in the habit of signing his name. The regular method of correspondence, it is said, consists in superscribing all comunications with the words "Sri Sri Har Sharnum" and there is evidence to show that this is a customary mode in which *Gurus* or spiritual preceptors address communications to their disciples. The defendant himself when examined on this point admitted (see page 72 of the record) that when he writes to his *seraks*, meaning his disciples, he is not in the habit of affixing his signature Another witness on this point is Gokul Chand who also deposes to the same effect, saying that spiritual preceptors do not sign their names when addressing letters to their disciples. The reason given by the plaintiff for this practice is that it would be derogatory for a person holding a high position like a *guru* to subscribe his name in a letter underneath the name of his disciple.

We are satisfied that this is a usual practice in communications of this kind and we hold, therefore, that any communication which is drawn up in this form, although it does not bear the actual name of th defendant No

2 must nevertheless be treated as being signed by him. The question whether words such as those we have referred to inserted at the top of letters or other communications, can be treated as signatures, has been dealt with in a case reported in *Gangadharrao Venkatesh* v. *Shidramapa Balapa Desai* (1) where it was held that the words "*guru samrath*" written at the top of a letter addressed by "preceptor" to his pupil constituted a signature for the purposes of S. 19 of the Limitation Act. We find moreover, that a similar decision has been given in the Madras case which is to be found reported as *Chidambaram Chetti* v. *Ramaswami Chettiar* (2). We may also refer in this connection to a somewhat similar case which is to be found in *Sadasook Agarwall* v. *Baikunta Nath Basunia* (3).

It is clear on all hands that these letters which bear the superscription were addressed by the second defendant either to the plaintiff or to the plaintiff's wife and that it was understood and was meant to be understood that these were communications proceeding from the second defendant who was their spiritual leader.

We hold, therefore, that, so far as these letters and communications are concerned, any of them which are found to be in the handwriting of the second defendant and which bear this superscription must be treated as having been signed by the second defendant.

To return to Exhibit No. 3 this is a memorandum or slip which bears the heading "Sri Sri Hari Sarnam." According to the statement of the plaintiff this document is in the writing of defendant No. 2 although the latter has denied the fact.

For the purpose of proving, an acknowledgment, however, it appears to us that this document is of no value whatever.

We have already mentioned the fact that on the 14th of December 1911 a mortgage was executed by the plaintiff in favour of one Makundi Lal for the purpose of borrowing a sum of Rs. 8,000.

In the endorsement made upon this mortgage at the time of registration particulars were entered regarding the mode in which money was paid: so many soverigns, so many notes and so much cash. The slip Exhibit 3, merely repeats the details of these various items and there is nothing in the document more than an acknowledgment by the second defendant that he had received a sum of Rs. 8,000 from the plaintiff in the various denominations of soverigns, notes and cash.

There is nothing in this document whatever to show an acknowledgment of an existing liability for Rs. 3,000 on this date and therefore, for the purpose of saving limitation in respect to the claim for Rs. 3,000 this document, as we have said, is of no avail. It may have some bearing upon the other question which we shall have to consider later on, namely, whether this sum of Rs. 8,000 borrowed on mortgage in December 1911 was, as a matter of fact, made over to the second defendant?

To continue, regarding the claim for Rs. 3000 the next document upon which the plaintiff lays stress is a document, Exhibit 4, which is printed at page 123 of the record. This document bears date of the 14th December 1911 being the date upon which the mortgage was executed although at the bottom of the document there is another date, *Magh Badi* 10th *Simbat* 1968, which would correspond to the 13th January 1912.

According to the plaintiff's statement this document is in the writing of the defendant No. 2 and in connection with the claim for Rs. 3,000 he refers to one entry in this list which reads as follows:—

"Paid on account of Babuji's parole debt Rs. 1,112. (*babuji ke hath udhar ke chukai*)."

We are unable to spell out of this document any acknowledgment on the part of the second defendant (assuming that the document is in his handwriting) that on the date on which the memorandum was prepared he owed the plaintiff a sum of Rs. 3,000. The plaintiff tries to make this out by saying that an account having been taken between the parties a sum

(1) [1894] 18 Bom. 586.
(2) [1914] 27 M.L.J. 631—26 I. C. 911.
3) [1904] 31 Cal. 1043—9 C.W.N. 83.

of Rs. 4,112 was found due to him and that after deduction of this payment of Rs. 1,112 there was left a balance of Rs. 3,000.

That, however, is not stated in the document itself. Further it is important to consider the language of the entry in the document in question. To us it appears as it did to the Subordinate Judge also, that the entry does not import that the sum of Rs. 1,112 was being paid on account of and in reduction of a debt of a larger amount. The word used is "*chukai*" which ordinarily signifies the complete satisfaction and discharge of a debt. In our opinion, therefore, the plaintiff can derive no assistance from the entry in this Exhibit 4 for the purpose of proving that this claim is within time.

We now come to another document which is marked Exhibit 12 and which is printed at page 103 of the record. This again bears the superscription 'Sri Sri Har Sarnam' and it purports to have been prepared on a date corresponding to the 17th August 1912. This document is perhaps the most important document in the case in connection with the claim of the plaintiff for recovery of the sums of money set out in the plaint. The document contains an entry indicating that a sum of Rs. 3,000 was due to Gopal Das the plaintiff, on account of a pre-existing debt. The defendant denied that this document was in his handwriting.

We have, therefore, to address ourselves to the question as to whether it has been proved that this document, as a matter of fact, was written by the defendant No. 2. The story of plaintiff regarding Exhibit 12 is this: At page 36 of the record Gopal Das states that the defendant wrote Exhibit 12 because he stood in need of more money after borrowing the sum of Rs. 8,000 which he took in the month of December 1911. Gopal Das states that in order to convince him that more money was required the second defendant prepared this document and made out a list of his debts. He proceeds to say that a few months after this document was handed to him the second defendant asked him to return this slip. The plaintiff told the defendant that he could not find it and so the defendant wrote out a second slip which is marked Exhibit 13 and which is printed at page 101 of the record. This, too, is said to be a statement of debts which were owing by second defendant, a statement which the he prepared in order to persuad ethe plaintiff to borrowsome more money for his benefit.

The genuineness of both these documents is most strongly denied on behalf of the defendants and we have been pressed here in appeal to consider the matter and to give more attention to it than it received at the hands of the learned Subordinate Judge. We have on the record a number of documents written in Hindi which are now either proved or admitted to be in the writing of the defendant No. 2. One test, therefore, which could have been applied for the purpose of determining whether these Exhibits 12 and 13 are genuine documents was comparison of the writing in them with the writing contained in documents which the defendant No. 1 is proved to have written.

We have done our best to assist Counsel in this matter and we have made a careful examination and comparison of the different writings. One difficulty in our way is that most of the letters which are on the record are written in a careful way and obviously with due deliberation whereas the slip Exhibit 12 appears to be a document which was drawn up more or less in a hurry and in a very brief form. There are certain abbreviations used in the entries which indicate that the memorandum was prepared in an off-hand manner. It is thus very difficult to institute any real comparison between the writings. Mr. Upadhia who has dealt with this part of the case on behalf of the appellants has drawn our attention to certain similarities in the formation of letters and in the general character of the writings. We must say that after giving this part of the case our best consideration we have not been able to satisfy ourselves that it is established that this document Exhibit 12 and the other document Exhibit 13 are in the writing of the defendant No. 2.

We have to notice here that there was a statement made by a witness named Gokul Chand to whom both these documents were shown. He professes to be familiar with the hand writing of the second defendant and he stated that he was able to recognize the writing in both Exhibits 12 and 13 as the writing of the second defendant. From certain questions put to this witness in cross-examination it seems that he and the second defendant have not been on good terms and we do not think it would be safe to rely on Gokul Chand's statement that these two documents are in the writing of Damodar Lal. Further we are bound to say that the story of the plaintiff in the witness box as to how this document Exhibit 12 came into existence is not very convincing. It is difficult to understand why if the defendant was anxious to have more money raised for his benefit, he should prepare this slip and make it over to the plaintiff and we are still more suspicious of the story told about the second document, Exhibit 13, which come into existence in the manner we have already indicated.

Dr. Sen has argued before us that, in view of certain questions which were put to the plaintiff in cross-examination, the defendants really admitted that these documents were in the writing of Damodar Lal. The plaintiff was asked if it were not a fact that he had discovered these two documents in certain books of account belonging to the second defendant which had come into his possession at the time of the execution of a decree. He denied that this was the manner in which he had come to have these documents in his possession. We cannot agree that there is anything in these questions asked in cross examination to justify our holding that the defendants have in any way admitted that these documents were, as a matter of fact, in their account-books and were found by the plaintiff in the manner suggested.

This brings us to the end of the case so far as it relates to the claim for Rs. 3,000 Our finding is that there is no proof of any acknowledgment which would save limitation as regards this claim for Rs. 3,000 so that, even if letters of later dates, of which there are many on the record, can be taken to contain any admission regarding a liability for the sum just mentioned they would be of no avail inasmuch as it cannot be shown that those admissions were made at a time while limitation was still running.

We agree, therefore, with the first Court that the plaintiff has failed to prove that his claim as regards this item is within time.

We come now to the claim in respect of the sum of Rs. 8,000. We have already adverted to the fact that this money was borrowed after the execution of a mortgage-deed in the month of December 1911. The document itself contains a recital to the effect that Gopal Das was borrowing this money for the purpose of advancing a loan to Damodar Lal and also to meet household expenses.

The words in the document are "*ba gharaz dene qarz apne guru Domodar Lal.*"

There was a good deal of argument apparently in the Court below as to the interpretation of those words but we have no doubt whatever that what they mean is that Gopal Das was raising money on mortgage for the purpose of making a loan to Damodar Lal. Damodar Lal himself attested this document and there is evidence which shows, in our opinion, that he knew that the recital was in the document and in spite of his denial we do not believe him when he says that he got none of the money which was raised by this mortgage.

Letters which were proved to have been written by the second defendant show to us unmistakeably that Damodar Lal got at least a portion of this money advanced to him. We refer in particular to one letter, Exhibit 24, which is to be found at page 147 of the record. That letter was written on the 14th October 1915 and contains the following passage:

"As regards Makundi Lal's money also it is matter of days only when every account will be cleared by the grace of Sriji."

Reading this letter with other letters which were written at or about the same time there can in our opinion, be no doubt whatever that Damodar Lal knew very well that he was liable to the plaintiff for the sum or a portion of the sum which had been borrowed on mortgage.

When the second defendant was in the witness box he was called upon to explain these statements. The only answer that he could give was that he knew that the plaintiff had borrowed money on mortgage from Makundi Lal. He said that the plaintiff was pressing him for help to raise loan in order to pay off Makundi Lal and so he says that the statement regarding Makundi Lal's debt contained in the letter, Exhibit 24, relates to certain exertions which he was making for the purpose of enabling the plaintiff to raise a fresh loan to pay off Makundi Lal. We have no doubt whatever that this is a false statement and indeed it has been conceded before us that, in view of the evidence and particularly the evidence in the letters, it is impossible to accept the story told by Damodar Lal in the witness-box.

The learned Subordinate Judge was of opinion that none of this money had come into the hands of the second defendant, but we do not agree with him.

However, the question still remains whether the plaintiff has been able to show that his claim is within limitation for, unless it is so, our finding to the effect that the second defendant had this money or a portion of it will be of no assistance to the plaintiff.

We start with the fact, that, according to the plaintiff's own case, this sum of Rs. 8,000 was advanced on the 14th December 1911. The suit was filed on the 29th October 1918.

We have already referred to the document, Exhibit 24, at page 147, and have held that it certainly contains an acknowledgment of liability on the part of Damodar Lal for the debt which was due by the plaintiff to Makundi Lal.

The date of that letter, however, is the 14th October 1915 and this acknowledgment will, therefore, not save limitation.

We have, therefore, to consider the further question as to whether the plaintiff has been able to produce any further evidence for the purpose of shewing that an acknowledgment of this liability was made at any time within three years commencing from the 14th December 1911.

Here again, the plaintiff has to fall back upon two documents which have already been dismissed by us, namely, Exhibit 12 and Exhibit 13. We have already dealt fully with the evidence regarding these documents and have discussed their history as given by the plaintiff in the witness-box. We have expressed our opinion that it is not proved that either of these documents is in the writing of the second defendant and so we need not dwell upon this matter any further. It is sufficient for us to say that we find that the plaintiff has failed to show that his claim regarding this sum of Rs. 8,000 was within limitation at the time the suit was filed.

We now come to the third part of the case, namely, that relating to the ornaments. What is the plaintiff's case in this respect? His story is that ornaments and utensils of an approximate value of Rs. 8,000 were lent to the defendants in the month of *Phagun Sambat* 1971, corresponding to the month of February 1915. The occasion of the lending of these ornaments was the *gauna* ceremony of the sons of the defendant. The story of the plaintiff was that these articles were taken on loan and that they were never returned. We have already mentioned that both the defendants denied ever having borrowed the articles in question.

The second defendant, who was the only one of the defendants who went into the witness-box, deposed that the story of the loan of the ornaments was not true.

In the course of the trial a small account book or *bahi* was produced containing the entries which are printed at page 79 of the record. This document is proved to be in the writing of the second defendant. The account-book was in possession of the plaintiff and was produced by him in Court: The defendant suggested in

cross-examination tha he plaintiff had got possession of it by unlawful means

There can be no doubt that this book contains a list of certain ornaments which were in the possession of the second defendant at the time when his son and his nephew were married.

The particu.ar portion of the entry in this book upon which the plaintiff relies is the list which is written underneath the words '*bahuji kitaraf ki.*' The plaintiff's story is that the word *bahuji* refers to his, (the plaintiffs') wife. The defendant, on the other hand, denies this and says that the word *bahuji* refers to the wife of a brother of his named Sham Lal. We are bound to say at once that we do not believe this statement. We have no doubt whatever that on the occasion of the marriage of these two boys the defendant No. 2 did not borrow ornaments and utensils from the plaintiff.

That, however, does not by any means settle the case for the plaintiff has admitted that after the marriage (*oiah*) was over these ornaments or at any rate a number of them were returned. The case he makes out in his plaint is that they were lent out on a second occasion, that is to say, on the occasion of the *gauna* ceremony.

It must be confessed that the evidence of the plaintiff on this part of the case is by no means satisfactory and it is proved that he has made at various times conflicting statements. In the trial of the present case he certainly endeavoured to make out that the whole of the ornaments which were mentioned in the lists attached to the plaint were lent for the second time on the occasion of the *gauna* ceremony.

The plaintiff, however, was confronted with a certain statement which he made in the Criminal Court in the month of November 1916. We may mention here that, before the present suit was filed, two cases in the Criminal Court had been brought by Gopal Das against Damodar Lal. The statement to which we are about to refer was made in the course of the trial of one of them.

At page 165 of our record there is printed Exhibit J. which is a certified copy of the deposition of Gopal Das in the Court of a First Class Magistrate. At page 166 he makes certain statements regarding the loan of ornaments to Damodar Lal. In his cross-examination he stated as follows :

"I lent him ornaments worth about Rs. 5,000.

'They are as follows:—

	Rs.
Bhuj set with diamonds worth.	2,000
Buttons set with diamond worth	..1,000
Chain set with emerald and rubies	...2.000

When he was making this statement on the 17th November 1916, Damodar Lal at first stated that he had lent these ornaments four years previously. He then corrected himself and stated that the ornaments had been lent on two occasions. He said that they had at first been lent on the occasion of the marriage of the two boys that they had been returned to him and that they were again lent on the occasion of the *gauna*.

It is obvious, therefore, that this statement does not fit in with the statement made by the plaintiff in the trial in this case. There he mentioned three items of ornaments only which had been lent and which had not been returned.

The value of those ornaments he gave as Rs. 5,000. Here he is referring to a larger list of ornaments the value of which he states to be Rs. 8,000.

We have satisfied ourselves by an examination of the evidence on the record that, although the claim of the plaintiff in respect of these ornaments is not established, he has nevertheless succeeded in showing that the ornaments to which we have just referred and which the witness mentioned in the course of his deposition in the Criminal Court were, as a matter of fact, lent to the defendant No. 2.

We have in this connection to refer to a letter which seems to us to really set the matter at rest. That letter is Exhibit 25, which is printed

at page 155 of the record. We may say that there are one or two other letters referred to in which reference is made to certain ornaments but this letter which we are now discussing is the only one of which it can be said definitely, that it contains a reference to specific articles such as those which are mentioned by the plaintiff in his plaint.

We extract the following passage from this letter, Exhibit 25, which was sent on the 30th October 1915 by the second defendant to the plaintiff's wife :—

"The other ornaments are at Kashi which will be redeemed but the Delhi ornaments, namely, two armlets (*bhujdo*) one chain and eight buttons are not traceable. So you can take the adequate amount in respect of the same."

This, in our opinion, is a distinct admission of liability on the part of the second defendant for the value of the ornaments so mentioned and we have no doubt whatever that to this extent the story of the plaintiff is true and that he lent to the defendants the two armlets, the chain and the eight buttons which are said to have been set with diamonds.

We wish to remark here that the translation of this letter, Exhibit 25, as it appears on the printed record, is altogether, misleading and erroneous and that it has been necessary for us to have the version corrected in order to enable us to decide the case properly.

We have it, therefore, that this document of 30th October 1915 contains an admission of liability in respect to these articles. The suit was brought on the 29th October 1918 which was within three years from the date of the acknowledgment. The only question that remains, therefore, is whether these articles were lent to the second defendant within three years of the 30th October 1915.

The story of the defendant regarding the marriage of his son and his nephew was to the following effect:—(see page 65) "The marriage of my nephew (brother's son) took place in the month of *Phagun Sambat* 1968, and the marriage of my son took place in the month of *Chait Sambat* 1969. The *gauna* ceremony of both of them took place in the following winter, that is, within a year.'

We gather from this statement of the defendant, therefore, that the *gauna* ceremony of these two boys took place between the month of October 1912 and the month of March 1913. The plaintiff, on the other hand, has assigned the month of February 1915 as the date of the *gauna*.

We are in this matter disposed to accept the evidence of the plaintiff in preference to that of the defendant but in one case it appears to us that the *gauna* ceremony must have taken place sometime within three years preceding the 30th October 1915, the date on which this acknowledgment was given.

It need not be supposed that we are willing to attach much credit to the statement of Damodar Lal. We have not the slightest doubt that he perjured himself freely in the witness-box. We have not the slightest doubt that these ornaments were borrowed and conclusive proof of this is to be found in the letter Exhibit 25.

It appears to us, therefore, that this portion of the claim, that is to say, the claim relating to the two armlets, the chain and the eight diamond buttons is within limitation, time being saved by the acknowledgment contained in the letter of 30th October 1915.

The statement of the plaintiff is, that these particular ornaments were worth the sum of Rs. 5,000 and there is nothing to contradict this. In the circumstances, we consider that the valuation which is put by the plaintiff on these articles ought to be accepted.

There are one or two other matters which perhaps call for some consideration but which really do not affect the decision of the case. The plaintiff alleged in his plaint that a payment by way of interest of a sum of Rs. 175 had been made to him in the month of June 1915 and he relied on that payment for the purpose of extending limitation.

We need only say regarding this part of the case that the plaintiff has failed to establish that any such pay-

ment was made to him by way of interest. What does appear from the evidence is that a certain sum of money was sent by the second defendant to the plaintiff's father in-law for the purpose of discharging a certain debt. The father-in-law made over the money to the plaintiff who thereupon appropriated a sum of Rs. 175 and applied it in the discharge of a debt which was due from himself. There can be no possible plea that this payment was made by the defendant by way of interest.

Another plea was taken by the plaintiff for the purpose of extending limitation. He alleged that by arrangement with the defendant No. 2 he occupied a certain house of the defendants on the understanding that the rent was to be Rs. 10 a month and that this rent was to be applied in reduction of the interest owing on the debt to the plaintiff by the defendant No. 2. This part of the case has also failed for we find no reliable evidence of any such agreement between the parties.

We now come to the end of the case, and our finding, therefore is that the appeal ought to be allowed to the extent which we have already indicated. We, therefore, accept the appeal and, setting aside the decree of the Court below, direct that a decree be given to the plaintiff against both defendants for the return of the three ornaments which are specified in list B attached to the plaint: in case the ornaments are not returned the plaintiff will be entitled to a decree for Rs. 5,000 (rupees five thousand) with proportionate costs in the Court below and in this Court including fees on the higher scale. We fix a period of one month from the date of this Court's decree for the return of the ornaments to the plaintiff; in default of their return within the time allowed the plaintiff will be entitled to execute the decree for Rs. 5,000.

As regards the defendant's costs we think it right to say that, in view of his conduct, he is not entitled to any costs either here or in the Court below and we order accordingly.

We wish to note in conclusion that the task of trying this appeal has been rendered unusually difficult on account of the gross inaccuracy of the translations which appear in the printed book. This is a matter which we propose to bring to the notice of the learned Chief Justice by means of a separate note.

Appeal accepted.

1925 ALLAHABAD 93

DANIELS, J.

Ram Prasad Singh — Plaintiff — Appellant.

v.

Janki Prasad Singh and others— Defendants—Respondents.

S. A. No. 155 of 1923, Decided on 30th June 1924, against the decree of the Dist. J., Azamgarh, D/. 25th October 1922.

Land Tenures—Sir *rights—Sale by some joint owners does not affect the others.*—Sir *rights cannot be purchased—Purchaser of entire* Sir *rights can only get* Khudkasht—Sir *rights though allowed only to proprietors, are distinct from mere proprietary right—Occupancy rights cannot be acquired by person cultivating under* Sir *holders—Separate* Sir *rights and joint proprietary rights can co-exist in same village

The purchaser of the rights of three out of four brothers being the joint *Sir* holders of a *Sir Khata* can be ejected by the fourth brother if he takes possession of his (the fourth brother's) portion. When a sale of *Sir* rights takes place in this manner the vendors alone lose their rights and obtain instead, ex-proprietary rights in a proportionate share of the holding and a person jointly interested in the *sir khata* does not lose his *sir* rights.

[P 91, C 2]

The acquisition of *sir* rights by purchase is not allowed. What the purchaser who takes actual cultivatory possession of the land under the sale of the entire *sir* gets, is treated not as his *sir* but as his *Khudkasht*.

[P 4, C 2]

A *Sir* holder's right consists in exclusive possession together with the fact that no person cultivating under him can acquire occupancy rights. Thus though *sir* rights can only be held by a proprietor they amount to something further and apart from the mere proprietary rights. It is possible that in a joint and undivided village the fact of the proprietary rights in the whole village remaining joint may not come in the way of each proprietor having his own separate *sir* rights.

[P 94, C 1, 2]

Mukhtar Ahmad—for Appellant.

N. C. Vaish—for Respondents.

Judgment—Though the value of this appeal is only Rs. 3, it involves a question of principle of some importance. The suit was one for ejectment in the Revenue Court under S. 58 read with S. 34 of the Agra Tenancy Act. S. 34 was not specifically pleaded, but the suit was clearly brought in reliance on that section as no specific contract of tenancy between the parties was either alleged in the plaint or proved. The real question in dispute is whether the land is or is not the plaintiff's *sir*. If it is his *sir*, he is entitled to treat the defendant as his tenant and to eject him under S 34, the defendant having occupied the land without the plaintiff's consent. The plaintiff's father Lohari Singh was one of four brothers who were proprietors and joint *sir* holders of a *sir khata*. The three brothers other than Lohari Singh sold their rights to the defendant. The three brothers thereby obtained exproprietary rights in a proportionate portion of the holding under S. 10 of the Tenancy Act, and proceedings were duly taken under S. 36 of the Land Revenue Act to demarcate the area in which these rights arose. The remaining portion of the holding continued to be *sir* under the definition contained in S. 4 (12) of the U. P. Land Revenue Act. Under the first proviso to the section so much of the holding as became the subject of ex-proprietary tenancy ceased to be *sir*, but the portion of the holding in which no such rights arose clearly continued to be *sir* under the definition The plot in dispute. No. 875, was a portion of the area which continued to be *sir*. The question is whether it became a joint *sir* of the purchaser and of the plaintiff's father, or whether the *sir* rights vested exclusively in the plaintiff's father whose share was not sold. So far as the proprietary right is concerned, the purchaser became jointly entitled to it, as the holding was undivided. This is not disputed. But *sir* rights, though they can only be held by a proprietor, are something beyond and apart from the mere proprietary right. The right of a *sir*-holder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights. In a join undivided village each proprietor may have his own separate *sir* although the proprietary rights in the whole village are joint.

The plot in suit has been recorded from the time of sale as the *sir* of the plaintiff's father and after him of the plaintiff. On this ground the Assistant Collector who tried the case held that the land continued to be the plaintiff's *sir* and that the defendant, who obtained possession of it without the plaintiff's consent was liable to ejectment. The officiating District Judge, on the other hand, held that as the defendant is a co-sharer in a proprietary right, the land must be treated as his *khudkasht*, and the suit for ejectment must fail It appears to me that the learned District Judge has not sufficiently considered the question whether the land retained the character of *sir*. It has generally been held (there are numerous decisions of the Board of Revenue to this effect) that *sir* rights cannot be transferred by purchase. Where the entire *sir* has been sold and the purchaser obtained actual cultivatory possession, the land is treated as his *khudkasht* and not as his *sir*. In the present case the defendant in his written statement does not claim to be a *sir* holder. His claim in para. 4 of the statement is that the land is his *khudkasht*.

It appears to me, therefore, that the decree of the Assistant Collector was correct and should be restored. Lohari Singh's brothers lost their *sir* rights by the sale to the defendant and obtained instead an ex-proprietary right in a proportionate share of the holding. Lohari Singh never sold his interest and, therefore, never lost his *sir* rights in that portion of the holding which was not separated off by proceedings under S. 36 of the Land Revenue Act. He is, therefore, entitled to treat the defendant as his tenant under S 34 and to get a decree for his ejectment. I, accordingly, set aside the decree of the Court below and restore that of the Assistant Collector with costs in this Court and in the Court below. *Appeal accepted.*

1925 ALLAHABAD 95

DANIELS, J.

Mt. Aishah and another—Defendants—Appellants.

v.

Abdul Ghani – Plaintiff — Respondent.

S. A. No. 154 of 1923, Decided on 26th June 1924, from a decree of Addl. Dist. J. Saharanpur, D/- 20th December 1922.

Agra Tenancy Act, S. 159 - Liability of Co-sharer.

The lambardar can recover from the co-sharer revenue paid by him on behalf of the co-sharer where the co-sharer paid revenue subsequently into the treasury without informing the Lamberdar. [P 95 C 2, P 96 C 1]

Nehal Chand—for Appellants.

U. S. Bajpai—for Respondent.

Judgment - This is a suit under S. 159 of the Tenancy Act to recover revenue paid to the Government by the plaintiff as *lambardar* on behalf of the defendant who is a co-sharer under his *lambardari*.

The facts of the case are unusual. The *lambardar* is the person primarily responsible under S. 144 of the Land Revenue Act for paying the revenue into the *tahsil*. It is the duty of the co-sharers to pay their quota through the *lambardar*. If the revenue is not paid, it is the *lambardar* who in the first instance will be subject to coercive process. In this case the revenue in dispute relates to the years 1325 and 1326 *fasli*. The revenue of 1325 was paid by the *lambardar* into the *tahsil* in two instalments on the 5th February 1918 and 7th June 1918 respectively. A week later, on the 11th February 1918, the defendant paid into the treasury direct her share of the first instalment which had already been paid by the *Lambardar*. The second instalment was similarly paid by her on 2nd July 1918, nearly a month after the payment by the plaintiff. The defendant in making the payment did not state that it was being made on account of the share held under the *lambardari* of the plaintiff. She wrongly entered her own name as *lambardar*, and instead of recognising that the payment was being made twice over, the *tahsil* officials by mistake credited the revenue to the account of two other *lambardars*, this being a village in which there is more than on *lambardar*. In 1320 the plaintiff paid the revenue due from him, including the defendant's share, in three instalments, on 1st February, 8th July and 16th August 1919 respectively The defendant paid into two instalments, on 3rd March and 27th June 1919. The plaintiff, when he paid his second and third instalments, had not been informed and was not aware that any payment had been made by the defendant. The defendant again failed to inform the *tahsil* officials that the money was being paid on account of the share held under the plaintiff's *lambardari*, and the *tahsil* officials again made a mistake in entering the amount to the credit of another *lambardar*. In the lower Court a reference was made to rule 13 of the Board of Revenue Circular 1-III reprinted by Dr, Agarwala on p 347 of his Land Revenue Act. 6th edition, which says that, though it is the duty of the co-sharers to pay through the *lambardar*, any payment made direct into the treasury by a co sharer shall be credited to the account of the *lambardar* and be deemed to have been made through him. The learned Additional Judge rightly held that this rule does not affect the case. It is primarily a direction to the Revenue Officials and any rules made under the Act must under S 234 be consistent with the Act and cannot in any way affect the duty of a co-sharer to pay through the *lambardar* as provided by S. 144.

The money having been paid into the *tahsil* twice over, the question is who is to suffer, the plaintiff who complied with the law in every respect, or the defendant, who made the payments irregularly contrary to S 144, did not inform the *lambardar* and gave incorrect information to the *tahsil* officials, which may have been partly responsible for their error in crediting the amounts. Under these circumstances there can be no question that if any one has to suffer it must be the defendant. The plaintiff has paid in good faith and in accordance with law the money due from

him on account of the defendant's share, and he is entitled to recover it under S. 159. I must, therefore, and hereby do, dismiss the appeal with costs including in this Court fees on the higher scale.

At the same time I see no reason why it should not be within the power of the Revenue Officials to repay to the defendant the excess payment made by her. It is purely due to the mistake of the *tahsil* officials that the money has been credited to a wrong *khata*. I direct that a copy of this judgment be sent to the Collector with a recommendation that steps should be taken to give the defendant a refund of the money paid by her which had already been paid on her account by the *lambardar*.

Appeal rejected.

1925 ALLAHABAD 96

DANIELS AND NEAVE, JJ.

Bhagvati Singh and others—Defendants—Appellants.

v.

Gurcharan Dube — Plaintiff — Respondent.

S. A. No. 1285 of 1922, Decided on 27th May 1924, from a decree of the Sub. J. of Basti.

Hindu Law—Joint Family father—Mortgage by, to clear encumbrance on pre-empted property—No benefit to family proved—Sons are not bound.

Where a Hindu father mortgaged joint family property for the purpose of paying off an encumbrance on a property which he had pre-empted and where such paying off was not for the benefit of the family.

Held: that the mortgage was not binding on the sons—33 All. 242; and 1923 All. 218 Dist. [P 96 C 2]

Shankar Saran—for Appellants.

N. Upadhia—for Respondent.

Judgment—We think that this appeal cannot succeed. The suit was for a declaration that a hypothecation bond executed by the plaintiff's father of ancestral joint property was not binding on the plaintiff, not having been executed for legal necessity. Both the Courts have decreed the suit and the defendants appeal. The bond in question was for a sum of Rs. 177 of which Rs. 165 was paid in discharge of a mortgage on certain property which the plaintiff's father had acquired under a pre-emption decree. The decree was given him on payment of Rs. 130 which had been paid into Court. The pre-empted property was however subject to an encumbrance, and the hypothecation bond in suit was executed to pay off this encumbrance. Reference has been made to the decisions in *Nathu* v. *Kundan Lal* (1) and *Chaturbhuj* v. *Govind Ram*, (2) which dissented from the decision, in *Nathu* v. *Kundan Lal* (1). Neither of these decisions is strictly applicable. In these cases the question arose whether payment of an amount which the father was required to deposit under a pre-emption decree amounted to antecedent debt or not. In this case there was no question of any debt. The amount which the father was required to deposit under the decree had already been deposited. The question is therefore reduced to this whether it was more advantageous to the family that the encumbrance on the pre-empted property should be paid off at the cost of encumbering the ancestral property or not. On this there is a finding of both the lower Courts that it is not established that the discharge of the encumbrance at the cost of hypothecating the family property was for the benefit of the family. The Courts have pointed out that the hypothecation bond in suit carried compound interest at a fairly high rate. In face of this finding the appeal cannot succeed and we accordingly dismiss it with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

(1) [1911] 33 All. 242=3 I.C. 336=7 A.L.J. 1182.
(2) 1923 All. 218=45 All. 407=21 A.L.J. 348=4 L.R.A.Civ. 409.

1925 Allahabad 97.

DANIELS, J.

Gulzari Lal—Appellant

v.

Har Prasad—Respondent.

S.A. No. 1571 of 1922, decided on 3rd April, 1924, against the decree of the District Judge of Farrukhabad.

(a) *Landlord and tenant—Agreement permitting tenant to plant grove—Restriction in power of sale is valid.*

Zamindar entered into a formal agreement with an occupancy tenant permitting him to convert the plots into groves. This agreement provided that he was to be the owner of one-fourth of the groves and the zamindar of three-fourths, but reading the deed as a whole his right of ownership was not absolute but restriction was that he was not entitled to sell the share in the groves except to the zamindar.

Held, the case was not governed by the general custom but by the conditions of the contract entered into between the parties. It was perfectly open to the zamindar to put restriction. *Held*, further though the word "malik" ordinarily connotes full ownership it was not intended in the case to give tenant a full right of ownership. The agreement regarding the sale of the share was very similar to an agreement giving the zamindar a right of pre-emption and such agreements are binding. [P. 97, C. 2 and P. 98, C. 1.]

(b) *Contract—Construction—Court is not entitled to see what the parties might have intended.*

The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. Sale and mortgage are two quite different things and prohibition against one does not necessarily import prohibition against the other. [P. 98, C. 1.]

(c) *Occupancy tenant—Permission to plant grove stops the tenancy.*

After permission to plant grove is given to an occupancy tenant the tenant no longer remains an occupancy tenant. [P. 98, C. 1.]

Judgment:—Gulzari Lal, the plaintiff-appellant in these two appeals, is the mortgagee of one-fourth share in two groves. The mortgage was executed in the year 1916 by Bhola Chamar. The mortgaged share has now passed into the possession of the zamindar by a sale executed by Bhola's widow, Musammat Umrai, in the year 1920. The plaintiff sues for recovery of his mortgage money by sale, if necessary, of the mortgaged share, against Musammat Umari and the legal representatives of the zamindar Bhawani Prasad who is now dead. The suit was resisted by the latter set of defendants. They are the respondents to these appeals. The real question in the appeals is whether it was competent to Bhola to mortgage his share in the groves. The two plots in question were originally his occupancy holding. In the year 1901, long before the mortgage in suit, the zamindar entered into a formal agreement with him permitting him to convert the plots into groves. This agreement provided that he was to be the owner of one-fourth of the groves and the zamindar of three-fourths, but reading the deed as a whole his right of ownership was not absolute. It was restricted in various ways. He was, for instance, not at liberty to cut down any green trees. There was a further restriction, and this is the clause which is material for the purpose of this case that he was not entitled to sell the share in the groves except to the zamindar. There was no prohibition against the groves being mortgaged but the learned District Judge has held that if the right of sale is excluded the right of mortgage must necessarily be excluded also and on this ground he has reversed the Munsif's decree in favour of the plaintiff and dismissed the suit.

Three points have been argued in support of the appeals.

(1) That under the village custom as recorded in wajib-ul-arz grove holders have a right to transfer their groves.

(2) That the agreement in dispute gives Bhola a full right of ownership in his share in the groves and that this right cannot be cut down by any subsequent restrictions.

(3) That the learned District Judge was wrong in reading into the agreement a prohibition against mortgage which it does not contain.

The third plea is in my opinion the important one. This case is not governed by the general custom set out in the wajib-ul-arz but by the conditions of the contract entered into between the parties.

The zamindar was not obliged to give Bhola leave to plant trees and if he did give leave, it was perfectly open to him to make that permission subject to conditions which Bhola himself accepted and which were embodied in a binding agreement.

As regards the second plea, although the word "malik" ordinarily connotes

full ownership, it is a cardinal principle of construction that the deed must be read as a whole and that it must be read as far as possible so as to make the different clauses which it contains consistent with each other. If the deed is read as a whole it is quite clear that it was not intended to give Bhola a full right of ownership. The agreement regarding the sale of the share is very similar to an agreement giving the zamindar a right of pre emption and such agreements have been held in a very recent case to be binding even on the successors of the parties who entered into them, *Basdeo Rai* v. *Jhagru Rai* (1).

The third plea has much more force and in my opinion the appellant is entitled to succeed on it. The Court must construe the contract which the parties have made and is not at liberty to make a fresh contract on their behalf because it thinks that they might have intended to do certain things which they have not expressed in their written agreement. Sale and mortgage are two quite different things and prohibition against one does not necessarily import prohibition against the other. In the present case the object of the agreement may have been and probably was to prevent Bhola's share passing out and out into the hands of a stranger. A sale to an outsider would necessarily have this effect. The same effect need not follow from a mortgage since if the mortgagee brings the property to sale it will always be open to the zamindar to purchase it. In any case, construing the contract as it stands, there is nothing in it to render the mortgage executed by Bhola illegal.

It has been argued on behalf of the respondents that Bhola remained an occupancy tenant notwithstanding the agreement as to the planting of the groves but it is I think impossible to maintain this view since the decision in *Jaleshar Sahu* v. *Raj Mangal* (2).

I therefore allow the appeals and setting aside the decree of the Court below, restore that of the trial Court with costs throughout, including in this Court, fees on the higher scale.

Appeal allowed.

(1) 1924 All. 400=46 All. 333=22 A.L.J. 265=L R. 5 A. Civ. 161.
(2) (1921) 43 All. 606=63 I.C. 437=19 A.L.J. 616.

1925 Allahabad 98.

NEAVE, J.

Madho Lal—Defendant-Appellant.

v.

Banarsi Das and others—Plaintiff and Defendant-Respondents.

S. A. No. 1762 of 1922, decided on 16th May, 1924, against the decree of the District Judge of Benares.

(a) *Civil Pro. Code, O. 18, r. 2 (1)—'The day fixed for the hearing of the suit.'*

In O. 18, r. 2 (1) "the day fixed for the hearing of the suit" does not mean or include the day on which issues are framed. [P. 99, C. 1.]

(b) *Allahabad High Court Rules—Rules for Subordinate Court, Ch. 21, r. 1—First day of hearing for purpose of filing certificate of payment of pleader's fees.*

For the purpose of determining whether a certificate of payment of pleader's fee has been filed in time the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. [P. 99, C. 1.]

K. N. Katju and *Hari Kishen Kaul*—for the Appellant.

Bhagwati Sanker—for the Respondents.

Judgment:—This appeal arises out of an order of the District Judge of Benares upholding the order of the Additional Subordinate Judge admitting a certificate for pleader's fee which was said to have been filed after the first day of hearing. The facts are that the certificate was filed on the 24th of April, 1922, the issues were framed on that date, and the case was fixed for final disposal on the 12th of May. The rule governing the question is rule 1 of chapter 21 of the General Rules (Civil). As it stood at the time, this rule prescribed that no fee to any legal practitioner should be included in any decree or order unless the Judge was satisfied that the fee was paid at or before the commencement of the hearing of the suit. An explanation appended to the rule ran "By the word 'hearing' is meant the hearing referred to in Order 18, rule 2 (1).....but not the day to which such hearing is adjourned." Order 18,rule 2 (1) provides that "on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his cause and produce his evidence in support of the issues which he is bound to prove." It seems to me clear that in this rule of the Civil Procedure Code "the day

fixed for the hearing of the suit" does not mean or include the day on which issues are framed. It is true that elsewhere in the Code, as for instance, in Order 8, rule 1, the first day of hearing is used to mean the first day on which the parties appear in Court, but having regard to the express reference made in the explanation to rule 1 of chapter 21, I take it that for the purpose of determining whether a certificate of payment of pleader's fee has been filed in time, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. This interpretation is supported by the recent amendment of the rule in question published in the U. P. Government Gazette on the 12th of April of this year. This amendment has altered the rule by allowing the payment of the fee to be made before the conclusion of the hearing of the suit, and has done away with the explanation. The certificate was filed within the time prescribed by the rule, and the appeal is accordingly dismissed with costs including in this Court, fees on the higher scale.

Appeal dismissed.

1925 Allahabad 99.

STUART, J.

Abdul Qaiyum Khan—Appellant

v.

King-Emperor—Respondent.

Cr. App. No. 785 of 1923, decided on 14th November, 1923, against the order of the Sessions Judge of Aligarh, dated the 1st August, 1923.

Crim. Pro. Code, S 476—Complaint of cheating before Tahsildar having powers of a second class Magistrate — Act of Tahsildar enquiring and ordering prosecution under S. 476 is legal.

Where there was a complaint of cheating before a Tahsildar having powers of a second class Magistrate who therefore was competent to entertain it and where after careful enquiry he ordered under S. 476 of the Crim. Pro. Code, the prosecution of the person complained against.

Held, the Tahsildar must be conceived to have been acting as a Criminal Court and to have been put in motion by the proper procedure. Although as a result of his enquiry it might have been discovered that he could not take cognizance of the case he was certainly authorised, in fact required, to make an inquiry which was of the nature of a judicial proceeding if in the course of that judicial proceeding he considered that the facts showed that a forgery had been committed. Therefore he had authority to act under S. 476. [P. 100, Cs. 1 and 2.]

U. S. Jang—for the Appellant.

The Government Pleader—for the Crown.

Judgment:—In this appeal there have arisen some points of difficulty. The main facts, however, present no difficulty. The appellant has been convicted of using as genuine a forged document in an audacious attempt to secure landed property which belonged to certain of his own relatives who reside at some distance from his village. The appellant is lambardar of his village. On the facts it is difficult to say whether one is more impressed by his moral obliquity or his extraordinary foolishness. He apparently thought that it would be easy to obtain the fabrication of a sale-deed by which his absentee relatives purported to transfer some property in his village to his brother and by forging powers of attorney on behalf of the alleged vendors to obtain mutation of names in the revenue Courts. As apparently he was already in actual possession of the property it is difficult to see why he wished to pile crime on crime to cover up what was presumably his previous dishonesty in misappropriating the income of his relatives' property. However he chose to take that course and applied for mutation before the Naib Tahsildar, who had the powers of a Tahsildar. The Naib Tahsildar was not imposed upon and was holding the matter up to ascertain whether the alleged vendors had or had not executed the sale-deed. Before the question of mutation had been decided in the Naib Tahsildar's Court a pardanashin lady, who was one of the relatives whom the appellant was endeavouring to defraud, put in a complaint before the Tahsildar who is a Magistrate with second class powers. This complaint did not bear a stamp but a stamp was added afterwards. The complaint does not state the remedy desired very definitely but it was to the point. It stated that the lady had come to hear that Abdul Qaiyum the appellant had put in a forged sale deed by which he was endeavouring to cheat her of her property and asked that he should be punished. It did not give any details but it could be read in a variety of ways and it might be read as a complaint of cheating which the Tahsildar as Magistrate of the second class was

competent to entertain. I do not think that the Tahsildar really applied his mind very much as to the exact powers that he had in the matter, but as far as I can see he had powers in the matter and his action afterwards was justifiable in every way. He made a very careful inquiry into the truth of this lady's allegation as a result of which he ordered the prosecution of Abdul Qaiyum under the provisions of section 476 of the Code of Criminal Procedure and Abdul Qaiyum has been convicted and sentenced under section 467 as explained by section 471 of the Indian Penal Code to five years' rigorous imprisonment. Upon the merits there can be no doubt as to the correctness of the conviction. It is proved up to the hilt that the deed was forged. One of the alleged executants is proved to have been dead at the time that the deed was supposed to have been executed. It is proved that Abdul Qaiyum purchased the stamp and there cannot be the slightest doubt as to the fact that he was the main person instrumental in getting the deed forged. His learned Counsel has not argued at length upon the merits of the conviction. He has pressed however earnestly that the whole proceedings are vitiated from the beginning. His case, which he has put as well as it could be put, is that Tahsildar had no authority to order a prosecution under section 476. Although such a point should be taken at the very commencement of the trial and not, as has been the case here, never urged during the trial but raised for the first time on appeal, the learned Counsel is quite within his rights in pressing the point now. Sometimes failure to take such a point at once is fatal as was pointed out by Chamier, J., in *King-Emperor* v. *Panchom* (1) and if the matter can be considered a mere irregularity section 537 would undoubtedly apply. If it is an illegality there is an end of the matter; the conviction would have to be set aside. If it was an irregularity its nature would have to be considered. But it is not necessary to discuss the effect of an irregularity because I am satisfied that there has been neither illegality nor irregularity. The Tahsildar must be conceived to have been acting as a Criminal Court and to have been put in motion by the proper procedure. Although as a result of his enquiry it might have been discovered that he could not take cognizance of the case, he was certainly authorised in fact required to make an inquiry which was of the nature of a judicial proceeding, and in the course of that judicial proceeding he considered that the facts showed that a forgery had been committed. Therefore he had authority to act under section 476 and in these circumstances the objection cannot succeed. In respect of the merits of the case, as I have said, there can be no doubt. I do not consider that there is any necessity to reduce the sentence. If may be urged that the appellant was committing a very foolish act because it was almost impossible that his offence would escape undetected. That is so. But he has shown himself to be actuated by the worst motives and to have endeavoured to perpetrate a particularly bad fraud upon his own relations by means of forgery and I see no reason to reduce his sentence. I find that he has been admitted to bail. He will at once surrender and complete his sentence. His appeal is dismissed.

Appeal dismissed.

(1) (1901) A.W.N. 151.

1925 Allahabad 100.

DANIELS AND NEAVE, JJ.

Nand Ram Singh—Defendant-Appellant

v.

Hari Saran Das and others—Plaintiffs-Respondents.

S. A Nos. 1201 and 1257 of 1922, decided on 21st May, 1924 from the decree of the District Judge of Sharanpur.

(a) *Thekadar—No lease but kabuliat executed—Defendant in possession and paying rent—Compensation for use and occupation must be paid.*

Where the defendant took possession of land under a lease and executed a kabuliat and paid rent for at least three years in accordance with it.

Held, even if the kabuliyat did not constitute a valid tenancy the defendant was liable to pay compensation for the use and occupation of the land, the measure of that being the amount which he agreed to pay under the lease. [P. 101, C. 2.]

(b) *U P. Land Revenue Act, S. 41—Tenant getting himself entered as thekadar and plaintiffs as lessors—Presumption under the section arises.*

Where the defendant himself applied for mutation of names and got himself entered as the thekadar and the plaintiffs as lessors.

Held, the plaintiffs were entitled to rely on the presumption laid down in S. 44 of the Land Revenue Act that the relation of landlord and tenant did exist between the parties. [P. 101, C. 2.]

(c) *Agra Tenancy Act, S. 10—U. P. Land Revenue Act, S. 36—Less than statutory rate of rent is claimable if agreed upon—Proceedings under S. 36, Land Revenue Act, are not necessary.*

If the rent agreed on between the parties for land in respect of which an ex-proprietary tenancy has arisen is less than the statutory rate laid down in S. 10 of the Tenancy Act the rent is claimable even though formal proceedings under S. 36 of the Land Revenue Act have not been taken. [P. 101, C. 2.]

Surendra Nath Sen—for the Appellant.

M. L. Agarwala—for the Respondents.

Daniels, J.:—These are two connected appeals in a suit for arrears of rent under section 102 of the Agra Tenancy Act. The suit has been decreed by both the Courts below and the defendant appeals. On 16th July, 1909, the defendant executed a usufructuary mortgage in favour of the plaintiffs of an eight annas share in the village of Mirpur Gaindiwar, mahal Daiyan Sadarang. It is in respect of this share that the present suit for arrears of rent has been brought. On the same date the mortgagees gave a *theka* of the share to the mortgagor on a rent of Rs. 210 per annum. No written lease was executed but the defendant executed a registered *kabuliat* stating that he had taken the zamindari share, the area of which was 101 bighas, on a lease from the plaintiffs and agreeing to pay the rent. Application for mutation was made to the Revenue Court and the defendant was duly entered in the *khewat* as *thekadar* and the plaintiffs as lessors in respect of the *theka*. It appears from the evidence of the patwari, who was the only witness examined, that the defendant who has admittedly been in possession, paid rent under the *theka* up to the year 1912.

The defence to the suit which was put forward in the Courts below and is repeated in the grounds of appeal is:—

1. That no tenancy was created by means of the *kabuliat* and therefore the defendant cannot be sued for rent. In this written statement he declared that he had paid the Rs. 210 a year now claimed up to date not by way of rent but by way of interest on the mortgage.

2. That as part of the land covered by the lease was *sir* land no rent could be claimed in respect of this portion of the area covered by the lease until rent had been determined under section 36 of the Land Revenue Act, which admittedly was not done.

3. That in any case the Courts below should have found whether a portion of the rent payable in respect of the 35 bighas *sir* land is less than the statutory rate prescribed by section 10 of the Tenancy Act.

It appears to us that it is not necessary in this case to go into the first question whether the tenancy can be created by means of a registered *kabuliat* or not. The case is covered by the Full Bench ruling in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (1). The defendant took possession of land under a lease and paid rent for at least three years in accordance with it and even if the *kabuliat* did not constitute a valid tenancy the defendant is liable under the ruling just referred to pay compensation for the use and occupation of the land, the measure of that compensation being the amount which he agreed to pay under the lease. Moreover in this case, as the defendant himself applied for mutation of names and got himself entered as *thekadar* and the plaintiffs as lessors the plaintiffs are entitled to rely on the presumption laid down in section 44 of the Land Revenue Act that the relation of landlord and tenant does exist between the parties. There is nothing to rebut that presumption. On the contrary there is a good deal to confirm it.

To the contentions regarding the *sir* area there are two answers. In the first place, as this lease was undoubtedly a *theka* of the zamindari share the case is covered by the ruling in *Mithan Lal* v. *Chhaju Singh* (2), on which the learned District Judge has relied. In the second place it has been held in more than one case that if the rent agreed on between the parties for land in respect of which an ex-proprietary tenancy has arisen is less than the statutory rate laid down in section 10 of the Tenancy Act the rent is claimable even though formal proceedings under section 36 of the Land Revenue Act have not been taken. In the present case the respondents' Counsel has been able to show from the evidence of the

(1) (1909) 31 All. 276=6 A.L.J. 167=2 I.C. 211=5 M.L.T. 347.

(2) (1918) 40 All. 429=45 I.C. 529=6 A.L.J. 384.

patwari, who was the sole witness, that the portion of the rent due in respect of the *sir* area is less than the amount which could have been fixed under section 36 of the Land Revenue Act. The decree of the Court below is therefore correct and we dismiss these appeals with costs including in this Court, fees on the higher scale.

Appeal dismissed.

1925 Allahabad 102.

BOYS, J.

Firm Hira Lal-Umrao Singh—Plaintiff-Appellant

v.

Firm Sri Ram-Brij Mohan Lal—Defendant-Opposite Party.

Civ. Rev. No. 45 of 1924, decided on 23rd June, 1924, against the order of the Small Cause Court Judge, Ghaziabad.

Contract Act, S. 30—Plaintiff alleging agency—Clear proof that plaintiff acted as agent between the defendant and third parties is necessary.

The plaintiff sued the defendant on a balance of account on a series of transactions of the sale and purchase alleged to have been effected by the defendant through the plaintiff. The transactions were admittedly wagering transactions.

Held, that before the applicability of the rule that though wagering transactions are void in themselves the collateral liabilities between the plaintiff as agent and defendant as principal are unaffected has to be considered, it must be clear that the plaintiff was not acting for himself as principal and with the defendant as the other principal but was acting merely as agent between the defendant as one principal and the plaintiff as agent and one or more other principals, as third parties and that where the plaintiff had failed to establish a single instance of dealings with any other party than the defendant in regard to the transactions the subject-matter of the suit, it followed that the plaintiff must himself have been a principal and not an agent. [P. 102, C. 2.]

U. S. Bajpai—for the Applicant.

N. C. Vaish—for the Opposite Party.

Judgment:—The plaintiff sued the defendant on a balance of account on a series of transactions of the sale and purchase of Khattis alleged to have been effected by the defendant through the plaintiff. The learned Judge of the Small Cause Court dismissed the suit holding that the transactions were wagering transactions. In civil revision here it has been urged that though the transactions were wagering transactions the plaintiff was an agent for the defendant in carrying out those transactions and that, therefore, though the wagering transactions in themselves may be void, the collateral liabilities as between the plaintiff as agent and the defendant as principal are unaffected and Mr. Bajpai for the applicant relies upon *Jagat Narain* v. *Sri Krishna Das* (1). It is obivious that before the applicability of that case has to be considered it must be clear that the plaintiff was not acting for himself as a principal and with the defendant as the other principal but was acting merely as agent between the defendant as one principal, and the plaintiff as agent and one or more other principals, third parties. The learned Judge of the Small Cause Court has on this point remarked:

"It is urged lastly that the plaintiffs were acting as agents of the defendant but the plaintiff has not proved a single instance in which he acted *bona fide* as such."

The phraseology was not at first sight very clear but I think the meaning of the learned Judge is that the plaintiff had failed to establish a single instance of dealings with any other party than the defendant in regard to the transactions, the subject-matter of the suit and that therefore it found that the plaintiff must himself have been a principal and not an agent. That this is the meaning of the learned Judge and also a sound view of the case is, I think, clear from the evidence of the plaintiff himself. He was definitely questioned and definitely failed to trace out one single instance or to give a clue to one single transaction in which a third party figured and moreover he admitted that it was impossible to do so. This speaks for itself and justifies the lower Court's finding that the plaintiff was in fact not an agent. It is clear therefore that Indian Law Reports, 33 Allahabad, page 219, can have no application. The application is dismissed.

Application rejected.

---

(1) (1910) 33 All. 219=8 I.C. 783=7 A.L.J. 1146.

**1925 Allahabad 103.

WALSH, A.C.J. AND RYVES, J.

Khub Lal and others—Appellants

v.

Bishambhar Sahai and others—Respondents.

F.A. No. 162 of 1923, decided on 17th June, 1924, from an order of the Sub-Judge, Aligarh, dated 17th July, 1923.

** (a) *Arbitration—Omission without consent of parties, to decide anything material, undertaken to be decided vitiates award—Parties' consent to omission need not be express—Consent is unnecessary for omission to do anything which was practically impossible for the arbitrators to do.*

If an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. But if in the course of events which have happened since an arbitrator took upon him his office, it has become impossible, or no longer desirable either in the view of the arbitrator, or in the view of the parties themselves to decide anyone or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. [P. 105, C. 1.]

The consent for such a purpose may take various forms: an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which makes a decision impossible, or a diplomatic silence with regard to a mutual understanding. Even in absence of parties' consent, the award is not invalidated by arbitrator's omission to do a thing which was impossible for him to do. [P. 105, C. 2.]

Where it was the duty of the arbitrators to divide certain villages between the parties but where it was practically impossible to go over the ground and to make the necessary partition by metes and bounds.

Held, that the omission to make the partition did not invalidate the award though the parties had not consented to the omission. [P. 106, C. 1.]

** (b) *Arbitration—Award—Setting aside—Arbitrator must not be examined on commission—He may be examined as to procedure adopted by him, the materials before him, etc., but not as to why or how he arrived at a decision—His decision that as a fact the parties had consented to anything is final.*

An arbitrator is not in the position of an ordinary witness. A Judge ought never to issue a commission to an arbitrator. He ought not to submit an arbitrator to a roving commission by way of examination by the parties uncontrolled by the Judge himself. When the arbitrator appears before a Judge, the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of re-hearing of the arbitration while from an arbitration, appeal does not legally lie. But more than that, a Judge ought to exercise a severe control over the interrogatories or the examination of the arbitrator when summoned. An arbitrator is a judicial person in respect of the matter to which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact upon some evidence, or allegation tending to establish or disprove his own misconduct, may no doubt be put to him if he is charged with misconduct. Where an arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind. In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. (*O' Rourke* v. *Commissioner of Railways*, 15 A.C. 371, *Foll.*) [P. 107, Cs. 1 and 2.]

Iqbal Ahmad and *Baleshwari Prasad*—for the Appellants.

Tej Bahadur Sapru, *Gulzari Lal* and *U. S. Bajpai*—for the Respondents.

Walsh, A.C.J. :—This is in many ways a lamentable specimen of the abuse of a valuable and simple piece of machinery which has been provided by the legislature, to enable people, if they wish to avoid Law Courts, to settle their disputes in a friendly way with the assistance of friends and members of their own brotherhood. That is not to say that the legal aspect of the questions which have been argued before us have not been admirably handled, but nobody acquainted with this litigation, or listening to such parts of the case as have been relevant to the argument before us, can have the slightest doubt that the two main parties to this arbitration proceeding, namely, Khub Lal and Bishambhar Sahai, were well advised to seek the assistance of three arbitrators to adjudicate upon their controversy; that they succeeded in obtaining apparently gratuitously able, conscientious and honest arbitrators and that in the main, it would be difficult in the whole history of arbitration to find work which had been better done. It is

heart-breaking (except to those who regard quarelling with members of their own family and litigating in the Law Courts as an existence in itself) to find that one of these parties, after all this labour and expenditure of time, and usefulness and hard honest work, should be so lost to any sense of decency, as to try and upset the whole arrangement. It does not follow that he is not entitled to succeed. Unfortunately it has been only too truly said of the law that from time to time under its protection knavery flourishes, but we are glad to say that the attack upon the arbitrators in this case, and the childish objections which have been raised to this admirable award, have entirely broken down. But the matters in dispute were substantial, and the variety of items, which had to be dealt with was considerable. How long the arbitration proceedings actually lasted, it is impossible to say. But it would be equally impossible to conduct such an arbitration from beginning to end without exposing the proceedings to attacks, which at any rate, in the hands of an able advocate can be made to look formidable, until they have been pulverized by the respondents on the other side, and there were, when this appeal was opened before us, a certain number of formidable points which were worthy of consideration in the way they were presented by Mr. Iqbal Ahmad. The appeal comes before us in a way which is not unfamiliar. The Judge, or the arbitrator has not yet been invented who is able to satisfy both parties in a difficult and complicated controversy. He will probably never be found in our day, and therefore when this award was published it was almost certain that one or other of the parties would be dissatisfied. It would not perhaps be a violent presumption to assume that the party, Khub Lal, who is dissatisfied in this case, has not done quite so well as he hoped. Possibly he hoped that the other party to the award would be the one to be dissatisfied. But being apparently dissatisfied, and not willing to accept the decision of the arbitrators, he indirectly forced his opponent to take the necessary proceedings under paragraphs 20 and 21 of the second schedule of the Code to have the award filed as a decree and made finally binding upon the two branches of the family. Then of course his batteries opened fire and the usual string of objections were filed in the Court below—too numerous and some of them, to trifling to be set out in detail here—and a very thorough enquiry was held in the Court below into the proceedings of the arbitrators, who, as a matter of course, were charged with misconduct—apparently they would not be real arbitrators if they did not lay themselves open to suspicion—and various other technical points were raised. A great deal of evidence was taken, including the evidence of a well-known and highly respected vakil of this Court who happened to be the Umpire, and the evidence of one of his colleagues. To this matter we will refer again in a moment. But the learned Judge before whom the matter came, after apparently a most painstaking hearing wrote an admirably clear and comprehensive judgment dismissing the objections and ordering the award to be filed. Thereupon the usual appeal was filed in this Court. The memorandum of appeal shows that the proceedings in the Court below had been in substance an appeal from the arbitrator's decision, and that an attempt was being made also in this Court by way of appeal from the Court below, to continue the appeal from the arbitrators. As an example of the kind of attack which was being made upon the proceedings, it is interesting to note that the 6th ground asks this Court to set aside the award upon the ground that Mr. Panna Lal, Vakil, High Court, was suffering from a defective memory with regard to something which he had decided about somebody or another's house, a matter which he must have desired to forget as soon as possible and now had nothing to do with for several months. If a defective memory is to be a ground for setting aside legal proceedings, there would be very few decrees which would ever achieve absolute finality. This attack upon an arbitrator for defective memory has a bearing upon something which we will have to say hereafter. But out of these numerically heavy attacks which have been made upon the proceedings of the arbitrators and of their conduct, one or two points have emerged in the skilful handling by Mr. Iqbal Ahmad in this Court which deserve to be dealt with by us and which necessitated our calling upon Sir Tej Bahadur Sapru to put his client's view of the matter, more out of respect for the points that were raised, than

for any legal difficulty which they created. A detailed and to some extent microscopic examination of the property which was dealt with by the arbitrators, and of the proceedings of the arbitrators, and of the award does disclose that certain matters, which were originally intended to be disdisposed of by the arbitrators, have been ignored or omitted from the award, or as it is sometimes said, left undetermined. Now in this case the agreement between the lawyers on either side about the principles is so complete, that it is hardly necessary to refer to authorities. It is agreed, on the one hand, that if an arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight without the consent of the parties omits from his decision anything really material, it is sufficient to destroy the award. The reason for that is obvious. We are discussing, be it observed, an arbitration without the intervention of the Court. The tribunal derives its authority only from the consent of the parties and from the moment when it goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he ceases to be clothed with the legal authority from which alone he derives his jurisdiction. About that there has been no controversy before us. Similarly there has been no controversy with regard to a corollary which follows. If in the course of events which have happened since he took upon him his office, it has become impossible, or no longer desirable, either in the view of the arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. To take a simple illustration, if the matter in dispute were an elephant which had died (a thing which really happens I think to elephants) in the course of a dispute, it would be absurd to suppose that an award could be upset merely because an arbitrator failed to divide among the parties the elephant which was dead and buried before the award was issued. It is not necessary, as we have said, to go through the authorities which Sir Tej Bahadur Sapru rightly cited from the English and Indian Reports establishing this proposition. There are several items in this case which the arbitrators have left undetermined. The learned Judge, with regard to those of any importance, has found that that was done with the consent of the parties. There was abundant evidence upon which he could come to that conclusion, and we see no reason to interfere with it. The consent for such a purpose may take various forms: an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which make a decision impossible, or a diplomatic silence with regard to a mutual understanding. Almost every one of these illustrations exists here. Two admirable illustrations occur in this particular case, one which was pressed upon us by Mr. Iqbal Ahmad, and one which was not. It so happened that in this wealthy family there were implements or accessories connected with indigo factories, which were scattered, difficult to value, impossible to divide, and altogether a troublesome item to handle. Whether the objection came, from the arbitrators themselves, all of whom were lawyers, and who, as they were giving their services freely at great sacrifice to themselves, could hardly be expected to make the necessary journeys and to undertake the burdensome task of collecting, assessing, dividing and apportioning these factory implements, or whether the parties themselves anticipated the objection which was certain to come sooner or later from the arbitrators, by a kind of tacit understanding, which is only to be expected of reasonable businessmen, the arbitrators were given to understand that the factory implements were in themselves so trivial, or at any rate the dispute with regard to them so minute, that they need not trouble their heads about them. Nobody we imagine was better pleased by this decision than the arbitrators themselves, except possibly the Subordinate Judge who might be asked to hear an appeal on the question as to whether these implements had been fairly divided. Another illustration is what we have described as the diplomatic tacit understanding. There was an unfortunate skeleton in the family cupboard. Skeletons in cupboards may be perfectly innocuous, but sometimes, when they are galvanized

into activity, they may become extremely troublesome, and this skeleton appeared to belong to the latter class. There was a house which has been left severely alone by the arbitrators. The evidence is clear that the arbitrators were given to understand that no decision could be arrived at with regard to this house without opening the door of the cupboard, and letting the skeleton out, and it was agreed by one of those tacit diplomatic understandings, which are so much more frequent in real life than in legal agreements, that the cupboard should be kept closed and that nothing should be said about the house, and nothing was said about the house. That point is clearly covered by the principle relied upon by Sir Tej Bahadur Sapru, namely, a point left undetermined by the consent of parties. and if there is one thing about which Khub Lal is to be congratulated in this case, it is that he preferred it should be left undetermined. Another formidable point raised by Mr. Iqbal Ahmad was the question of the two villages, which certainly gave us a great deal of trouble. In substance what has been done about these two villages is this. Strictly speaking it was the duty of the arbitrators to divide these villages as they were in the zamindari held in common and recorded in the revenue papers of a tahsil which remained undivided, and although with regard to the property relating thereto the parties approved of the agreement which the arbitrators adopted, and although the arbitrators were prepared, and indeed carried out a declaration of right as to the rateable shares of both parties corresponding to the type of declaration contemplated by Order 20, rule 18, the view of Mr. Panna Lal, Umpire, as expressed in box, was that it was practically impossible if not absolutely impossible, and there is no difference between practical and absolute impossibility so far as an arbitrator in a matter of this kind is concerned, to go over the ground and to make the necessary partition by metes and bounds. Therefore they did what they could, and did not attempt to do what they realised they could not, and by way of explanation or possible justification of the excellence of their decision, Sir Tej Bahadur Sapru has produced in Court for our inspection the result of the partition which has actually been carried out by the revenue authorities with all their experience and knowledge, leaving us to draw a lurid picture of what would have happened if Mr. Panna Lal and his colleagues had even endeavoured to do the same thing, their failure to do which, Mr. Iqbal Ahmad suggests, has invalidated these proceedings. It is difficult to see how anybody would have profited by that proceeding. We think that Sir Tej Bahadur Sapru has put the proper construction on these proceedings. Mr. Iqbal Ahmad's contention naturally made was that there was no clear evidence of consent by the parties to the omission. Sir Tej Bahadur Sapru's answer is, that he does not suggest that this was a point left undetermined by the consent of the parties. Rather was it a point which has been decided in the only way in which it was humanly possible for the arbitrators to decide. One or two other points, which would have been of great interest, were raised by Mr. Iqbal Ahmad, but we have come to the conclusion that his client is prevented from raising them in this Court as they were not properly raised in the Court below. This much suffices for the disposal of this appeal, but it leaves two matters untouched which we feel we cannot entirely ignore : (1) a simple and pleasant task, (2) the other not so pleasant and somewhat difficult. The first task is this, that we think we ought to express our admiration for the way in which this arbitration proceeding has been carried out as well as for the way in which it has been handled by the Judge in the Court below, and by the gentlemen who have discussed it before us during the last two days. I have some experience of agreements of reference, and I am bound to say that I have seldom seen one, which seemed to me more admirable, than that which Mr. Panna Lal prepared for the parties in this arbitration. I have no experience of large arbitration proceedings, but we both of us felt that in this matter all the arbitrators must have devoted themselves with extraordinary industry, and on the whole with unparalelled success to the preparation of a clear document which should successfully record the right of the parties for all time, and in spite of Khub Lal's dissatisfaction, we think both parties ought to be grateful to the arbitrators for the way in which they have done their work. In our view the learned Judge has handled the matter in the Court below

with one exception admirably. The exception is this, and after what has been said before us in argument we think we ought not to pass the matter over without some observation. As a matter of policy it is obvious that if arbitration is for the general benefit of the community in India, it can only become so by being put in the hands of men of position and ability, and if it is to become, as we are afraid it has to a large extent, a recognised practice the moment an award is completed to start an unjustifiable attack upon the personal character and conduct of those who have only been doing their best to please the parties, and to drag them before a Court of law, to cross-examine them as witnesses, and have offensive suggestions flung at them, the thing will become so unpopular as to be almost impracticable. But it is not merely as a matter of policy that we would mention it. As a matter of law it should be clearly understood by the Courts below that an arbitrator is not in the position of an ordinary witness. All those concerned in this case recognise that a great deal of the examination to which Mr. Panna Lal was submitted as Umpire was quite unjustifiable. The Judge could not stop it because Mr. Panna Lal's evidence was taken on commission. But if the principles governing the competence of arbitrators are clearly understood, it is obvious that a Judge ought never to issue a commission to an arbitrator. We are not prepared to go the length of Sir Tej Bahadur Sapru's suggestion that a Judge ought not to summon an arbitrator without an affidavit as to what he is required to say, but he certainly ought not to submit an arbitrator to a roving commission by way of examination by the parties uncontrolled by the Judge himself. Assuming without deciding that a Judge cannot refuse the issue of a summons to an arbitrator, when the arbitrator appears before him, the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of rehearing of the arbitration. Nothing can be worse than that, because there is no appeal from an aribtrator, and a Judge ought, from the first severely to discountenance anv proceeding which attempts to take that form. But more than that he ought to exercise a severe control over the interrogatories or examination of the arbitrator when summoned. An arbitrator is a judicial person in respect of the matter of which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact upon some evidence, or allegation tending to establish or disprove his own misconduct, may no doubt be put to him if he is charged with misconduct. So with regard to Mr. Iqbal Ahmad's contention in this case, his failure to decide the point submitted to him. So too with regard to that withdrawal by the parties of points originally submitted, bearing this in mind that Sir Tej Bahadur Sapru was right when he argued that where an arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind. In short an arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision, and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. We think this view is fully supported by a dictum to be found quoted in the judgment of Lord Watson in the case of *O'Rourke* v. *The Commissioner for Railways* (1), quoted from a judgment of Earl Cairns in a previous authority in the House of Lords :

> "He (i.e., the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased".

(1) 15 A.C. 371=59 L.J.P.C. 72=63 L.T. 66.

In our view that is a short and comprehensive statement of the liability of an arbitrator to be questioned in the presence of or by the Court with regard to matters affecting the award, and we trust that Judges before whom this direction of ours may come on a future occasion, will adhere to that principle. Strangely enough the learned Judge for whom one has great sympathy had clearly in his mind, supported by authority, the rule that a Judge has no business in an application of this kind to sit in judgment on the decision of the arbitrators. But none-the-less in a long passage a portion of which precedes his correct declaration of the law, and a portion of which follows closely upon it the learned Judge was engaged in an analysis of the accounts and the decision of the arbitrators upon the accounts, which we are satisfied must have caused him hours of work.

The appeal must be dismissed with costs including in this Court, fees on the higher scale.

Inasmuch as Mr. Iqbal Ahmad has pressed upon us with great earnestness his objection to the way in which the arbitrators dealt with a specific piece of property which had originally been in this family and indeed still belonged to the family in one sense though undoubtedly impressed with a trust, either expressly or impliedly, created by the deceased head of the family, we will add a word or two about it although we are bound to say that it was not open to Mr. Iqbal Ahmad to argue it here. We agree with Sir Tej Bahadur Sapru's construction of the decision of the arbitrators, that it was not a new disposition of the property, but merely a temporary and no doubt admirable arrangement for the provisional treatment of the property. One way of putting it is that it was not, as suggested by Mr. Iqbal Ahmad's client, an alienation at all. Nor is there the slightest foundation for the suggestion of any impropriety on the part of the arbitrators, with the consent of the parties, to take part in the general administration and the provisional working of this property through a Committee to which they belonged. Mr. Iqbal Ahmad pressed upon us that as representing the minors, the grand-children of Khub Lal, who could not speak for themselves, he was entitled to object to this part of the decision, although Khub Lal himself could not, being *sui juris*. We recognize that it is somewhat unusual, and perhaps hard on Mr. Iqbal Ahmad, that we should rule him estopped from raising the point, because he had not raised it adequately in the Court below and at the same time that we should decide against the point in the course of observation in our judgment. But we would merely add this, in regard to the interest of the minors, that in our opinion, though it is not necessary for us to arrive at any decision on the point, the guardian having been properly appointed and the minor properly represented in this proceeding, and the guardian having been a party to the award both in his own capacity and as guardian, the award must be binding upon the minors for the time being through their guardian, and they cannot be heard to raise any objection which might be open to them as minors on the ground that their interest as infants have not been properly looked after until they reach majority, and raise it in the ordinary way, and when if ever they do so they will doubtless be reminded, if they are not at that age already keenly conscious of the fact themselves, that the arrangement which was arrived at was one which received the unanimous and almost enthusiastic approval of all those who were *sui juris* and who were best able to judge what was best in the general interest of the family and of the minors themselves, and also the approval of the Judge before whom the matter came originally and of the Court of appeal.

Appeal dismissed.

---

* 1925 Allahabad 108.

MUKERJI AND DALAL, JJ.; THEN DANIELS AND NEAVE, JJ.

Wajid Ali Khan—Appellant

v.

Puran Singh and others—Respondents.

Ex. F.A. No. 202 of 1923, decided on 11th July, 1924, from a decree of Sub-Judge, Bulandshar, dated 28th March, 1923.

* *Pre-emption—Effect of abatement—Decree of the appellate Court, on appeal by vendee, in ignorance of death of one of the pre-emptors respondents, dismissing suit is nullity—Payment of decretal amount jointly by the pre-emptors does not affect the question.*

Payment of consideration money by pre-emptors jointly without specification of shares in terms of

the decrees of the Court of first instance in the first Court before the appeal was heard, during the pendency of which one of the pre-emptors died, does not affect the rights of the parties where the vendees' appeal was decreed in ignorance of the fact that one of the respondents (pre-emptors) was dead and the suit was dismissed. In such a case the whole appeal abates and the appellate decree dismissing the suit on the merits is a nullity against all the plaintiffs (pre-emptors). [P. 115, C. 1.]

S. Abu Ali, Iqbal Ahmad and *Mukhtar Ahmad*—for the Appellant.

P. L. Banerji and *K. N. Katju*—for the Respondents.

Mukerji, J. :—[12th June, 1924]. This appeal is connected with the Execution First Appeal No. 281 of 1923. They have arisen under the following circumstances :—

Four persons Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh instituted a suit for pre-emption against Wajid Ali Khan who had purchased a property and who is the appellant in Appeal No. 202 of 1923. The suit succeeded in the Court of first instance and a decree was made in favour of the plaintiffs on 20th February, 1921. The consideration money was directed to be paid within one month of the decree becoming final and was actually deposited in Court on 22nd June, 1921. Wajid Ali filed an appeal to this Court on 30th March, 1921. Amar Singh died pending the appeal on 12th January, 1922. The first appeal in this Court was heard in ignorance of the fact that Amar Singh was dead, and a decree was made on 18th January, 1923 reversing the decree of the Court of first instance. Before the appellate decree was made, the pre-emptors on payment of the consideration money had obtained delivery of possession over the pre-empted property. Wajid Ali on his success in appeal, applied for restoration of possession, and it appears that, by an *ex parte* order, he was restored to possession on the 2nd of February, 1923. Thereupon, the plaintiffs Puran Singh, Lekhraj Singh and Pirthi Singh and the representatives of the deceased plaintiff Amar Singh made an application on the 16th of February, 1923, in the Court of first instance asking that, they should be restored to possession. Their case was that Amar Singh having died pending the appeal the decree passed by the High Court was a nullity and therefore Wajid Ali got nothing by the decree made by the High Court in his favour.

The Court of first instance held that the sons of Amar Singh were entitled to keep possession of the entire property if the three surviving plaintiffs agreed that the entire consideration money might be taken as having been deposited by the heirs of Amar Singh.

Wajid Ali, the vendee, has appealed, his appeal being No. 202 of 1923. In this appeal the three surviving plaintiffs filed a cross-objection, but they did not pay the Court-fee payable on the same, and their objection should be deemed to have been rejected. It appears that under the decisions of this Court under certain circumstances, it is cheaper to file an appeal than to file a cross-objection, and accordingly the three surviving plaintiffs Puran Singh and others filed the Appeal No. 281 of 1923.

Mr. P. L. Banerji appearing for the three surviving plaintiffs tells us that, his clients are willing to have the entire money credited as paid by Amar Singh, and that the order passed by the Court below may be taken as effective. The case of the surviving plaintiffs, however, is that the whole appellate decree is a nullity and therefore the entire decree made by the Court of first instance should stand, giving all the four plaintiffs in the Court of first instance the fruits of the decree, unhampered by the decree made by the High Court.

On behalf of Wajid Ali Khan it has been contended that the result of not bringing on the record the heirs of Amar Singh was simply this, that the decree of this Court reversing the decree of the Court of first instance stood in respect of three-fourths of the property and was a nullity in respect of the share of Amar Singh.

It is common ground that the decision of the question raised between the parties depends on the effect of the provisions made in Order 22 of the Civil Procedure Code. The argument on behalf of the surviving plaintiffs is that if the fact that Amar Singh was dead had been brought to the notice of the High Court, the High Court would have been bound to declare that the whole appeal had abated and could not proceed to determine the appeal on its merits. The contention of Wajid Ali is that the abatement would have been declared with respect to the interest of the deceased Amar Singh alone and not with respect to the interest of any of the remaining plaintiffs-respondents.

Order 22, rule 1 of the Civil Procedure Code declares that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. The expression "right to sue" has not been defined anywhere in the Civil Procedure Code, but I take it that the expression means 'a right to ask for relief' whether in the Court of first instance or in the Court of appeal. Rule 2 lays down that where there are more plaintiffs or more defendants than one, and any of them dies, and the right to sue survives either in favour of the remaining plaintiff or plaintiffs or against the remaining defendant or defendants *alone* an entry will be made by the Court that a party is dead and it will proceed with the disposal of the case before it. Rule 3 says that where the sole plaintiff or sole surviving plaintiff or one of two or more plaintiffs dies and the right to sue survives in favour of the legal representatives as well, the legal representative of the deceased plaintiff will be brought on the record. The penalty of not bringing the legal representative of the deceased plaintiff is specifically declared, and it is this, namely, the suit shall abate *so far as the deceased plaintiff is concerned*. Rule 4 applies to the case of defendants, and provides that where the sole defendant or sole surviving defendant dies and the right to sue survives against the legal representative as well, the legal representative of the deceased shall be brought on the record. The penalty of not bringing the legal representative on the record would be that the suit would abate as against the deceased defendant. The provision as to defendants and plaintiffs is to be adapted to the case of an appeal as provided in rule 11 of the Order. The sum total of all the provisions in rules 1 to 4 seems to me to be this. Where the right to sue survives in favour of or against the legal representative as well, and there are more parties than one, the result of not bringing on the record of the legal representative of the deceased party is this and *this only*, that the suit or appeal would abate as against the deceased party. It is nowhere laid down in the Code of Civil Procedure, *as re-enacted in 1908* that the whole of the appeal will fail if the legal representative of the deceased party be not brought on the record. The addition of the words "as far as the deceased plaintiff is concerned" or the words "as against the deceased defendant" to the Code of 1908 clearly indicates that, the abatement can take effect as against the deceased party only, and the abatement *shall not affect* the entire case before the Court. The main point is whether the right to sue survives or not. If the right to sue does not survive, then and then alone the whole case may go.

Where the language of law is simple and there is no ambiguity, it is not open to look to the reason of the rule. But there can be no doubt that, the legislature acted on a well defined policy in altering the law in 1908. They expressly enacted (Order 1, rule 9) that no suit should fail for misjoinder or non-joinder of parties, and directed the Courts to decide the case as between parties on the record. The same policy, in my opinion, is responsible for the rule that only a part of the suit or appeal should abate and not the whole of it.

Now applying the rule of law as discussed above to the facts of the present case we find that when Amar Singh died he had already become entitled to a quarter share in the property subject to the result of the appeal. Indeed, he had completed his title under the decree by deposit of the consideration money along with his co-plaintiffs. It goes without saying that the plaintiffs in a pre-emption suit claim under their individual titles, and in the present case, the four plaintiffs could have instituted four different suits, one for each plaintiff. In the case of their success, the Court would have divided the property among the four plaintiffs. In that case, however, there would have been this further provision that, if one party failed to pay his share of the purchase-money, the other rival plaintiffs would be entitled to pay the same. In the present case the four plaintiffs agreed to take the property among themselves, and it must be taken that each of the plaintiffs was entitled under the decree to a fourth share in the property. When, therefore, Amar Singh died he was, subject to the result of the appeal, entitled to a fourth share in the property. If the appellant Wajid Ali Khan wanted to contest the appeal as against Amar Singh's legal representatives, he was bound to bring them on the record and to argue the appeal in their presence. The death of Amar Singh did not result in the death of the 'right to sue', because Amar Singh had already obtained a decree in his favour. In a pre-emption

suit when a plaintiff dies, the question whether his son or other legal representative can be brought on the record or not depends on good many circumstances. Where, for example, a plaintiff claims a preferential right of purchase over the vendee, on his death, his son cannot be brought on the record unless he also in his personal right is entitled to pre-empt as against the vendee : see *Partab* v. *Daulat* (1). But where a decree has already been passed and an interest in the property has been acquired, the question of the personal right of the legal representative of a deceased plaintiff, in a pre-emption appeal does not arise. Anybody who would succeed to the property of the deceased would be entitled to be brought on the record. Thus, it is perfectly clear that the 'right to sue,' so far as the appeal went, did survive not only against the surviving plaintiffs-respondents but also against the legal representative of the deceased plaintiff-respondent. The result of not bringing the legal representatives of Amar Singh on the record in appeal would simply be this that, the appeal would abate as against Amar Singh. The appeal would continue to be good as against the surviving plaintiffs-respondents. In this view of the law the legal representatives of Amar Singh would be entitled to take back possession with respect to one-fourth share of the property, and the application of the surviving plaintiffs would be liable to be dismissed. For the decree of the High Court would not be a nullity but would be binding on the surviving plaintiffs-respondents.

Now I shall consider the authorities cited at the bar. The learned Counsel for Puran Singh and others, the surviving plaintiffs, referred us to several cases. The first one is *Imamudin* v. *Sadabarat* (2). In this case the person who had died pending the appeal was one of the vendees, and it was held that as his legal representative had not been brought on the record, the decree that was passed in appeal was a nullity. In the judgment it is expressly stated that, it was admitted at the Bar that the suit was one in which the cause of action did not continue against the surviving defendants alone and it was necessary to bring on the record, the representatives of the deceased respondent. It is clear in that case that the suit being one for pre-emption the plaintiffs could succeed, if at all, only with respect to the whole property. As one of the vendees was dead and his legal representative was not brought on the record, the decree, if held good, could have only resulted as being against a part only of the pre-empted property. That this is the effect of this ruling was recognized in the case of *Ambika Prasad* v. *Jhanak Singh* (3). At page 94 of the report occurs the following expression of opinion :—

"It might, however, be argued on behalf of Ambika Prasad that the principle underlying that decision (32 All. 301) does not apply to this appeal, inasmuch as the decree against the vendees could not be split up as the shares of vendees perhaps were not specified in the sale-deed".

It may also be pointed out that, the decision in 32 Allahabad depended on the interpretation of the law as it stood before the Code of 1908 was enacted.

In the case before us, as I have already indicated, one of the four pre-emptors, who had definitely got each a fourth share in the property, died and the case in 32 Allahabad therefore has no application. The rule that there cannot be pre-emption of a part of the property exists for the benefit of the vendee and cannot be used to his disadvantage. He may say "well, if my appeal cannot succeed with respect to one-fourth share, let it succeed with respect to the rest, three-fourth share." In the case of *Ambika Prasad* v. *Jhanak Singh* (3) it appears that only one of three plaintiffs filed an appeal, and he stated that he was filing the appeal not only on his own behalf but also on behalf of his co-plaintiffs. These co-plaintiffs were not made parties in the appeal. One of them Hubedar died pending the appeal. The appeal was decreed by the High Court. When the successful plaintiffs-appellants tried to take possession, it was contended for the purchaser that the decree of the High Court was a nullity and could not be executed. This Court held, on the authority of a Calcutta case *Balram Pal* v. *Kanyasha Majhi* (4) that where one of several joint plaintiffs died and his legal representative was not brought on the record, the suit and the appeal must fail. I have looked through the Calcutta case, and I do not think that it can bear

(1) (1914) 36 All. 63=22 I.C. 678=12 A.L.J. 18.
(2) (1910) 32 All. 301=5 I.C. 897=7 A.L.J. 228.
(3) 1923 All. 211=45 All. 286=21 A.L.J. 91=L.R. 4 All. Civ. 92.
(4) (1919) 53 I. C. 548.

the weight of a broad proposition like this. It is clear, however, that in the case of *Ambika Prasad* v. *Jhanak Singh* (3) the decision did not turn on the peculiar incidents of a pre-emption case. As against these two cases cited by the learned Counsel for the surviving plaintiffs we have the case of *Imdad Ali* v. *Jagan Lal* (5) decided by two learned Judges of this Court, namely, Sir John Edge, C.J. and Banerji, J. In that case it was found that of two persons against whom a decree had been made one had died before the decree was passed. It was held that the decree could be executed against the property of the person who was surviving but not against the property of the deceased person. This case was considered and approved of by Chief Justice Richards and Banerji, J. in the case of *Sripat Narain Rai* v. *Tribeni Misra* (6).

In this conflict of authority, indeed, if there be any conflict at all, I would prefer to follow the cases of *Imdad Ali* v. *Jagan Lal* (5) and *Sripat Narain* v. *Tribeni Misra* (6) to the case of *Ambika Prasad* v. *Jhanak Singh* (3).

I need hardly point out that my reading of the law is consistent with the rulings I propose to follow.

The result is that I would modify the decree of the Court below and restore Amar Singh's legal representative to the possession of only one quarter share in the pre-empted property and would dismiss the Appeal No. 281 of 1923 of the surviving plaintiffs Puran Singh, Lekhraj Singh and Prithi Singh. The cross-objection of Puran and others in Appeal No. 202 of 1923 must be rejected.

Dalal, J.:—[12th June, 1924.] Wajid Ali Khan was the purchaser in a pre-emption suit brought by Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh for pre-emption of a complete revenue paying *mahal*. A decree was passed on 28th February, 1921, jointly in favour of all the four, plaintiffs without specification of shares conditional on their depositing Rs. 2,173 and odd for payment to Wajid Ali Khan. The following dates may be quoted in tabular form .—

18th March, 1921. Appeal to the High Court by Wajid Ali Khan against the four plaintiffs.

22nd June, 1921. The plaintiffs deposited in Court amount as directed in the decree.

30th June, 1921. Plaintiffs took possession through Court.

12th January, 1922. Plaintiff Amar Singh died.

18th January, 1923. The decree of 1st Court reversed by the High Court.

2nd February, 1923. Wajid Ali restored to possession.

On 16th February, 1923, the heirs of Amar Singh—his two sons and the other plaintiffs applied to be put again in possession on the ground that the decree of the High Court having been passed after the death of Amar Singh and without his legal representatives being brought on the record was a nullity. The lower Court dismissed the objection of the three surviving plaintiffs but directed possession to be made over to Amar Singh's sons "provided the purchase money already deposited in Court is consented to go to the opposite party by all the objectors."

Both Wajid Ali and the three surviving plaintiffs have appealed separately. This is the appeal of Wajid Ali. The reasoning of the lower Court does not satisfy me. The learned Judge held that the appeal against three out of four plaintiffs was competent and that the decree thereunder was binding on them. If so, Amar Singh's sons can retain or receive back $\frac{1}{4}$th of the property or property commensurate with Amar Singh's share of the money deposited in Court according to agreement betwen the four pre-emptors. It is true as observed by the lower Court that Amar Singh alone could have pre-empted the entire property but he did not do so, nor is it urged that he alone owned the money which was deposited in court.

In my opinion the correct reasoning here would be that the decree of this Court was a nullity because the appeal abated against *all* the respondents and that therefore the pre-emption decree in favour of the original plaintiffs still operates. Possession was given to Wajid Ali wrongly. It may be mentioned that no plea of *res judicata* is set upon his behalf.

Much stress was laid by the learned Counsel for the appellant on the change of phraseology in the Code of Civil Procedure, 1908. In my opinion the alteration has not changed the law on the subject. According to Order 22, rule 4, clause 1,

(5) (1894) 17 All. 478=1895 A.W.N. 109.
(6) (1918) 40 All. 423=45 I.C. 21=16 A.L.J. 327.

where one of two or more defendants dies and the right to sue does not survive against the surviving defendants alone (as here) the Court shall upon application cause the legal representatives of the deceased defendant to be made parties. Clause 3 of this rule lays down that in the absence of an application the suit shall abate as against the deceased defendant. The words "as against the deceased defendant" are new in the present Code. This means that the appeal abates *primarily* against the deceased respondent *alone*. The provision means that the appeal shall not abate as a whole necessarily as an invariable consequence of abatement against a respondent. At the same time, the provision does not lay down that in every case the appeal shall proceed against the other respondents. The point will have to be decided in every appeal whether the appeal abated as against the deceased unrepresented respondent only or as a whole.

My opinion is that Wajid Ali's appeal here abated as a whole. A vendee cannot admit the right of one out of several pre-emptors to pre-empt a portion and appeal as to the right of the others. The rights of all pre-emptors were of equal degree and admission of the right of one amounted to an admission of the right of all. Amir Singh may have had claims of his own to the entire property which he would not be able to urge if he is not made a party to the appeal. Suppose Amar Singh alone had deposited the money as he was fully entitled to do under the decree and became entitled to possession of the entire property. The purchaser by appealing against the others, who did not want to press their claims, would deprive Amar Singh of the fruits of his victory by depriving him of a hearing in the appellate Court. The decree in favour of the plaintiffs was joint and not divisible. To my mind, the principles of the ruling in the case of *Imamuddin* v. *Sadarath Rai* (2) apply here though the defendants in that case were purchasers and not pre-emptors. Here the interests of the pre-emptors are indivisible just as those of the purchasers were indivisible in the case quoted. The decree can be executed whole or not at all. On this ground the learned Judges rightly distinguished a decree in a pre-emption suit from a decree such as the one under construction in *Imdad-ali* v. *Jaganlal* (5). There the properties of two judgment-debtors were divisible. The decree was passed against Mohamed Jalil and not Hamidunissa for possession of property, while the lady had died prior to decree and her representative in interest was not brought on the record. This Court held that so far as the interests of the lady were concerned the decree was not enforceable. Presumably it was known to what extent the decree was passed against Abdul Jalil and to what extent against the lady. In the present case the decree in favour of the four plaintiffs is indivisible.

Ambika Prasad v. *Jhanak Singh* (3) was another ruling of this Court quoted on behalf of the respondent. I shall not rely upon it because the reasoning does not appear to me to be sound that one of several pre-emptors in equal decree cannot appeal with respect to the entire property. I should have thought that, taking the facts of the present case for an example, if the plaintiffs had failed in the first Court, any one of them could have appealed alone to pre-empt the entire property.

As in my opinion the decree of this Court of 18th January, 1923 is inoperative, I would dismiss this appeal and decree appeal Ex. No. 281 of 1923.

By the Court :—As we are differing, on a question of law, we refer the case, to the Hon'ble the Acting Chief Justice with the request that, he may constitute a Bench for hearing the question under section 98 (2) proviso of the Civil Procedure Code. The question is this :—

(*a*) Where in a pre-emption suit, the vendee appeals against a decree allowing the claim of four plaintiffs pre-emptors and the appeal is decreed, in ignorance of the fact that one of the respondents was dead, and the suit is dismissed, whether the whole appeal had abated and consequently the appellate decree is a nullity or whether the decree was operative as against the plaintiffs-respondents who survived ?

(*b*) Further, whether the fact that, the consideration money had been paid by all the pre-emptors jointly, without specification of shares, in terms of the decree of the Court of first instance, in the said Court, before the appeal was heard, will make any difference in the answer to be returned to the question (a) ?

Upon the Reference being heard the following judgment was delivered by

Daniels and Neave, JJ :—[10th July, 1924.] This is a reference under section 98 of the Civil Procedure Code in consequence of a differnce of opinion between Mr. Justice Mukerji and Mr Justice Dalal. The question for decision in the appeal was whether the failure of the appellant Wajid Ali Khan to implead the legal representatives of Amar Singh plaintiff in his first Appeal No. 119 of 1921, to this Court involved the dismissal of his entire appeal or only its dismissal in respect of one-fourth share of the subject-matter.

The facts are stated in the two referring orders. They are that four persons Puran Singh, Lekhraj Singh, Amar Singh and Pirthi Singh filed a joint suit for pre-emption. Wajid Ali Khan, the vendee of the property under the sale impugned was the sole defendant. The trial Court decreed the suit on 28th February, 1921, and gave a joint decree in favour of the plaintiffs. On 18th March, 1921, Wajid Ali Khan appealed to this Court. In the meanwhile the decree-holders deposited the pre-emption money and obtained possession of the property.

On 12th January, 1922, Amar Singh died. No steps were taken to implead his legal representatives. This Court nearly a year later, in ignorance of Amar Singh's death, allowed the appeal and dismissed the suit. This was on 18th January, 1923. Wajid Ali Khan obtained an *ex parte* order restoring possession to him, but subsequently on the objection of the legal representatives of Amar Singh this order was set aside and possession delivered to the legal representatives of Amar Singh. As between the decree-holders there is a mutual agreement the effect of which is that it is immaterial whether possession is restored to all the decree-holders jointly or to the representatives of Amar Singh alone. Wajid Ali Khan appealed to this Court and contends that he should have been allowed to retain possession of three-fourths of the property and only the remaining one-fourth restored to the representatives of the deceased. The appeal came before a Bench consisting of Mr. Justice Mukerji and Mr. Justice Dalal. Mr. Justice Mukerji was of opinion that this contention should prevail. Mr. Justice Dalal considered that the order of the Court below was correct. They have accordingly referred to us under section 98 of the Code of Civil Procedure the following two questions of law :—

(A) Where in a pre-emption suit the vendee appeals against a decree allowing the claim of four plaintiff-pre-emptors, and the appeal is decreed in ignorance of the fact that one of the respondents was dead, and the suit is dismissed, whether the whole appeal had abated and consequently the appellate decree was a nullity or whether the decree was operative as against the plaintiffs-respondents who survived?

(B) Further, whether the fact that the consideration money had been paid by all the pre-emptors jointly without specification of shares in terms of the decree of the Court of first instance, in the said Court, before the appeal was heard, will make any difference in the answer to be returned to the question (A)?

We agree with the view of Mr. Justice Dalal that the order of the Court below should be upheld. A reference has been made to the difference in language between Order 22, rule 4 of the Code of Civil Procedure and the corresponding provision of the Code of 1882. The old Code said that the whole appeal should abate. The present Code says that it shall abate as against the deceased defendant or respondent. This does not mean that the appeal can in all cases succeed against the remaining respondents. Whether this is so depends entirely on whether the interest of the deceased respondent can be separated from that of the remaining respondents so that it is possible to give a separate decree against the latter without affecting the interest of the legal representatives whom the appellant has failed to implead. When several persons have a joint interest in property, it is in general impossible to give a joint decree for possession against some of them when the decree declaring the right of the other joint holders to retain possession has become final, otherwise the result would be two contradictory decrees both of equal authority. Our answer to the first question must depend therefore on whether the other three plaintiffs had a separate interest in the property which could be restored to Wajid Ali Khan without prejudice to the rights of Amar Singh's representatives. Clearly they had not. The decree was a joint decree; each plaintiff was given a joint interest in the entire property. It was open to any of the four to pay the entire pre-emption money if his co-plaintiffs failed to do so. To suggest

that Amar Singh obtained by the decree a one-fourth share in the property which can be separated off from the share decreed in favour of his co-plaintiffs is directly contrary to the decree itself. The rulings relied on by Mr. Justice Mukerji do not in our opinion affect the question at all. In *Imdad Ali* v. *Jagan Lal* (5) the report shows that the judgment-debtor whose representatives had not been impleaded had a distinct and separate share in the property in suit, and and this would naturally be the case as the parties were Muhammadans. The case of *Sripat Narain Rai* v. *Tirbeni Misra* (6) merely decided that a decree against a dead man was a nullity, but expressly left open the question whether the decree could be given effect to against the surviving defendants. On the other hand, *Ambika Prasad* v. *Jhanak Singh* (3) is a strong authority against the appellant. Other instances in which an appeal was held as wholly abated because the legal representatives of one of the joint decree-holders had not been impleaded are *Sardari Lal* v. *Ram Lal* (7) and *Tej Narain Sahu* v. *Dal Ram Sahu* (8).

Our answer to the second question is that the rights of the parties are not affected by the fact that they jointly paid in the pre-emption money in accordance with the decree of the trial Court. The argument of the appellant is that they must be presumed to have paid in equal shares and therefore to have become tenants-in-common of one-fourth share of the property each. Such a presumption could only be drawn as between the decree-holders in the absence of any evidence to the contrary. As against the judgment-debtor the money was paid in jointly in pursuance of a joint decree. No party could have claimed to deposit a fourth share of the price separately; nor would he have acquired any rights by so doing. Moreover, the order of the trial Court was that the money should be paid in within thirty days after the decree became final. In fact the decree never did become final because an appeal was filed. The payment was therefore only provisional, and the rights of the parties cannot be affected by it. Our answer to question (*a*) therefore is that the whole appeal abated, and our answer to question (*b*) is that the payment into Court of the pre-emption money by the decree-holders makes no difference to the answer returned to question (A).

Upon the appeal, coming up before Mukerji and Dalal, JJ.

Mukerji and Dalal, JJ:—[11th July, 1924.] This appeal owing to a difference of opinion between the Judges constituting this Bench was heard so far as the question of law was concerned by two Hon'ble Judges of this Court and their opinion and the opinion of one of us are that the decree made by this Court on appeal in the pre-emption suit was a nullity. The result of that finding is that Wajid Ali Khan must restore possession to all the four plaintiffs, who made the application in the Court below. The Court below allowed the application of the heir of the deceased plaintiff Amar Singh. But according to the decision of this Court now all the four plaintiffs ought to be restored to possession. The appeal of Wajid Ali, the vendee, therefore fails and Appeal No. 202 of 1923 is hereby dismissed with costs which will include counsel's fees in this Court on the higher scale.

---

(7) (1920) 1 Lah 225=57 I.C. 199=1 L.L.J. 225.
(8) 1922 Patna 606=1 Pat 699=4 P.L.T. 170.

1925 Allahabad 115.

WALSH, A.C.J. AND RYVES, J.

In the matter of Lachhman Dass Narain Dass of Cawnpore.

Mis. Case No. 245 of 1924, decided on the 13th June, 1924, from the Commissioner of Income Tax., U. P.

Income-tax Act of 1922, S.4 (30)—Income derived from profits in trade or business though the income may be dedicated to an idol, is not income from trust property.

Income derived from profits by a trading concern in business, is not income derived from property held under trust.

Where the 3/16th share allotted to an idol was, in substance merely by a dedication by the active members of a firm of 3/16th of the profits of their business to charitable purposes, and where, as a matter of fact, the 3/16th was derived from the profits made in the business.

Held that no exemption was due. [P. 116, Cs. 1 and 2.]

P. L. Banerjee—for the Applicant.

L. M. Banerjee—for the Crown.

Judgment:—This is a case stated by the Income Tax Commissioner on a question of principle raised by a firm carrying on business in Cawnpore, in these Provinces. The business carried on by the firm is that

of an oil mill, which includes buildings and other premises and machinery, and is of course carried on by them for profit. It is an ordinary trading business as defined in section 2 (4) of the Income Tax Act:

"Business includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture".

The firm is a registered firm under the Income Tax Act. For reasons, which it is not necessary to specify, the Income Tax Act of 1922 enables a firm to register its business. A registered firm as provided by section 2 (14), "means a firm constituted under

"An instrument of partnership specifying the "individual shares of the partners of which the "prescribed particulars have been registered "with the Income Tax Officer in the prescribed "manner."

Certain advantages accrue to the members of a firm so registered, upon which we need not now dwell. This firm was registered on the 9th of January, 1923, and the shares of the respective partners if it is right to describe each of them as a member of the firm were divided in the following way :—Madan Gopal, the head of the firm, had seven annas in the rupee, Benarsi Das had three annas, Kunji Lal had three annas, and a charitable or religious object under the name of Radha Ballabh a temple in Muttra had three annas. In substance, of course, that was merely a dedication by the these active members of the firm of 3/16ths of the profits of their business to charitable purposes. As a matter of fact, the 3/16ths is derived fromthe profits made in carrying on the business. There is no reason in the world why a firm should not divide 15/16ths of its profits to charitable or other public purposes, receiving 1/16th only for its own personal enjoyment. The result would be the same. The proportion so allotted would still be a proportion of the profits made by the business. That is not seriously denied. The objection taken by the firm is that the 3/16ths of their profits, which have been thus allocated to charity in their partnership deed is not liable to taxation on the ground that it is exempt as being devoted to the religious or charitable purpcses. Upon that point the Income Tax Commissioner, who decided against them, has stated a case to this Court. The Income Tax Commissioner has given reasons for his decision against the trading firm, which we do not think it necessary to discuss. It may on another occasion be necessary to decide whether all or any of his reasons, are sound, and we think it better that we should not, without further argument express any opinion upon the views so expressed. In our view the contention of the applicants raised a broader and more important question. The question is, whether the class of income, of which 3/16ths in this case is undoubtedly devoted to charity, is within the exemption, or can by any stretch of language be brought within the exemption at all. The exemption relied upon by the applicant is contained in section 4 (3). It runs as follows :—

"This Act shall not apply to the following classes of income":—

(1) "Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application thereto."

In our view income derived from profits madeby a trading concern in business, is not income derived from property held under trust. The provision in the deed in question is merely an allocation of the proportionate part of the profits to religious purposes. The exemption deals with a totally different subject-matter. In most countries, in a manner with which we in India are familiar, Government has within certain limits exempted from the ordinary liabilities to contribute to public revenue, endowed property setlapart by pious people, or held under pious trusts for purposes which are wholly religious or charitable, or in the case of properties which are only partly so held, that part alone which is applied by the trust or the instrument creating it to religious or charitable purposes is granted an exemption, and the language used in section 3 (*i*) is in our opinion appropriate to an exemption of that kind and to no other. It is impossible to hold having regard to the terminology used in this Act, that the profits of a trading concern are in any sense derived from property held under a trust or a legal obligation for religious purposes. That view is strengthened by a perusal of sections 9 and 10, in which the Legislature has demarcated the boundary line between property strictly so called, and a business, and has laid down the circumstances under which income-tax is payable upon property and payable upon profits derived from a

business. In our view it is sufficient for the purposes of this case without deciding any question raised in the Income Tax Commissioner's decision that we should hold, as we do, that the profits for which it is sought to claim exemption in this case, do not come within the exemption clause.

Therefore the case must be decided against the applicants who will pay the appropriate costs in such a case to the Income Tax Commissioner. The applicants must pay the amount certified being the same as that paid to their own Barrister.

Reference answered.

---

* 1925 Allahabad 117.

MUKERJI AND DALAL, JJ.

Dwarka Das—Decree-holder-Appellant

v.

Muhammad Ashfaqullah — Judgment-debtor-Respondent.

Ex. S.A. No. 1779 of 1923, decided on 1st July, 1924, from a decree of Additional District Judge, Gorakhpur, dated 23rd June, 1923.

* *Civ. Pro. Code, S. 11—Principle applies to execution proceedings.*

The provisions of S. 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently.

The transferee of a decree applied under O. 21, r. 16 for the substitution of his name. A definite order of substitution of name was passed by the executing Court. Later on the judgment-debtor applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted.

Held, that under the circumstances the question of the validity of the transfer of the decree was *res judicata* and could not be re-agitated. [P. 117, C. 2.]

Per *Mukherjee, J.*—It was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. (11 A.L.J. 815; 14 A.L.J. 370, *Foll.*; 13 A.L.J. 162, *Dist.*) [P. 118, C. 2.]

Shiva Prasad Sinha—for the Appellant.

Ajodhia Nath—for the Respondents.

Dalal, J.:—The Kayastha Bank had a decree against Ashfaq-ullah. Babu Dwarka Das applied for execution on 2nd November, 1918 for the first time on the ground that, the decree had been transferred to him by the Manager of the Bank acting on behalf of the Bank on 6th September, 1918. On 3rd February 1919, Dwarka Das's name was substituted. On 4th February, 1919 he applied for execution and this application was struck off. Another application was made on 12th April, 1920 with the same result. On 16th June, 1920 he applied again and during the pendency of this application Ashfaq-ullah paid Rs. 400 on 18th January, 1921 and at the same time prayed that, the money might not be paid to the decree-holder as he desired to object to the transfer in favour of this decree-holder, Dwarka Das. The execution application, however, was dismissed after part satisfaction without any direction that the money may not be paid to the decree-holder. On 26th October, 1922 another application for execution was filed by Dwarka Das whereupon Ashfaq-ullah objected that the manager had no right to transfer the decree on behalf of the Bank and that the transfer being made in consideration of a personal debt due by the Manager to Dwarka Das was not valid. The trial Court of the Subordinate Judge dismissed this objection on 17th March, 1923 on the ground that it was too late for Ashfaq-ullah to raise such an objection after so many previous applications for execution. Practically it held that the question as to the validity of the transfer was *res judicata*. In appeal the learned Judge disagreed with this finding and further held that the manager was not entitled to make the transfer on behalf of the Bank and that the transfer had not been subsequently ratified by the Bank.

In our opinion the question of law was correctly decided by the trial Court. We are supported in this opinion by Division Bench rulings of this Court in *Mumtaz Ahmad* v. *Sri Ram* (1) and *Taj Singh* v. *Jagan Lal* (2). The provisions of section 11 of the Code of Civil Procedure are not expressly made applicable to execution proceedings, but the principles are applicable and if a point has been directly or by implication decided in any particular execution proceeding the point cannot be raised subsequently. The

(1) (1913) 35 All. 524=11 A.L.J. 815=21 I.C. 452.

(2) (1916) 38 All. 289=33 I.C. 234=14 A.L.J. 370.

lower appellate Court has quoted in favour of its opinion a judgment of a single Judge of this Court in *Kalian Singh* v. *Jagan Prasad* (3) which was confirmed by a Division Bench in Letters Patent appeal as reported at page 828 of the same volume. There, however, the question was one of the amount due on the decree and that question had not been specifically decided at any time by the execution Court. In the present case as we have seen Dwarka Das applied on 2nd November, 1918 under Order 21, rule 16 for the substitution of his name. Such a substitution could not be made without intimation to the judgment-debtor and the decree is not executed until the Court has heard the objection, if any by the judgment-debtor. The presumption will be that the Court proceeded according to law and that notice was issued to Ashfaq-ullah. A definite order of substitution of name was passed by the executing Court. If the order was passed *ex parte* it was open to Ashfaq-ullah to have it set aside. Further, on 18th January, 1921 Ashfaq-ullah applied to the Court that the money deposited by him may not be paid to the decree-holder on the ground that the decree-holder was not a rightful transferee. This application was not granted. This also amounted to a finding that Dwarka Das was a transferee who can execute the decree. Under the circumstances we are of opinion that the principle of *res judicata* will apply here.

The appeal succeeds on this point; otherwise we would have remanded it to the lower appellate Court. The learned Judge of that Court has proceeded on evidence which is not on the record when he decided the issue of fact. He has referred to certain memorandum and Articles of Association and a power of attorney which documents or copies thereof are not on the file. As to consideration also he is in error that the transferee Dwarka Das was bound to prove the validity of the consideration paid by him. As however we have held that Dwarka Das can execute the decree and as the point is now *res judicata* we shall not discuss the question of authority of the Manager of the Bank to make the transfer.

Mukerji, J.:—I agree with my learned brother that the objection of the judgment-debtor could not be entertained. I wish only to add that having regard to the entire scheme of Order 21, rule 16 of the Code of Civil Procedure it was incumbent on the judgment-debtor when he received the notice of the application for execution made by the assignee of the decree-holder to have come forward and raised any objection that he may have had to the execution of the decree by the assignee. An execution proceeding is always a lengthy one and various applications can be made within the course of 12 years. It is therefore necessary to decide where there is a transfer by the decree-holder whether the transferee is entitled to execute the decree or not. If after, say, nine years of execution the judgment-debtor should come forward and say that the transferee had no right to execute the decree the result would be simply disastrous. The law therefore insists on the assignee's application for execution not being proceeded with until the judgment-debtor has been served with a notice and he has had opportunity to raise objections if he has any. If it be the case that the judgment-debtor had no intimation of the original application it was his duty to come forward and make an application to set aside the order for executing the decree. So long as the order for execution of the decree stands, having been passed after notice to the judgment-debtor, it does not lie in his mouth to come forward and say, in the teeth of the order, that the decree-holder has no right to execute the decree. The authorities directly on the point are all one way and some of the cases have been cited in his judgment by my learned brother. I agree in the order proposed.

By the Court:—We set aside the decree of the lower appellate Court and restore the order of the trial Court dismissing the objection of the judgment-debtor with costs including fees here on the higher scale. We direct that execution proceedings do continue in the trial Court as from date 17th March, 1923.

Appeal allowed.

(3) (1915) 13 A.L.J. 162=27 I.C. 950.

1925 Allahabad 119 (1).

DANIELS, J.

Bishen Sahai—Defendant-Appellant

v.

Chhotey Lal and others—Plaintiffs-Respondents.

Stamp Ref. in F. A. No. 158 of 1924, decided on 8th July, 1924.

*Court Fees Act, S. 7 (v)—Cross-objection claiming possession of immoveable property—*Ad valorem *fee is payable—Court Fees Act, Sch. II, Art. 1.*

In the case of a cross-objection claiming possession of an immoveable property the Court-fee is payable *ad valorem* on the value of the property and should not be calculated on five times the land revenue in accordance with S. 7 (v). (40 All. 93, *Foll.*) [P. 119, C. 2.]

An *ad valorem* fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Art. 17 of Schedule, II, for Art. 17 does not provide for cross-objections but only for plaints and appeals. (1924 All. 175, *Foll.*) [P. 119, C. 1.]

S. N. Sen—for the Appellant.

Durga Prasad—for the Respondents.

Judgment:—The question for decision in this reference is whether in the case of a cross-objection claiming possession of an immoveable property the Court-fee is payable *ad valorem* on the value of the property or should not be calculated on five times the land revenue in accordance with section 7 (v). As is well known the word "cross-objection" was introduced in the Court Fees Act for the first time by Act V of 1908. It appears in article I of First Schedule which relates to *ad valorem* fees. It was decided in 1917 by Tudball, J. in *Lakhan Singh* v. *Ram Kishan Das* (1) that an *ad valorem* fee is payable on a cross-objection even when the relief claimed by it is of a declaratory nature which would come under Article 17 of Schedule II. The reason is that article 1, schedule I makes all plaints, appeals and cross-objections chargeable with an *ad valorem* fee unless otherwise provided for in the Act. Plaints and memorandums of appeal of a declaratory nature are otherwise provided for in article 17 of schedule II; cross-objections are not. The appellant's counsel seeks to distinguish this ruling because in section 7 appeals are not separately mentioned. He argues therefore that the word "suits" in section 7 must be held to include cross-objections as well as appeals. This argument is historically unsound. Appeals have always been valued in accordance with section 7, whereas until Act V of 1908 cross-objections paid a Court-fee of Rs. 2 only as applications. The point now raised appears to be precisely covered by the ruling of Piggott, J. in *Ishdat Tiwari* v. *Tameshwar Tiwari* (2). In that case a decree had been given to the plaintiffs for the possession of property to the value of Rs. 100 and the cross-objections were directed against this portion of the decree. The argument raised on behalf of the objector was that court-fee was payable on five times the land revenue, but Mr. Justice Piggott held that it must be paid *ad valorem* on the value of the subject-matter. I accordingly hold that the office report is correct and that the objector must pay an *ad valorem* fee. I allow him two months' time within which to make good the deficiency.

Reference answered.

(1) (1918) All. 93=43 I.C. 179=15 A.L.J. 886.
(2) (1924) All. 175=45 All. 537.

1925 Allahabad 119 (2).

KANHAIYA LAL, J.

Sagwa and others—Defendants-Appellants

v.

Bhagwan Das—Plaintiff-Respondent.

S. A. No. 258 of 1923, decided on 2nd July, 1924, from a decree of the Sub. J., Meerut, dated 4th December, 1924.

Landlord and Tenant—Tree on a holding—Tenant is entitled to tree in absence of custom or contract otherwise.

The trees on a holding partake of the nature of the holding and in the absence of a contract or custom to the contrary a tenant has the same rights in respect of them as he has in the holding; zamindar claiming such trees must prove some special contract or custom. (23 All. 126 and 13 All. 571, *Foll.*) [P. 120, C. 1.]

S. D. Sinha—for the Appellant.

K. N. Katju—for the Respondent.

Judgment:—The dispute in this appeal relates to a mango tree standing on the border or near the boundary of an occupancy plot No. 492 *khasra* occupied by the defendants. The plaintiff is the zamindar of the village. The tree recently dried up and fell down. The plaintiff thereupon

sought to appropriate the fallen wood. The defendants interfered. The plai ntiff accordingly filed the present suit for an injunction to restrain the defendants from interfering with the appropriation by the plaintiff of the fallen wood of the said tree, or, if the wood has meanwhile been removed, for the recovery of Rs. 18 on account of the value of the same. The Courts below decreed the claim, holding that according to the general custom the zamindar was entitled to the wood of the said tree. A copy of the *wajib-ul-arz* of the village was produced, which describes the rights of grove-holders but said nothing particuar about the rights either of the zamindar or of the tenant to the fallen wood or dried timber of the stray trees standing on the occupancy holding. As pointed out in *Harbans* v. *The Raja of Benares* (1) the trees on a holding partake of the nature of the holding and in the absence of a contract or custom to the contrary a tenant has the same right in respect of them as he has in the holding. The plaintiff does not allege that the tree in question had been planted by him. The defendants asserted that they had planted it, but they failed to prove their allegation. The tree in question must therefore be deemed to have been a self-sown tree growing on the occupancy holding ; and a tenant is as much entitled to the fruits or to the fallen wood of such a tree as he is to the produce of the land. In *Nathan* v. *Kamla Kuar* (2) it was held that a zamindar claiming a right to the fallen wood of self-sown trees, which had been growing on an occupancy holding, must prove some custom or contract, by which he is entitled to take such wood. The plaintiff in this case failed to establish that he has any such right. This appeal is therefore allowed and the claim of the plaintiff is dismissed with costs here and hitherto.

Appeal allowed.

(1) (1901) 23 All. 126 = 1901 A.W.N. 15.
(2) (1891) 13 All. 571 = 1891 A.W.N. 167.

* 1925 Allahabad 120.

DALAL, J.

Bishunath Rai—Plaintiff-Appellant

v.

Jodhi Rai and others—Defendants-Respondents.

S. A. No. 131 of 1923, decided on 26th June, 1924, against the decree of the District Judge, Ghazipur, dated 12th October, 1922.

* (a) *Hindu Law—Joint family—Unsecured debt by father for raising pre-emption money—Legal necessity exists.*

A debt contracted by the father to pay pre-emption money is for a legal necessity for which the father, the managing member of the family, may borrow money. Apart from that it will be the pious duty of the son to pay a simple money debt due from his father even during the lifetime of his father. [P. 120, C. 2.]

(b) *Hindu Law—Joint family—Father, mortgage by, sale in execution of decree on—Onus is on son to prove immorality of debt.*

Where joint family property is mortgaged by a Hindu father, and the property is sold in execution of a decree on the mortgage, the onus of proving that the debt had been contracted for an immoral purpose lies on the son of the mortgagor, 13 Cal. 21, *Foll*; 39 All. 437, *Foll.*) [P. 121, C. 2.]

Hamid Hasan—for the Appellant.

M. L. Agarwala—for the Respondents.

Judgment :—A Hindu son sued for the cancellation of two auction sales of joint family ancestral property sold in execution of decrees which the lower appellate Court held were not binding on him. The question was whether the decrees were such as would bind a Hindu son. One sale was held on the 28th June, 1911 in execution of a decree for sale on foot of a mortgage and the other sale took place on 28th September 1912 in execution of a simple money decree. The simple money decree was for a debt contracted by the father to pay pre-emption money. Both the lower Courts have held that this was a legal necessity for which the father, the managing member of the family, may borrow money. The property is still in the possession of the family. Apart from that it will be the pious duty of the son to pay a simple money debt due from his father even during the lifetime of his father.

The second sale raises a question of burden of proof. It was argued here that it lay on the auction-purchaser to prove that the debt was contracted for valid

necessity. This is not correct. The first court held that the plaiutiff and his father were members of a joint family and that the family property was jointly held. Thus the plaintiff could not claim half share of the property in suit as there has been no division of the joint family property. He can avoid the sale entirely if he could prove that the debt was contracted for immoral purposes. This he has failed to do.

The argument was that the burden lay on the purchaser. I had occasion in Oudh to discuss this matter in *Rup Kishore* v. *Kanhaiya Lal* (1). The distinction between the son's liability under a mortgage executed by a father in a joint Hindu family and his remedy after proceeding taken against the father on the foot of the mortgage was first stated by Lord Hobhouse in the Privy Council judgment of *Nanomi Babuasin* v. *Modhun Mohun* (2).

"It appears to their Lordship that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for antecedent debt or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is no conflict of authority."

In *Sahu Ram Chandra* v. *Bhup Singh* (3) the law on the subject was again examined by the Privy Council. The question at issue there was the nature of an antecedent debt. Their Lordships pointed out that so far as the joint family estate was concerned the law had been invoked for the protection of third parties whose rights in or with regard to it have been acquired in good faith and they went on to observe:—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out or where a decree in execution of the mortgage has been obtained against the property and rights have thus sprung up with regard to the joint family estate these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

These pronouncements leave no doubt that the burden of proof in a case like the present lay on the plaintiff. It is admitted that he has not discharged it, so the decree of the lower Court is perfectly correct.

This appeal is dismissed with costs which will include fees here on the higher scale.

Appeal dismissed.

(1) F.A. No. 70 of 1921.
(2) (1886) 13 Cal. 21=13 I.A. 1=4 Sar. 682 (P.C.)
(3) (1917) 37 All. 437=44 I.A. 126=21 C.W.N. 698=1 Pat. L.W. 557=15 A.L.J. 437=19 Bom. L.R. 498=26 C.L.J. 1=33 M.L.J. 14=(1917) M.W.N. 439=39 I.C. 280=22 M.L.T. 22=6 L.W. 213 (P.C.).

1925 Allahabad 121.

MUKHERJI AND DALAL, JJ.

Sukurwa—Defendant-Appellant

v.

Sheikh Nazir Ahmed——Plaintiff-Respondent.

S. A. No. 1618 of 1922, decided on 18th July, 1924, from a decree of the District Judge, Pilibhit, dated 18th July, 1922.

(a) *Land Revenue Act, Ss. 56, 48, 49, 50 and 230—Cess recorded by Asstt. Record Officer in absence of appointment of Record Officer and Government Notification is invalid.*

There was no revision of records notified by the Local Government, and no Record Officer was appointed by it. An Assistant Record Officer had recorded the cesses.

Held: that he had no authority to make any record such as would make a cess valid under the provisions of S. 56. [P. 122, C. 1.]

(b) *Land Revenue Act, S. 86—Cess recorded without definite sanction of Local Government is irrecoverable.*

The sanction of a settlement operation would include such a definite sanction as is required by S. 86 and in the absence of such sanction the cess recorded cannot be recovered. [P. 122, C. 2.]

Iqbal Ahmad—for the Appellant.

Tej Bahadur Sapru and *K. N. Katju*—for the Respondent.

Dalal, J.:—This is a second appeal from a decree passed by the District Judge of Pilibhit reversing a decree of the Munsif of that place. There are several connected appeals and this order will govern them all. The suit was filed in the Civil Court for the recovery of cesses by a zamindar from tenants. Every suit referred to a separate tenant. It was said that these cesses were customary dues payable by these agricultural tenants in addition to rent and that the zamindar was entitled to recover them under section 56 or 86 of the Land Revenue Act. The appellant's counsel argued that cesses could be recovered only if they were held to be payable under those two sections and not otherwise, and his contention was

that the cesses recorded by the Assistant Record Officer or Assistant Settlement Officer, Munshi Harbishan Dayal, did not comply with the provisions of either section. We shall examine the provisions of each section separately.

Taking up section 56 first, cesses which are payable by tenants on account of the occupation of land and other cesses shall be recorded by the Record Officer under the appellations by which they are known, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court. It was stated on behalf of the plaintiff that these cesses were recorded by the Assistant Record Officer Munshi Harbishan Dayal in the *dasturdehi* prepared under his supervision. The beginning of Chapter 4, relating to revision of maps and records, first lays down in section 48 that if the Local Government thinks, that, in any district or other local area, a general or partial revision of the records, or a resurvey, or both, should be made, it shall publish a notification to that effect. In the present case no such notification was published by the Local Government The powers of an Assistant Record Officer are defined in section 50. The appointment of an Assistant Record Officer is directed in section 49 which gives the Local Government the power to appoint a Record Officer and as many Assistant Record Officers as it may seem fit. In the *tahsil* of Pilibhit within which the lands held by the defendants, agricultural tenants, are situated, no Record Officer was appointed in or about the year 1914. Munshi Harbishan Dayal was appointed as Assistant Record Officer. Under section 230 an Assistant Record Officer is granted all or any of the powers conferred by the Act on Record Officers subject to the control of the Record Officer. It is apparent that when no Record Officer was appointed the Assistant Record Officer cannot exercise any power conferred on the Record Officer. Section 56 grants the powers of recording cesses to a Record Officer only, and an Assistant Record Officer can exercise that power under section 230, subject to the control of the Record Officer. Under the circumstances two facts are wanting here. There was no revision of records notified by the Local Government, and no Record Officer was appointed by it. Munshi Harbishan Dayal had therefore no authority to make any record such as would make a cess valid under the provisions of section 56 of the Land Revenue Act.

Next we turn to the provisions of section 86. Clause 1 of that section enacts that the list of all cesses other than those referred to in section 56 levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the Settlement Officer, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court. Munshi Harbishan Dayal was appointed Assistant Settlement Officer, and there was also a Settlement Officer for the *tahsil* of Pilibhit. There was also a notification declaring this particular *tahsil* to be under settlement. The general or special sanction of the Local Government is however wanting in this case. The learned Counsel for the respondent argued that the general sanction of settlement operations included a general sanction of all these cesses. We are not prepared to hold that the sanction of a settlement operation would include such a definite sanction as is required by section 86. In our opinion these cesses, if recorded by Munshi Harbishan Dayal as Assistant Settlement Officer with the powers of a Settlement Officer under section 231, were neither generally or specially sanctioned by the Local Government. The cess is therefore not recoverable under section 86 either.

A similar opinion to the one we are giving here was held by a Bench of this Court in Second Appeal No. 159 of 1917. In that case the provisions of section 86 only were considered. The relevant part of judgment runs as follows:—

> "We consider that it lay upon the plaintiff to show that the cesses he claimed had been generally or specially sanctioned by the Local Government.....It is contended that inasmuch as these cesses were recorded in the settlement they must have been taken to have been generally sanctioned. We cannot agree with this contention. We hold that no sanction was ever given as contemplated by S. 86."

The position here is the same. The case to which we have referred related to land situated in pargana Pilibhit as here.

In the result we decree this appeal and dismiss the plaintiff's suit with costs of all the Courts including counsel's fees here on the higher scale. The objection by way of appeal requires no order as the appeal has been decreed.

Appeal allowed.

1925 Allahabad 123 (1).

NEAVE, J.

Ram Prasad—Plaintiff-Appellant.

v.

Rajjan and another—Defendants-Respondents.

S. A No. 224 of 1923, decided on 27th June, 1924, against the decree of the District-Judge, Jhansi, dated 15th November, 1922.

Agra Tenancy Act, Ss. 97 and 41—Mere entry in the khatauni signed by landlord, tenant and qanungo is not agreement to enhance rent.

Section 41 of the Tenancy Act provides that the rent of an occupancy tenant shall be liable to enhancement only by a registered agreement or by decree or order of a Revenue Court. Section 97 allows the substitution of the attestation of a Revenue Officer not inferior in rank to a qanungo for registration subject to such conditions as the Local Government may direct. The mere entry of a figure in the khatauni with the signatures of the landlord, the tenant and the Qanungo cannot be regarded as an agreement to enhance rent duly attested under these provisions of the Act. [P. 123, C. 2.]

P. L. Banerjee—for the Appellant.

N. C. Vaish—for the Respondents.

Judgment:—This is a plaintiff's appeal arising out of a suit for arrears of rent at the rate of Rs. 45 a year for the three years, 1327, 1328 and 1329 Fasli. The defence was that the rate of rent was Rs. 18 only and this had been duly paid. The first Court has found that this defence was false, that the rent recorded until 1325 was Rs. 21-8 that from 1325 onwards Rs. 45 has been entered as the rent and that in the *khatauni* of 1329 Fasli there appear against the entry of Rs. 45 the signatures of the landlord, of one of the tenants and of the Qanungo. This entry it has accepted as an agreement to pay rent at the enhanced rate of Rs. 45 under section 41 of the Tenancy Act and the signature of the Qanungo it has accepted as a sufficient attestation to dispense with the necessity for registration under section 97 of that Act. The lower appellate Court has dissented from this view and has decreed the suit at the rate of Rs. 21-8, holding that no valid enhancement of rent had taken place.

In appeal two points have been taken, the first that the entry in the *khatauni* amounts to a valid agreement for the enhancement of the rent under section 41 read with section 97 of the Tenancy Act, the second that even if this is not the case there is evidence to prove that for the years 1325 and 1326 Fasli rent at the enhanced rate had been paid and that under section 35 of the Tenancy Act this must be presumed to be the rate payable for the holding.

Section 41 of the Tenancy Act provides that the rent of an occupancy tenant shall be liable to enhancement only by a registered agreement or by decree or order of a Revenue Court. Section 97 allows the substitution of the attestation of a Revenue Officer not inferor in rank to a Qanungo for registration subject to such conditions as the Local Government may direct. The Local Government has laid down a certain form of endorsement to be entered on in such an agreement. It is quite clear that the mere entry of a figure in the *khatauni* with the signatures of the landlord, the tenant and the Qanungo cannot be regarded as an agreement to enhance rent duly attested under these provisions of the Act. There remains the question whether it is proved that the tenants had been paying rent at the enhanced rate for two years previously to the years in suit. In support of this there is the entry in the *khatauni*, but no other direct evidence. The plaintiff, when examined on oath, deposed that the defendants' brother and predecessor-in-interest had executed a registered *kabuliat* under which he had to pay the higher rate. He did not, however, produce this *kabuliat*. I am unable to regard the evidence of payment of Rs. 45 for the years 1325 and 1326 as adequate. In these circumstances the appeal must fail and is dismissed with costs including in this Court, fees on the higher scale.

Appeal dismissed.

---

*1925 Allahabad 123 (2).

MUKERJI, J.

Ram Badan Singh — Decree-holder-Appellant

v.

Ram Pargash Singh—Judgment-debtor-Respondent.

S. A. No. 35 of 1924, decided on 16th June, 1924, against the decree of the District Judge, Benares, dated 5th October, 1923.

• (a) *Civ. Pro. Code., O. 21, r. 1—Payment out of Court to the decree-holder's attaching creditor can't satisfy the decree.*

The definition of the term "decree-holder" as given in S. 2 (3) of the Code of Civil Procedure does not include an attaching creditor of the decree-holder. The payment, therefore, to the attaching creditor of the decree-holder is not payment to the decree holder within the meaning of R. 1 (*b*) of O. 21. [P. 124, C. 2.]

•(b) *Civ. Pro. Code, S. 2 (3)—Attaching creditor.*

Decree-holder does not include an attaching creditor. [P. 124, C. 2.]

Harendra Krishna Mukherjee—for the Appellant. Rspondent was unrepresented.

Judgment:—This appeal raises a question of law, and it is unfortunate that the respondent is not represented.

Briefly the facts are these. The appellant holds a decree for money against one Ram Pargash Singh. The final decree in the case was made on 16th March 1922. The decree holder Ram Badan Singh was the judgment-debtor in a decree held by two persons Ram Harakh and Mst. Rup Kali. The decree in favour of these two persons was passed sometime in 1907. In 1922 Ram Harakh and Rup Kali sought the execution of that decree by the attachment of the decree held by Ram Badan against Ram Pargash. On an application being made by Ram Harakh and Rup Kali an order was passed for the attachment of the decree held by Ram Badan Singh. The application was, however, struck off for default of prosecution on the 23rd of December 1922. The attachment was consequently automatically removed. On 16th March 1923 Ram Badan Singh sought the execution of his decree by the arrest of Ram Pargash. Ram Pargash was arrested and brought into Court. On that date a certificate of satisfaction of the decree held by Ram Harakh and Rup Kali was granted by the decree-holders. The Court of first instance held that the certificate of satisfaction was a collusive transaction and did not exonerate Ram Pargash from paying the money due by him to Ram Badan under the decree held by the latter. The lower appellate Court, however, held the contrary view with the result that Ram Badan's decree was found to be inexecutable.

In this Court it has been urged that assuming that Ram Pargash did really pay the decretal amount due to Ram Badan to Ram Harakh and Rup Kali, this payment made out of Court was not valid at law and did not result in the satisfaction of the decree held by Ram Badan Singh.

I think this contention is right. The methods of payment of money under a decree are laid down in rule 1, Order 21 of the Civil Procedure Code. It may be mentiond here that the decree in favour of Ram Badan was passed by a Subordinate Judge and that in favour of Ram Harakh was passed by a Munsif. The methods of payment are:—

(1) into the Court whose duty it is to execute the decree; or

(2) out of Court to the decree-holder; or

(3) otherwise as the Court which made the decree directs.

It will be observed that none of these methods was adopted by Ram Pargash. It was the duty of the Subordinate Judge to execute the decree under which Ram Pargash had to make payment. If a payment into Court had to be made, that payment should have been made into the Court of the Subordinate Judge. It is, however, nobody's case that any payment into Court was made. For the payment to the decree-holder out of Court, the payment must be made to the holder of the decree in respect of which the payment has to be made. The definition of the term "decree-holder" is given in section 2 (3) of the Code of Civil Procedure and does not include an attaching creditor of the decree-holder. The payment, therefore, to the attaching creditor of the decree-holder is not a payment to the decree-holder within the meaning of rule 1 (b) of Order 21. The last clause does not apply. The payment therefore, to the attaching creditor Ram Harakh and Rup Kali was no such payment as could discharge Ram Pargash from the decree passed in favour of Ram Badan Singh.

That this conclusion is correct can be seen by examining the facts of the case. When a person purporting to be a decree-holder seeks the attachment of another decree, it is open to the decree-holder, whose decree is sought to be attached, to impugn the attachment. If without giving the decree-holder, whose decree has been attached, an opportunity to impugn the attachment, his judgment-debtor should make a payment to the person who professes to be the attaching creditor, room for fraud would be opened. In this particular

case the final decree in favour of Ram Harakh and Rup Kali was passed as long ago as in 1907. Their application of 1922 was on the face of it barred by twelve years' rule of limitation (section 48, C.P. C.). Obviously it was never the intention of the legislature that a debtor liable under a decree which has been attached should obtain a discharge by payment to the person who professes to possess a right to attach the decree.

The appeal succeeds. I set aside the decree of the lower appellate court and dismiss the objection of Ram Pargash as to payment. Ram Pargash will pay the costs of the decree-holder Ram-Badan Singh in this court and the court below. The execution proceedings will proceed.

Appeal allowed.

1925 Allahabad 125.

MUKERJI, J.

Hirdey Narain Rai—Plaintiff-Appellant.

v.

Jagadish Narain Rai and another—Defendants-Respondents.

S. A. No. 81 of 1923, decided on 19th June, 1924, from the decree of the District Judge, Ghazipur, dated 21st December, 1922.

Agra Tenancy Act, S. 202 (2)--Appeal does not lie from Revenue Court to Civil Court even if parties had been wrongly referred to Revenue Court originally by a Civil Court.

Once a case has been properly referred to the Revenue Court an appeal from the Revenue Court would not come to the Civil Court. The same rule applies even if it be the case that the parties had been originally wrongly directed by a Civil Court to go to a Revenue Court, for the question can be raised again by way of appeal against the decree that will be passed by that Civil Court in accordance with the decision of the Revenue Court. That remedy if necessary, against a wrong decision of the Civil Court as to the applicability or otherwise of S. 202 of the Tenancy Act is still open. [P. 126, C. 1.]

M.L. Agarwala—for the Appellant.

B.E. O'Conor—for the Respondents.

Judgment:—This appeal arises under the following circumstances:—

The respondents who are two in number namely, Jagdish Narain Rai and Musammat Kesha Kunwar, brought a suit in the Civil Court against the appellant Hirday Narain Rai for possession and mesne profits on the allegation that the parties were joint owners of the plots in suit and the share of the plaintiffs, namely, the present respondents, was two-thirds. The appellant pleaded that he was, apart from the question of the title being found in the parties, the sole tenant of the entire land in suit, and, therefore, he was not liable to be ejected, his possession being lawful. The respondents' case was that the lands were the *khudkasht* of the parties and the entry of the appellant's name as a tenant in the village papers was a fictitious one. In accordance with the provisions of section 202 of the Agra Tenancy Act, the learned Subordinate Judge referred the appellant to the Revenue Court. The suit out of which the present appeal has arisen was accordingly instituted by the appellant in the Revenue Court. The respondents pleaded there that the entry in favour of the appellant as a tenant was fictitious, and that, if there was a tenancy both the parties were entitled to it. They further took the plea that the Revenue Court had no jurisdiction to entertain the suit. The learned Assistant Collector held that he had jurisdiction, the case having been referred to him by the Subordinate Judge. He further held that, the appellant was an occupancy tenant of the lands, holding under the entire body of proprietors.

The respondents being dissatisfied with the decree of the Assistant Collector lodged an appeal before the learned District Judge. There, it was contended for the appellant that the appeal lay to the Commissioner and not to the District Judge. The learned District Judge held that he had jurisdiction to hear the appeal, and, accordingly, entertained the appeal, and in the result dismissed the suit of the appellant as instituted in the Revenue Court.

In this appeal only one point has been urged, namely the learned District Judge had no jurisdiction to entertain the appeal, and the entertainment of the appeal by the District Judge was entirely against the entire scheme on which section 202 of the Tenancy Act has been based.

I think this contention of the learned counsel for the appellant is sound. Before proceeding further I may point out the anomaly that would arise by the learned District Judge entertaining the appeal, The original suit before the learned Subordinate Judge is still pending. It will have to be decided (assuming that there was no appeal to this Court) according to

the decision of the learned District Judge. Then there would be an appeal to the District Judge. Thus the learned District Judge, would be hearing two appeals from different Courts on the same subject.

The learned counsel for the respondents relied on section 177 (*f*) of the Tenancy Act and contended that an appeal did lie to the District Judge under that provision of law. But it was with the object of settling questions of jurisdiction that the provisions of Chapter XIV of the Tenancy Act were enacted, and there is no force in this contention.

If we assume, as we must assume for the present, that the learned Subordinate Judge was right in directing the appellant to obtain a declaration from the Revenue Court as to his status as a tenant, the only Court to which an appeal would lie from the decision of the Revenue Court would be a superior Revenue Court, namely, the Court of the Commissioner. This is expressly laid down in section 202 of the Tenancy Act itself. It says in clause (2) that the Civil Court would dispose of the suit in accordance with the final decision of the Revenue Court *of first instance or appeal as the case may be*. Clearly it was never contemplated that once a case has been properly referred to the Revenue Court an appeal from the Revenue Court would come to the Civil Court.

If, however, it be the case that the learned Subordinate Judge was wrong in referring the appellant to the Revenue Court, the question can be raised again by way of appeal against the decree that will be passed by the learned Subordinate Judge in accordance with the decision of the Revenue Court. That remedy, if necessary, against a wrong decision of the Civil Court as to the applicability or otherwise of section 202 of the Tenancy Act is still open.

In my opinion the learned District Judge was in error in assuming jurisdiction. I, accordingly, allow the appeal, set aside decree of the Court below and direct the learned District Judge to return the memorandum of appeal (when the record is received in his Court) to the respondents for presentation, to the proper Court. The respondents will at all events, pay the costs of the appellant in the District Judge's Court and in this Court. Costs in this Court will include counsel s fees on the higher scale.

Appeal allowed.

1925 Allahabad 126.

DANIELS, J. (ON DIFFERENCE BETWEEN WALSH, A.C.J. AND RYVES, J.)

Emperor—Petitioner

v.

Chanda and another—Accused-Opposite Party.

Cr. Ap. No. 417 of 1924, decided on 2nd July, 1924, from an order of the Sessions Judge, Meerut, dated 17th March, 1924.

(a) *Penal Code, S. 304—Continual ill-treatment of daughter-in-law by mother-in-law—Daughter-in-law spilling oil—Beating—Death—No evidence showing intention or knowledge of likelihood of causing death—Mother-in-law was held not guilty under S. 304 but under S. 323—Penal Code, S. 323.*

On the day before the death the deceased spilt some oil and her mother-in-law, the accused gave her a beating. The thing was done openly at 8 a.m. in the view of a number of neighbours. The evidence did not show that the accused either intended or contemplated the death of the deceaded as a result of the beating which was inflicted on her. It was clear that the accused had taken a dislike to her daughter-in-law, that she underfed her, kept her short of clothes, and used at times to beat her. The circumstances in which the beating took place formed the strongest evidence that the accused did not realise that it was anything out of the ordinary or might produce serious consequences. There was no evidence, medical or other, to support the view that the ill-treatment by the accused would certainly have terminated in her death from natural causes if the accused had not accelerated it by beating her. The lack of nutrition had not reached a point which was in itself dangerous, or which suggested a deliberate attempt to starve the girl.

Held, that the evidence did not establish an offence under S. 304, still less under S. 304, against the accused. But that the offence under S. 323 of the Indian Penal Code had been committed and the maximum penalty under that section must be imposed.

(b) *Penal Code, S. 107—Husband looking on while wife beats daughter-in-law—No conspiracy proved—Husband is not guilty of abetment.*

Although it may be a moral duty of a person who sees a second person beat a third, to interfere, it is not a legal duty in the sense that the omission to do so is punishable. A private person is entitled to interfere to prevent the commission of an offence, but he is not in general legally bound to do so, and it is only in the case of a non-cognizable and non-bailable offence that he is entitled of his own motion to arrest the offender.

Govt. Advocate—for the Crown.

Ram Nama Prasad and *Majid Ali*—for the Accused.

The case first came up before Walsh, A. C. J. and Ryves, J., who differed and

was accordingly referred to a third Judge (Daniels, J.) who delivered the following :—

Judgment:—This case has been referred to me under section 429 of the Criminal Procedure Code on account of a difference of opinion between two Judges of this Court. The case relates to the death of the girl named Mt. Shakuran who was married to the son of the two accused Chanda and Mt. Ramzano. The girl came to their house to reside as the wife of their son six or seven months before her death. Her age at the time of her death was 15 or 16 years. At the *post-mortem* examination the Civil Surgeon found an absence of fat in the body and other appearances which pointed to ill nourishment extending over several months. The parties are Muhammadan *Telis*. It is established that on the day before her death, namely, on 17th January last, the deceased had spilt some oil and her mother-in-law, the accused Mt. *Ramzano*, gave her a beating. The thing was done openly at about 8 a.m. in the view of a number of neighbours. The stick used is described as a twig or a branch of a tree. Several of the witnesses, both male and female, describe it as about as thick as their thumbs. The only witnesses who give any details, Ismail and Mt. Zamurrad, say respectively that the blows were struck on the arms and back and on the back and shoulder. The girl's father-in-law, the accused Chanda, sat by and did not interfere.

No one realized at the time that the girl had received any serious injuries. She is not even said to have fallen down as the result of the beating. Next morning she was up and about fetching cowdung cakes as usual. About 9 a.m. (the time is given in the telegram sent to the girl's father by Chanda accused) she collapsed and died. The Civil Surgeon's evidence is that death was due to "shock from several blows on an ill-nourished girl suffering from chronic lung disease."

The accused was committed to the Sessions Court on a charge under section 304 of the Indian Penal Code. The Sessions Judge altered the conviction to one under section 302, but in the end acquitted both accused altogether. The acquittal of Mt. Ramzano is incomprehensible, as on the Judge's own finding an offence under section 323 of the Indian Penal Code was established against her. The Local Government has appealed, and the learned Government Advocate has pressed for a conviction under section 304 of the Indian Penal Code, or failing that, for a conviction under section 323. The learned Acting Chief Justice was of opinion that the evidence established the offence of murder, though in view of the attitude of the Crown, he was content to convict under section 304 of the Indian Penal Code and to sentence both accused to transportation for life. His view is that the accused subjected the deceased to

> "A continuous and severe course of ill-treatment and starvation which could only have one end if persisted in, and would certainly have terminated in her death from natural causes if they had not accelerated it by beating her."

Mr. Justice Ryves after an elaborate analysis of the evidence came to the conclusion that the accused certainly did not intend to cause the girl's death, and further that it was not proved beyond reasonable doubt that they knew that they were doing what was likely to cause it. He held that both the accused are guilty under section 323 of the Indian Penal Code (the male accused on the ground that he was present and abetting the offence), and in view of the previous ill-treatment and the fact that death did result in consequence of the beating, he considered that the maximum sentence allowed by the section, namely, one year's rigorous imprisonment, should be imposed.

The case has been re-argued before me, and I have read the entire evidence ; and I may say at once that on the evidence it appears to me impossible to hold that the accused either intended or contemplated the death of the deceased as a result of the beating which was inflicted on her. It is clear enough that Mt. Ramzano had taken a dislike to her daughter-in-law, that she underfed her, kept her short of clothes, and used at times to beat her. I may note at this point, that the evidence as to previous beatings is more scanty than one would expect. Most of the women who appear as witnesses, all of whom live in the vicinity, say that they had not seen the accused beat her before. A woman is more likely to be a witness of these beatings than a man. When, therefore, Hakimulah (P.W. 16) says that he had seen Ramzano beating the deceased "scores of times" and Niadar (P.W. 17) "tens of times"

one may suspect a certain exaggeration. That the female accused had beaten the deceased on previous occasions is, however, undoubtedly the fact.

The only motive suggested in argument why the accused should have desired to make away with the girl is that they would thereby get rid of paying the allowance of Rs. 5 a month by way of pin money which they had agreed at her marriage to pay to her. This suggestion will not bear a moment's examination. There is not the slightest evidence that this allowance had ever in fact been paid, and it is most unlikely in the circumstances that it ever had been. The suggestion that the motive may have been "economy carried beyond legal limits" is pure surmise. The probability is that the assistance in the house which the accused got from the deceased was worth more to them than her keep. If they thought she was a burden on them, they had only to send her back to her parents, who would have been only too glad to have her. It is highly probable that the refusal to allow her brother to see her on the last occasion when he came was due to a fear that she might run away with him.

The circumstances in which the beating took place formed the strongest evidence that the accused did not realise that it was anything out of the ordinary or might produce serious consequences. If they had thought for a moment that there was any danger of serious consequences ensuing, it would have been easy for them to have taken her into her room and taken steps to stifle her cries. No less than five witnesses outside the family witnessed the beating, and though they say they remonstrated, it is clear that they did not attach any great importance to it at the time. According to their ideas, it was quite in the ordinary course that a girl who spilt valuable oil should get a beating from that domestic tyrant, her mother-in-law. Then, again, the fact that the accused himself without any delay sent a telegram to the girl's father calling him to the funeral and saying that it was being kept waiting for him, is strongly against the theory that there had been any deliberate attempt to do the girl to death. The witness Nanwa says he suggested to the accused that he should send the telegram, but this does not do away with the inference. It may be argued that the telegram was sent to save appearances, but, if so, one would expect that either a letter would be sent or the telegram would be delayed until it was no longer possible for the girl's father to arrive in time to see the body. Kallu took the singular course of wiring to find out what was the disease of which the girl died, waited for a reply, and only left Delhi for Meerut on the following day, when he arrived after the funeral.

No argument can be based on the fact that the accused put in a false defence. Ramzano had at any rate beaten the deceased severely on the day before her death and thereby committed an offence punishable with imprisonment. The accued knew that they were in for trouble and took the common course of denying every fact which might tell against them. I can find no evidence, medical or other, to support the view that the ill-treatment by the accused would certainly have terminated in her death from natural causes if the accused had not accelerated it by beating her. The local witnesses do not say it: there is nothing in their evidence to show that they regarded her life as in any way in danger. There is not a word in the Civil Surgeon's evidence to show that the state of undernutrition in which he found the body was sufficiently grave to be likely to produce fatal results apart from this particular beating. Had there been any such evidence, there might have been a reasonable case for conviction on the graver charge; without it there is none.

This brings me to the Civil Surgeon's evidence. It is to be regretted that the Civil Surgeon was not re-called in the Sessions Court to clear up one or two points which were left vague in his evidence before the Committing Magistrate. He states that when he examined the body about two days after the death there were no wounds on it, but there were abrasions or bruises three or four days old on the chin, forhead, cheek, breast-bone, back and thighs. The marks on the back were due to a stick, the other marks might be due either to a stick, or a fist. The blow on the forehead must have been struck with considerable force. The body was very emaciated. The heart was unusually small. The kidneys were small and there was hardly any fat in the abdominal wall. These facts indicated ill-nourishment extending over several months, possibly a

year or more. Both lungs were congested and chronically inflamed. This might in the Civil Surgeon's opinion have been caused by starvation, exposure and over-work, but he does not state, and apparently was not asked, whether it was likely to have been so caused. Congestion of the lungs may be due to so many causes that it would not be fair to assume that it was due to under-nutrition unless the Civil Surgeon indicates at least a preponderating probability in this direction. As I have already said, the Civil Surgeon does not state that the lack of nutrition had reached a point which was in itself dangerous, or which suggested a deliberate attempt to starve the girl.

I find therefore that the evidence does not establish an offence under section 304, still less under section 302, against either accused. I agree with Mr. Justice Ryves in convicting Mt. Ramzano of an offence under section 323 of the Indian Penal Code and in imposing the maximum penalty under that section.

Against the male accused I find that no offence is established. He never struck the girl at all. He said nothing to encourage his wife to do so. Indeed, even on the former occasions on which the girl was beaten the witnesses are unanimous that it was always her mother-in-law who struck her and never her father-in-law. The only fact alleged against Chanda is that he was sitting nearby when the beating was inflicted and that he did not stop it. This is not sufficient to constitute an abetment. If it were so, every spectator of an assault, unless he actively interfered, would be an accomplice and therefore a tainted witness. To constitute abetment there must be under section 107 of the Indian Penal Code either (1) instigation, (2) conspiracy or (3) actual aid either by an act or an illegal omission.

Although it may be a moral duty of a person who sees a second person beat a third, to interfere, it is not a legal duty in the sense that the omission to do so is punishable. A private person is entitled to interfere to prevent the commission of an offence, but he is not in general legally bound to do so, and it is only in the case of a non-cognizable and non-bailable offence that he is entitled of his own motion to arrest the offender. I might hesitate to differ from my learned brothers on a point on which they are apparently agreed, but that under section 429 of the Criminal Procedure Code the responsibility for the final decision rests with me, and it is obviously impossible for me to convict an accused against whom there is no evidence that he either committed the offence charged or abetted it. In the view taken by the learned Chief Justice the question did not arise, as if there was a conspiracy both accused were equally guilty. In the judgment of Ryves, J., the position of the male accused has not been considered in detail.

I accordingly allow the Government Appeal against Mt. Ramzano to this extent that I convict her of an offence under section 323 of the Indian Penal Code and sentence her to one year's rigorous imprisonment. Against the accused Chanda the appeal is dismissed and he will be set at liberty.

Reference answered.

1925 Allahabad 129.

NEAVE, J.

(*Sri*) *Narain Singh*—Applicant

v.

Emperor—Opposite Party.

Cr. Ref. No. 376 of 1924, decided on 12th July, 1924, by the Additional Sessions Judge, Mirzapur, dated 13th June, 1924.

Crim. Pro. Code, S. 195—Conviction under S. 173 of the Penal Code without complaint by public servant concerned is illegal though convicting Magistrate purported to take cognizance of the offence under S. 225 (b) of the Penal Code to convict the accused for a minor offence under S. 173.

When the Code provides that the Court shall not take cognizance of certain offences without complaint from a public servant it is not open to a Magistrate to ignore this provision by the device of instituting the case under another section of the Penal Code. Hence the Magistrate cannot say that he took cognizance of an offence under S. 225 (*b*) of the Penal Code and that having done so he was entitled under S. 238 of the Criminal Procedure Code to convict the accused under S. 173 of the Penal Code which he regarded as a minor offence of the same character as that for which a penalty is provided under S. 235 (*b*). [P. 130, C. 1.]

The parties were not represented.

Judgment:—This is a reference from the Additional Sessions Judge of Mirzapur asking this Court in revision to set aside the sentence passed under section 173 of the Indian Penal Code.

It is not disputed that there was no complaint in writing made by the public servant concerned or by any public servant to whom he is subordinate as is required by section 195 of the Criminal Procedure Code before cognizance can be taken by a court of an offence under section 173. The learned Magistrate's explanation is that he took cognizance of an offence under section 225 (*b*) of the Indian Penal Code and that having done so he was entitled under section 238 of the Criminal Procedure Code to convict the accused under section 173 of the Indian Penal Code which he regards as a minor offence of the same character as that for which a penalty is provided under section 235 (*b*) of the Indian Penal Code.

It is clear that when the Code provides that the Court shall not take cognizance of certain offences without complaint from a public servant it is not open to a Magistrate to ignore this provision by the device of instituting the case under another section of the Indian Penal Code. The conviction was clearly illegal. The reference is accepted and the conviction and sentence are set aside. The fine if paid will be refunded.

Reference accepted.

1925 Allahabad 130 (1).

STUART AND MUKHERJI, JJ.

Kalyan Rai—Plaintiff-Appellant

v.

Jagannath and others—Defendants-Respondents.

S. A. No. 506 of 1922, decided on 3rd December, 1923, against the decree of the District Judge of Pilibhit, dated the 30th January, 1922.

Evidence Act, S. 32 (3)—Statement against interest is admissible.

Statement in sale-deed that a certain sum is due from the executant thereof on account of a promissory note executed by him is admissible for controverting the presumption that a promissory note is executed for consideration and showing that only a part of the consideration really passed. [P. 130, C. 2.]

Mukhtar Ahmad for *Iqbal Ahmad*—for the Appellant.

Durga Prasad and *S. C. Das*—for the Respondent.

Judgment:—The question raised in this second appeal is whether the lower appellate Court was justified in coming to the conclusion that only a part of the consideration of the promissory note, which was the basis of the suit, out of which this appeal arises, passed. The Court of first instance had relied on the presumption of the law that a promissory note is executed for a consideration. The learned District Judge controverted this presumption on the fact that as a matter of fact at least a part of the consideration was not paid on the date the promissory note was executed. He also admitted into evidence a certain statement of the executants of the promissory note. It was contained in the sale-deed executed by them. By this sale-deed the executants left a part of the sale consideration for payment of the very promissory note now in question. They said that only a sum of Rs. 700 was due from them on account of the promissory note. The learned Judge thought that this statement was admissible under section 32 (2) of the Evidence Act. Without specifically deciding whether the statement was admissible under clause (2) or not we are clearly of opinion that the statement is admissible under section 32 (3). The evidence therefore that was admitted and the presumption that was raised by the Court below was not unjustified. The finding is clearly one of fact only and we do not think we are entitled to go behind it.

The result is that the appeal fails and is hereby dismissed with costs on the higher scale.

Appeal dismissed.

1925 Allahabad 130 (2).

DALAL, J.

Shiam Sundar Ram and another—Appellants

v.

Ram Het and others—Opposite Parties.

Civil Revision No. 15 of 1924 decided on 1st May, 1924, from an order of the Small Cause Court Judge, Deoria.

Provincial Small Cause Courts Act, Schedule II, Art. 35 (ii)—Property taken under claim of right—Suit for compensation lies in Small Cause Court.

There was a dispute between two persons as to the ownership of certain standing crops. So the crops were cut and placed in the custody of a trustee until the matter of ownership may be decided by a Court. Before any decision could be

arrived at, the defendant took away the crops from the trustee. The plaintiff, therefore, sued the defendant for the price of the crops in the Court of Small Causes.

Held, the defendant could not have been charged of an offence of theft because he acted under a claim of property, as the ownership was doubtful and the crops were therefore handed over to a trustee. As neither party could be charged with theft of or the removal of the crops, the Small Cause Court had jurisdiction. [P. 131, C. 1.]

S. C. Das—for the Applicants.

Sankar Saran—for the Opposite Parties.

Judgment:—One point of law has been pressed here in this application for revision from an order of a Court of Small Causes. There was a dispute between two persons as to the ownership of certain standing crops. So the crops were cut and placed in the custody of a trustee until the matter of ownership may be decided by a Court. Before any decision could be arrived at the defendant took away the crops from the trustee. The plaintiff, therefore, sued the defendant for the price of the crops in the Court of Small Causes.

It is argued here that that Court had no jurisdiction because article 35 (ii) of the second schedule provides that what is exempted from the jurisdiction of the Small Cause Court is a suit for compensation for an act, which is or would be but for the exception of the Indian Penal Code, an offence punishable under Chapter 17 of that Code. What is meant by the contention is that the defendant was guilty of theft and, therefore, the Court of Small Causes had no jurisdiction. There is a conflict of authority in this court as to the nterpretation of this particular article (see 21 A. L. J. 213 and 357). No difficulty, however, arises in the present case. The defendant could not have been charged of an offence of theft because he acted under a claim to property. The ownership was doubtful and that is why the crops were handed over to a trustee. Neither party, therefore, can be charged with theft for the removal of the crops. Before the suit was instituted in the lower Court the matter had not been decided. It had to be investigated by the Court and decision arrived at as to whether the plaintiff was the owner of the crops or the defendant. In such a case no criminal offence was committed by the defendant and the lower Court had jurisdiction.

I dismiss this application with costs.

Application dismissed.

1925 Allahabad 131.

KANHAIYA LAL, J.

Manga—Plaintiff-Appellant

v.

Changa Mal—Defendant-Respondent.

S. A. No. 357 of 1923, decided on 8th July, 1924, from a decree of the Additional Sub. Judge, Banda, dated 8th December, 1922.

Limitation Act, Art. 29—Applies only where attachment is illegal ab initio—*Property attached before judgment—Suit decreed by first Court but dismissed by appellate Court—Time for suit for compensation runs from date of appellate decree and not from attachment—Limitation Act, Art. 49.*

In a suit against the plaintiff by the defendant for recovery of money, plaintiff's property was attached before judgment. The suit was decreed by the first Court but dismissed by the Appellate Court. Plaintiff sued to recover compensation for loss of profits, etc.

Held, Art. 29 does not apply to the suit for Art. 29 is applicable only to those cases in which the seizure is intrinsically wrongful or perhaps to cases where the seizure is made without jurisdiction. The proper article to be applied is Art. 49 and time for suit runs from the date of appellate decree and not from the date of attachment. (42 Cal. 85, 29 All. 615 and 31 Mad. 431, *Dist.*; 19 Mad. 80, 39 All. 322 and 6 Bom. L.R. 704, *Referred to.*) [P. 132, Cs. 1 and 2.]

K. N. Laghate—for Appellant.

U. S. Bajpai—for Respondent.

Judgment:—This appeal arises out of a claim for compensation caused by the wrongful seizure and detention of certain movable property attached before judgment during the pendency of a suit instituted by the defendant against the plaintiff, for the recovery of money due on a promissory note alleged to have been executed by the latter. The attachment was made on the 14th July 1919. Among the property attached were some carts and a pair of bullocks, one of which died during the pendency of the attachment.

The present plaintiff denied having executed the promissory note. The suit was decreed by the Court which made the attachment but dismissed on appeal. The plaintiff whose property was attached claims compensation for the loss of profits, and the loss of one bullock, and also for the mental distress, and loss of reputation. The suit was filed on the 14th July 1921. The courts below, applying article 29 of the Indian Limitation Act, held that it was barred by limitation. That view is clearly unsustainable.

Article 29 applies to a suit for compensation for wrongful seizure of moveable property under a legal process. There was no wrongful seizure in this case on the day on which the attachment was made. The order of attachment may have been passed on insufficient grounds: but the attachment which was made in pursuance of that order, could not be regarded as illegal, bacause the property attached was the property of the then defendant. The subsequent dismissal of the suit had the effect of making the detention of the attached property wrongful, and if the detention could be treated as a continuing wrong, section 23 of the Indian Limitation Act would, even if Article 29 were applicable, bring the suit within time. But if the seizure itself was in the circumstances in which it was made not wrongful, the detention of the property seized, while the fate of the suit was still uncertain, could hardly be treated as wrongful.

Order 38, rule 9 of Code of Civil Procedure provides that an attachment made before judgment abates when the suit is dismissed. The right of the present plaintiff to the restoration of the property attached therefore arose on that date, and under Article 49 of the Indian Limitation Act the present suit is within time. That Article provides a limitation of three years for compensation for wrongfully taking or detaining a specific moveable property from the date when the property is wrongfully taken or when the detainer's possession becomes unlawful. The detention in this case was made by the court at the instance of the present defendant; and the defendant is responsible for the consequences. The detention became unlawful when the claim of the plaintiff was dismissed on the 15th March 1921. Article 36 cannot apply, because it is a residuary article, only applicable where no other article providing for such a suit is available.

The decision in *Ram Narain* v. *Umrao Singh* (1) and the decision in *Narasimha Rao* v. *Gangaraju* (2) are inapplicable, because the property there attached belonged to a third party against whom the seizure was wrongful on the very date it was made.

In *Manavikraman* v. *Avisilan Koya* (3) it was held in somewhat similar circumstances that Article 49 was applicable. In fact, as pointed out in *Sokkalingam Chetty* v. *Krishnaswami Ayyar* (4) the foundation of the claim is that the defendant procured a seizure of the property under a perfectly legal process but by a misrepresentation to the court that the money claimed was due by the then defendant. Article 29 is applicable only to those cases in which the seizure is intrinsically wrongful or perhaps to cases, such as the *Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.* (5) where the seizure is made without jurisdiction. In *Ram Narain* v. *Banke Lal* (6) where a quantity of grain was attached before judgment in the possession of the defendant, on which a third party successfully claimed his lien for the unpaid purchase-money, it was held that neither Article 29 nor Article 36 of the Indian Limitation Act was applicable. In *Surajmal Chunnilal* v. *Manekchand Kapurchand* (7) Article 36 read with section 23 of that Act was applied. In *Arjan Biswas* v. *Abdul Biswas* (8) Article 29 was similarly held to be inapplicable. The damage caused by the attachment complained of would have been negligible but for the continuance of the attachment and the detention of the property attached awaiting the final determination of the suit. The complaint of the plaintiff is that the attachment led to the loss of profits and the death of one of the animals attached and whether article 49 or article 36 read with section 23 is applied the suit is within time.

The appeal is therefore allowed and the decree of the Court below set aside and the suit remanded to the Court of first instance with a direction to re-instate it under its original number and to dispose of it after determining the other points involved therein in the manner required by law.

The costs here and hitherto will abide the result, including fees in this Court on the higher scale.

Suit remanded.

---

(1) (1907) 29 All. 615=4 A.L.J. 548=(1907) A.W.N. 194.
(2) (1908) 31 Mad. 431=18 M.L.J. 590=4 M.L.T. 271.
(3) (1896) 19 Mad. 80=6 M.L.J. 11.
(4) (1920) 38 M.L.J. 324=(1920) M.W.N. 192=27 M.L.J. 259=55 I.C 786=11 L.W. 479.
(5) (1915) 42 Cal. 85=28 I.C. 463.
(6) (1917) 39 All. 322=39 I.C. 532=15 A.L.J. 295.
(7) (1904) 6 Bom. L.R. 704.
(8) (1921) 35 C.L.J. 480=64 I.C. 513.

1925 Allahabad 133.

SULAIMAN AND KANHAIYA LAL, JJ.

Bakha Singh and others— Plaintiffs-Appellants

v.

Ram Narain Singh and others—Defendants-Respondents.

S. A. No. 1609 of 1922, decided on the 19th June, 1924, from a decree of the Sub-Judge, Jaunpur, dated 8th July, 1922.

Adverse possession — During continuance of equity of redemption mortgagee can't claim prescriptive title.

A mortgagee is not in a position to deny the right of the mortgagors or their successors-in-interest to redeem the mortgage so long as the equity of redemption subsists. A person who lawfully comes into possession of land as a mortgagee cannot by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession. (25 Mad. 507 ; 38 All. 411 and 33 Cal. 296, *Foll.*) [P. 135, C. 1]

U. S. Bajpai—for the Appellants.

S. N. Sen and *Haribans Sahai*—for the Respondents.

Judgment :—The suit which has given rise to this appeal was brought by the plaintiffs-appellants for the redemption of three mortgages of different dates and comprising some common and some separate properties. The first mortgage was effected by Sakaldip Singh and Ghazi Mal in favour of Naurang Singh and Ujagar Singh on the 10th of June, 1865 and the period fixed for redemption was 8 years. The second mortgage was effected by way of a *zaripeshgi* lease by Sakaldip Singh, Suba Karan Singh and Prayag Singh on the 19th of February, 1869, in favour of the same mortgagees for a period of 10 years. The third mortgage was made by Binda Singh in favour of the same mortgagees on the 31st of March, 1870.

On the 26th of July 1869, Sakaldip Singh and Prayag Singh sold their interests in the equity of redemption to Bhawani Din Singh, Thakur Prasad Singh and Dawan Singh and left a portion of the sale consideration for the satisfaction of the first two mortgages. Bhawani Din Singh was the uncle and Thakur Prasad Singh was the nephew of the mortgagees. Dawan Singh is said to have been the brother of the wife of Ujagar Singh, and it is common ground that his name was fictitiously entered in the sale deed. Whether the vendees paid the money left with them for the satisfaction of the prior mortgages to the prior mortgagees is not clear. On the 17th of June, 1872 Binda Singh sold his interest in the equity of redemption to Bhawani Din Singh and Thakur Prasad Singh and left a portion of the sale consideration for the payment of the third mortgage above referred to, but whether the vendees paid the money to the prior mortgagees is not clear.

The plaintiffs claimed to be the legal representatives of Thakur Prasad Singh and as such they sued for the redemption of half the properties sold by the above deeds of sale alleging that the interest of Bhawani Din Singh the owner of the other half of the equity of redemption had passed to Naurang Singh the predecessor-in-title of the defendants Nos. 1 to 5 and that Naurang Singh and the defendants Nos. 1 to 5 had in their capacity as the owners of the other half of the equity of redemption got the mortgaged property redeemed from Ujagar Singh or his heirs to the extent of the interest of Ujagar Singh in the said mortgages. The suit was contested by the defendants Nos. 1 to 5 on various grounds. In order to understand the nature of their defence it will be necessary to refer to the pedigree appended to the judgment of the lower appellate Court, showing that one Subansa Singh had two sons, Pheran Singh and Dayal Singh. Pheran Singh was the father of Naurang Singh and Ujagar Singh the mortgagees. Dayal Singh was the father of Bhawani Din Singh, one of the purchasers of the equity of redemption. Thakur Prasad Singh, the other purchaser was the son of Sarabjit Singh, a brother of Naurang Singh and Ujagar Singh. The defendants Nos. 1 to 5 denied that the plaintiffs had any right to sue and pleaded that the name of Ujagar Singh was fictitiously entered in the mortgage deed, that he had never been in possession of the mortgaged property and that the sale-deed in favour of Thakur Prasad Singh, Bhawani Din Singh and Dawan Singh was similarly fictitious. Their contention really was that Naurang Singh had taken the mortgages in question with his own funds and had got the name of his brother Ujagar Singh fictitiously entered in the deeds, that

the real purchaser of the equity of redemption from the original owners was Naurang Singh himself and that neither Thakur Prasad Singh nor Dawan Singh nor Bhawani Din Singh had paid any portion of the consideration or obtained possession of any portion of the property in dispute. In other words they set up Naurang Singh's exclusive title as a mortgagee and then as a vendee and thereafter by reason of his adverse possession for a period of more than 12 years.

It is admitted in the written statement that there had been a separation in the family of the parties in the time of Pheran Singh and Dayal Singh and that the sons of Pheran Singh had also separated after the death of Pheran Singh, but it is nowhere asserted that the mortgages in question had been obtained by Naurang Singh and Ujagar Singh as members of a joint Hindu family or that the sales aforesaid had been obtained by Thakur Prasad Singh and Bhawani Din Singh for the benefit of the said family in satisfaction of the said mortgages.

The Court of first instance found that the defendants had failed to establish that the name of Ujagar Singh was entered fictitiously in the deeds of mortgage and that the names of Thakur Prasad Singh and Bhawani Din Singh were fictitiously entered in the deeds of sale. It also found that every fact and document were consistent with the theory of the co-ownership of Thakur Prasad Singh and Naurang Singh after the disputed sales, and as an explanation for the exclusive possession of Naurang Singh it suggested that the mortgages and sales were taken for the benefit of the joint family comprising the two mortgagees and Thakur Prasad Singh, that the sales had thus the effect of extinguishing the mortgages and that by some arrangement Naurang Singh had become the exclusive possessor of the disputed properties. It then proceeded to find that Naurang Singh had been in adverse possession of the properties in question for more than 12 years prior to the suit and that the claim was barred by limitation.

The lower appellate court upheld those findings. It pointed out that an attempt was made in 1902 by Naurang Singh to set up his own exclusive title and seek the removal of the name of Thakur Prasad Singh from the revenue papers but without success. It also pointed out that on the death of Thakur Prasad Singh his son Baksha Singh, one of the plaintiffs to the present suit, applied for the entry of his name in place of Thakur Prasad Singh and his application was opposed by Naurang Singh on the same ground and that though the application of Bakha Singh was allowed the name of Naurang Singh continued throughout entered as that of the person in actual possession of the property. From that fact the lower appellate Court concluded that the exclusive title of Naurang Singh and his heirs by adverse possession for more than 12 years had been established beyond dispute.

In effect the court below further held that the mortgages in question had ceased to subsist and that no suit for redemption was maintainable.

It is conceded that unless the mortgages were paid or that some other event had happened to put an end to the equity of redemption a suit for redemption would be maintainable, if brought within 60 years from the date when the right to redeem accrues. The contesting defendants did not set up anywhere in the pleadings that the mortgages in question had been redeemed except in so far they alleged that Naurang Singh was really the sole mortgagee and sole purchaser of the equity of redemption. The courts below, however, found that the entire family owned the mortgages, *including the two mortgagees* Naurang Singh and Ujagar Singh and that the entire family had purchased the equity of redemption. It is noticeable, however, that one of the mortgagors, namely Ghazi Mal, had not joined in the sales and his interest in the equity of redemption still remains unaffected. It is further noticeable that neither party set up in its pleadings anything suggesting that all the descendants of Pheran Singh, the father of Naurang Singh and Ujagar Singh, were the owners of the mortgagee rights or had purchased the equity of redemption of the persons who had effected the sales. On the other hand one of the purchasers was Bhawani Din Singh, the son of Dayal Singh, who was admitted in the written statement to have been separate from Pheran Singh. The effect of the purchases could not in the circumstances have been to extinguish the mortgages or to vest the rights of the mortgagors in the mortgagees except to a limited extent. The courts below have dismissed the claim

of the plaintiffs on a ground which was not set up in the written statement, namely, that the mortgages and the purchases had been made by the joint family and the very basis on which the Courts below have proceeded cannot therefore be sustained.

A mortgagee is not in a position to deny the right of the mortgagors or their successors in interest to redeem the mortgage so long as the equity of redemption subsists, and as pointed out in *Seshamma Shettati* v. *Chickaya Hegade* (1), a person who lawfully comes into possession of land as a mortgagee cannot by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party acquire, by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession. In *Kunwar Sen* v. *Darbari Lal* (2) and in *Khairaj Mal* v. *Daim* (3) the same rule was enforced.

It is not therefore open to Naurang Singh and his successors in-interest to set up an adverse title so long as the right of the plaintiffs to redeem the mortgages subsists and is not barred by limitation. The orders passed in the mutation proceedings did not operate to extinguish the title of the plaintiffs. In fact the orders referred to upheld or allowed the entry of the names of Thakur Prasad Singh and his son Bikha Singh in the revenue papers and the possession of Naurang Singh which appears to have continued in spite of the entries of their names can only be attributed to the title which he possessed as a mortgagee, of the whole of the mortgaged properties till redemption was effected in due course of law.

The appeal in these circumstaces must be allowed and the case remanded to the lower appellate Court with a direction to reinstate the appeal to its original number and to dispose of it after deciding the other points involved in the case in the manner provided by the law. The costs here and hitherto will abide the result. The costs in this Court will include fees on the higher scale.

Case remanded.

(1) (1902) 25 Mad. 507=12 M.L.J. 119.
(2) (1916) 38 All. 411=34 I.C. 171.
(3) (1905) 32 Cal. 296=32 I.A. 23=9 C.W.N 201=2 A.L.J. 71=7 Bom. L.R. 1=1 C.L.J. 584=8 Sar. 734 (P.C.).

1925 Allahabad 135.

SULAIMAN AND KANHAIYA LAL, JJ.

(*Mirza*) *Imdad Hussain*—Plaintiff-Appellant

v.

Mirza Haidar Beg and another—Defendants-Respondents.

S. A. No. 1719 of 1922, decided on 22nd May, 1924, from the decree of the District Judge, Benares, dated 18th July, 1922.

Land tenure—Co-sharers—"Hissedar" *owns a share in* mahal.—*But proprietary right in* mahal *without ownership of share therein is possible.*

The presumption of custom of pre-emption raised by the *wajib-ul-arz* of a mahal is not rebutted by an express entry in the *wajib-ul-arz* of one of the other mahals, which was carved out of the original village prior to the year when the *wajib-ul-arz* of the mahal in question was framed, for it may well be that the co-sharers of the other mahal had agreed to abrogate the custom which might have been in existence from before. *A hissedar* means a co-sharer, that is to say, a person who owns a share in the mahal. A 'mahal' is ordinarily divided into 'annas' and 'pies' share or into 'bighas' and 'biswas' share. It comprises a certain specified area. A person who owns a fractional share in the 16 annas or a fractional share in the 20 biswas necessarily owns a share in the joint Khalsa land as a co-sharer. But there may be proprietors, who have proprietary interests in the mahal and yet do not own a fractional share of the 16 annas or of the 20 biswas, as the case may be. [P. 136, Cs. 1 and 2.]

In the khewat against serial No. 1 the extent of the share was recorded as 16 annas. Under this serial number followed a list of three groups of co-sharers against whose names separate shares were respectively recorded. The total of these fractional shares was 16 annas. It was obvious that the group of proprietors mentioned under serial No. 1 owned among themselves the entire 16 annas comprised in the mahal. After serial No. 1 there were other serial numbers namely No. 2 to 9 against each of which in the share column there was no entry whatsoever, but in the area column specified areas were recorded.

Held: that no proprietor in serial Nos. 2 to 9 could be said to own any part of the 16 annas of the khalsa lands which were exhausted in serial No. 1.

The owners of the areas in serial Nos. 2 to 9 although proprietors could not therefore be called co-sharers, that is, persons who owned specified shares in the 16 annas. [P. 137, C. 1.]

Peary Lal Banerjee—for the Appellant.

H. Mushtaq Ahmad—for the Respondents.

Sulaiman, J. :—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff alleged that there was a custom of pre-emption in the village under which he was entitled to pre-empt the sale by the vendor in favour of the defendant vendee who was said to be a stranger. The vendee defendant No. 1 denied the existence of the custom and also pleaded that he himself was a co-sharer in the *mahal* and therefore on the same footing as the plaintiff pre-emptor.

The Court of first instance came to the conclusion that no custom had been established at all and that the entry in the *wajib-ul-arz* relied upon by the plaintiff was a record of contract and not of custom. It however held that the defendant No. 1 was not a co-sharer in the same *mahal*, and that even if there had been a custom he would not have been on the same footing as the pre-emptor.

The lower appellate Court has upheld the decree of the Court of first instance but differed from it on both its findings. It has found that the custom is established but that the defendant vendee is also a co-sharer in the *mahal* and that therefore the plaintiff has no preference.

As to the question of the existence or non-existence of a custom it may be noted that the evidence consists of an entry in the *wajib-ul-arz* prepared at the settlement of 1881. The district however is a permanently settled district and that settlement is still in force. There is nothing to rebut the presumption raised from this entry except the circumstance that there is an express entry in the *wajib-ul-arz* of one of the other *mahals*, which was carved out of the original village prior to the year 1881, that the co-sharers had a perfect right of transfer. This in our opinion does not necessarily negative the presumption of a custom in the *mahal* in suit; for it may well be that the co-sharers of the other *mahal* had agreed to abrogate the custom which might have been in existence from before. We are therefore not entitled to take into consideration the non-existence of such a right in the neighbouring *mahal*. We see no reason to differ from the view taken by the learned District Judge that the plaintiff has established by *prima facie* evidence that the custom of pre-emption prevails in the *mahal*.

The main question in controversy is whether the defendant vendee is or is not a co-sharer in the same *mahal* so as to defeat the right of the plaintiff. Under the terms of the custom as recorded in the *wajib-ul-arz* the first right of pre-emption is given to a co-sharer who is a member of the family of the vendor (*sharik khandan*) and then to the co-sharers of the village. The plaintiff claimed to be a distant relation of the vendor, but that point has not been gone into by the Court below and in the view which we take of the case it is not necessary for us to decide that point. The defendant vendee however claimed to be a co-sharer in the *mahal*. A "*hissedar*" means a co-sharer, that is to say, a person who owns a share in the *mahal*. A 'mahal' is ordinarily divided into 'annas' and 'pies' share or into 'bighas' and 'biswas' share. It comprises a certain specified area. A person who owns a fractional share in the 16 annas or a fractional share in the 20 biswas necessarily owns a share in the joint *khalsa* land as a co-sharer. But there may be proprietors, who have proprietary interests in the mahal and yet do not own a fractional share of the 16 annas or of the 20 biswas, as the case may be. That this is so is shown by a number of cases decided by this Court; (vide *Mawari* v. *Moolchand* (1), *Mahadeo Prasad* v. *Jagar Desgir* (2) and *Izzat Husain Khan* v. *Ram Chander* (3).

The main question to consider therefore is whether the defendant vendee owns a fractional share of the 16 annas in this mahal.

A reference to the *khewat* shows that the constitution of the village is as follows:—Against serial No. 1 the extent of the share is recorded as 16 annas and the area is 56.24 acres and the Government revenue is Rs. 191-15-1. Under this serial number follows a list of three groups of co-sharers against whose names separate shares to the extent of 6 annas 4 pies and 16 krants, 6 annas 4 pies and 16 krants, and 3 annas 2 pies and 8 krants, are respectively recorded. The total of these three fractional shares is 16 annas. It is obvious that the group of proprietors mentioned under serial No. 1 own among themselves the entire 16 annas comprised in this mahal. After serial No. 1 there are other serial numbers namely Nos. 2 to 9, against each of which in the share

(1) (1912) 34 All. 434=14 I.C. 278=9 A.L.J. 670.
(2) (1916) 38 All. 260=33 I.C. 23=14 A.L.J. 313.
(3) (1920) 18 A.L.J. 120=59 I.C. 366.

column there is no entry whatsoever, but in the area column specified areas are recorded. Two of the proprietors mentioned therein are the Municipal Board and the Government. There is the Government revenue of Rs. 14 recorded at the end of serial No. 9. The learned District Judge has come to the conclusion that this represents the Government revenue payable on account of serial Nos. 2 to 9. Whether that is so or not and whether the revenue of Rs. 14 is confined to serial No. 9 alone, it is not necessary for us to decide. But it is not disputed that this sum of Rs. 14 is no part of Rs. 191-15-1 which are assessed on serial No. 1. Below all these figures we have the grand totals in areas and in the Government revenue, but the 16 annas share is not repeated. On a consideration of the entries in the *khewat* it is clear to us that it is only the proprietors mentioned under serial No. 1 who own the entire 16 annas among themselves. It follows therefore that no proprietor in serial Nos. 2 to 9 can be said to own any part of the 16 annas of the *khalsa* land which are exhausted in serial No. 1. The owners of the areas in serial Nos. 2 to 9, although proprietors, cannot therefore be called co-sharers, that is persons who own specified shares in the 16 annas. They are liable to pay Government revenues which are assessed against their shares, but they cannot be deemed to have engaged for the payment of any part of Rs. 191-15-1 which is the Government revenue assessed on the 16 annas share described under serial No. 1. The defendant vendee cannot therefore claim to be a *hissedar* on the same footing as the plaintiff pre-emptor. In this view we are supported by the ruling of *Radha Kishen* v. *Abbasi Begam* (4), where the distinction between a mere proprietor and a co-sharer was very clearly drawn.

It is also to be noted that both the Courts below described the properties entered under serial Nos. 2 to 9 as '*haqiat-i-mutafarriqa*' that is to say miscellaneous properties. They did not describe these as a part or a fractional share of the 16 annas of the mahal.

In our opinion therefore the finding of the learned District Judge that there is a custom of pre-emption should be upheld and so also the finding of the first Court that the defendant vendee is not a co-sharer in the 16 annas of the mahal and is therefore not a *hissedar* within the meaning of the *wajib-ul-arz*.

The result therefore is that this appeal is allowed and the decrees of both the Courts below are set aside and the plaintiff's claim for pre-emption is decreed on payment of a sum of Rs. 2,000 on or before the 2nd of July, 1924. In case of such payment the plaintiff will be entitled to his costs in all the Courts including in this Court, fees on the higher scale, from the defendant vendee. In case of default of payment the suit shall stand dismissed with costs in all the Courts.

Appeal allowed.

(4) (1921) 19 A.L.J. 859=64 I.C. 480.

1925 Allahabad 137.

DANIELS, J.

Baijnath Das—Defendant-Appellant

v.

Balmakund—Plaintiff-Respondent.

Stamp Ref. in F. A. No. 513 of 1923, decided on 10th July, 1924.

Civ. Pro. Code, S. 144—Appeal—Court fee—Court Fees Act, Sch. II, Art. 1.

Appeal from order under S. 144 must be stamped *ad valorem*. (19 A.L.J. 771, *Overruled*; 1922 All. 223; 1922 All. 238 and 1925 Patna 1 (F.B.), *Foll.*)
[P. 138, C. 1.]

P. L. Banerjee—for the Appellant.

Govt. Pleader—for the Crown.

Judgment:—The question for decision in this reference is whether an appeal from an order passed on an application for restitution under section 144 of the Civil Procedure Code requires to be stamped *ad valorem* under article 1, schedule 1 of the Court Fees Act as an appeal from a decree, or can be filed as an appeal from an order in execution on a Court-fee of Rs. 2. The suit out of which the reference arises was one claiming a declaration that the plaintiffs were owners in possession of a house which had been sold in execution and bought by the defendant appellant. The first court dismissed the suit. In appeal the suit was decreed for a one-third share in the house. The defendant had obtained possession of the entire house under the trial Court's decree. The order under appeal has granted the plaintiff possession of a one-third in the house by way of restitution. The appellant's case is that the

plaintiff could only obtain possession of his one-third share by means of a suit for partition.

The question of law does not admit of any doubt. Orders under sections 47 and 144 are expressly declared to be decrees by section 2 of the Code. In the absence of any provision to the contrary appeals from decrees require to be stamped *ad valorem*. The fee payable on appeals under section 47 would be *ad valorem*, but that it has been specially reduced by the Governor in Council by Notification No.1231-VII of the 11th of October 1923, under the powers conferred by section 35 of the Court Fees Act as amended by the Devolution Act of 1920. No similar reduction has been made in the case of appeals under section 144.

In order to claim exemption from an *ad valorem* fee the objector is compelled to argue that all orders under section 144 are orders in execution falling also under section 47. There was at one time some difference of opinion even in this Court as to whether orders under section 144 were to be treated as orders in execution, and the objector is able to cite one decision, *Gokul Prasad* v. *Ram Devi* (1) in his favour, but the opposite view is now generally accepted and has been adopted by this Court in two cases, *Jiwa Ram* v. *Nand Ram* (2), and *Brij Lal* v. *Damodar Das* (3) and by the Patna High Court in an elaborate Full Bench decision in *Balmakund Marwari* v. *Basanta Kumari Dasi* (4). The question has usually arisen with reference to limitation whether an application would be barred if it falls under article 181 of the Limitation Act but in time if it can be treated as an application for the execution of a decree under article 182. The principle of these decisions is equally applicable to the question of court-fees.

An application under section 144 is no doubt one which carries out the intention of the appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. In this case the High Court's decree was a declaratory and could only have been executed in respect of costs. The appellant must therefore stamp his appeal *ad valorem*. As only one-third of the house is really in dispute and not the entire house, he asks leave to amend his valuation so as to correspond with the matter in dispute. He is permitted to do this. The Court-fee on the amended valuation (the value of one-third of the house) must be made good within two months of this date, failing which the appeal will be put up for orders of rejection.

It is unlikely that the omission of orders under section 144 from the Notification referred to above was due to deliberate intention. The exemption of appeals under section 47 from an *ad valorem* fee dates back to a time when the Code of 1882 was in force. Under that Code, section 583, an application by way of restitution was treated as a proceeding in execution and there was need for a separate notification under the section corresponding to the present section 144. It is probable that if the matter is brought to the notice of Government, Government will not consider it desirable to impose an *ad valorem* fee on a party who is merely asking the Court to right a wrong unintentionally done by the Court itself. I direct that a copy of this judgment be forwarded to Government with the suggestion that the provisions of paragraph (4) of the Notification should be extended to appeals from orders under section 144.

Reference answered.

(1) (1921) 19 A.L.J. 771=63 I.C. 513.
(2) 1922 All. 223=44 All. 407=20 A.L.J. 226.
(3) 1922 All. 238=44 All. 555=20 A.L.J. 456.
(4) 1925 Patna 1=3 Pat. 371=5 P.L.T. 145=(1924) Pat. 33 (F.B.).

1925 Allahabad 138.

MUKHERJEE AND DALAL, JJ.

Roshan Lal and another—Plaintiffs-Appellants.

v.

Chaudhuri Bashir Ahmed and another—Defendants-Respondents.

F. A. No. 464 of 1921, decided on 16th June, 1924, from decree of the Sub-Judge, Allahabad, dated 19th May, 1921.

**Limitation Act, S.25—Applicability depends on interpretation in each case—Section does not apply where the parties have agreed that time must run from a particular date.*

If the starting point is to be calculated, as so many months or so many years from a particular date, that point must be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself the Court cannot apply S. 25 of the Limitation Act. It is really a matter of interpretation in every case.

Where the intention was that the interest should be payable at the expiry of "six months" according to the Hindi calendar that is to say on a particular date and not at the expiry of six months, and that the cause of action should arise on default. [P. 139, Cs. 1 & 2.]

Held: that S. 25 was not applicable.

Gulzari Lal and *S. N. Sen*—for the Appellants.

Iqbal Ahmed and *Hukhtar Ahmed*—for the Respondents.

Judgment:—The question for determination in this appeal is whether the suit was rightly dismissed by the Court below on the ground of limitation.

The suit was brought on foot of a bond executed on the 10th of July, 1908. The principal amount was payable in the course of three years. But it was also stipulated that interest would be paid every six months according to the Hindi calendar and if any such interest (payable every six months) should remain unpaid the mortgagee would be entitled to enforce his bond without waiting for the three years' time. It is common ground that no interest was paid by the mortgagor. It is also common ground that if six months, according to the Hindi calendar, be added to the date of the bond, the starting point of limitation would be some time before the 10th of January 1909, the date on which the suit was actually filed. On the other hand if six months, according to the Gregorian calendar, be taken from the date of the bond as the starting point of limitation, the suit would be just within time. The question is what course should be adopted to find out the starting point of limitation.

The learned counsel for the appellants has taken his stand on section 25 of the Limitation Act and has referred us to two cases, *viz*: *Rungo Bujaji* v. *Babaji* (1) and *Latifi-un-nisa* v. *Dhan Kunwar* (2). The Court below has referred to the case of *Dwarka Prasad* v. *Raja Ram* (3). We have carefully gone through these cases and are of opinion that it is really a matter of interpretation in every case. The true principle seems to be this. If the starting point is to be calculated, as so many months or so many years from a particular date, that point must be calculated according to the Gregorian calendar. On the other hand if thestarting point is otherwise fixed by the stipulation itself, the Court cannot apply section 25 of the Limitation Act. In the case of *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha* (4), their Lordships of the Calcutta High Court had to interpret a policy of insurance and they held that lunar months were meant and not calendar months. It is therefore really a matter of interpretation in every case.

Coming to the facts of this case we find in the bond itself the following expressions:—

"I therefore covenant and give in writing that I shall pay the principal to the said creditor within three years and shall continue to pay interest on the entire amount at-/14/-per cent. per mensem according to Hindi months including the intercalary month till the payment of the entire amount due thereunder...If God forbid.....or if six monthly interest be not paid, the said creditor shall, under all the circumstances, have power to realise the whole of the principal, &c."

We have read and re-read the document and we have also consulted the original document in Urdu character. It seems clear to us that the parties meant that interest would be paid every six Hindi months without dividing the year in which there is an intercalary month into the two periods of six and seven months. This view of the stipulation has been taken by the plaintiff himself in the account appended to the plaint. There interest has been calculated every six Hindi months. In the first two six months the calculation is from *Asarh* to *Pus* and *Pus* to *Asarh*. But in the third period which contained apparently an intercalary month, the six months are composed not of seven months *Asarh* to *Pus* but exactly six months *Asarh* to *Aghan*. The intention therefore was that the interest should be payable at the expiry of six months according to the Hindi calendar, that is to say on a particular date and not at the expiry of "six months" which under section 25 of the Limitation Act would mean six months under the Gregorian calendar.

The decree of the Court below seems to be right and we hereby dismiss the appeal with costs which will include counsel's fees in this Court on the higher scale.

Appeal dismissed.

(1) (1881) 6 Bom. 83.
(2) (1897) 24 Cal. 382.
(3) (1915) 13 A.L.J. 486=29 I.C. 980.
(4) (1909) 36 Cal. 516=2 I.C. 573=13 C.W.N. 425.

*1925 Allahabad 140.

WALSH, A.C.J. AND RYVES, J.

Tawassul Husain—Applicant.

v.

Wajid Ali and another—Opposite Party.

F. A. No. 54 of 1924, decided on 12th June, 1924, from an order of the Additional District Judge, Cawnpore.

Civ. Pro. Code, S. 62—Actual residence at date of plaint is not necessary.

The word, residing, for the purposes of jurisdiction does not necessarily mean keeping within the jurisdiction. If a person has a residence within the jurisdiction it is sufficient residence although he may not be staying there at the exact time when the proceedings were initiated against him. [P. 140, C, 2]

M. N. Raina—for the Applicant.

Majid Ali—for the Opposite Party.

Walsh, A.C.J.:—We think that there has possibly been a miscarriage of justice in this case and that we must remit the matter for a hearing in the lower Court. It is entirely the fault of the applicant, or rather his misfortune, because at the critical moment he was absent through illness. The Judge did not believe that he was ill, because he said, that there was only the statement of the pleader to support it. The Judge does not say why he thinks, a man should keep away from an important appointment of this kind which he himself had started, unless there was some insuperable obstacle which prevented his attendance. As the matter was only a miscellaneous case and could be disposed of on any convenient day the learned Judge ought to have adjourned it to another day or dismissed it altogether for default. Instead of that he did just the worst thing he could have done. He started a kind of enquiry on imperfect material. We must, therefore, return it to the learned Judge to find as a fact whether, Billhaur in Cawnpore, was on the 25th September, 1923, a residence of the lady in question. People do not always realise the true meaning of the word "residing" for the purpose of jurisdiction. In this case section 62 requires the Court to be the District Court within whose jurisdiction such person is residing. That does not necesarily mean that she slept the night on the particular day when the application was filed in the jurisdiction. A person may have several residences and may be residing in more than one place for the purpose of jurisdiction. If a person has a private house to which he may resort in Calcutta, he has a residence there, and therefore, resides there even, if he only goes there once in five years. He may have a residence in Kashmir which he prefers to Calcutta. The word used by the Legislature to get over that difficulty when it desires to specify one place only as the place of service, or for establishing jurisdiction, is the word "ordinarily", that is to say, the place where a person ordinarily resides. Then that confines the Court to the duty of ascertaining the ordinary residence. Here, it is sufficient if she had any residence even although she was not staying at the time. Now the evidence on the record throws a heavy burden on the party objecting, not to show that she had a residence elsewhere, but to show that she had no sort of residence in Cawnpore. A sale-deed alleged to be executed by her only one month before the application, namely, the sale-deed, dated 18th August, 1923, describes her as a resident of Billhaur in Cawnpore, at present in Kanauj. Unless the Judge comes to the conclusion that, by a curious but true coincidence, there has been a complete abandonment of this residence between the 18th of August, and 25th of September, the lady is really estopped from denying that this place is not a residence of hers within the jurisdiction. It is a question of fact, on which the evidence appears to us to be all one way, even though she may also have a residence in Kanauj. We, therefore, remit the case to the learned Judge to hear and determine on these facts as to whether this residence in the sale-deed is a residence of her in Cawnpore and, if it is, to dispose of the application. The Judge will listen to any further evidence that may be tendered by either party on this question.

Appeal dismissed.

1925 Allahabad 141.

NEAVE, J.

Bikramjit Rai and others—Defendants-Appellants

v.

Mahant Darshan Das and another—Plaintiffs-Respondents.

S. A. No. 331 of 1923, decided on 9th July, 1924, from a decree of the District Judge, Azamgarh, dated 30th November, 1922.

Civ. Pro. Code, O. 22, r. 4 (3) and r. 9—Death of one respondent—No legal representatives substituted—Appeal abates against all respondents where their interest is inseparable.

Though the rule only provides that the appeal shall abate as against the deceased respondent, there are cases in which it must abate as against all the respondents. The test is whether the result of leaving the decree to stand would be to have two inconsistent or contradictory decrees relating to the same subject-matter. Where the interest of the respondents can be distinguished and separated then the appeal will abate as against the deceased respondent only; where no such determination is possible it must abate against them all.

Where sale was a joint one in favour of six defendants and where during the pendency of an appeal from a decree refusing to set aside the sale, one of the respondents died, and where no legal representatives were substituted in his stead.

Held, the appeal abated against all the respondents. [P. 141, C. 2.]

M. L. Agarwala—for the Appellants.

S. N. Sen—for the Respondent.

Judgment:—This appeal arises out of a suit brought by *Mahant* Darshan Das for possession of certain property on the ground that it belonged to the *math* of which he had been duly elected *mahant*. The property in suit had been sold by one Mst. Subhagi to Gobind Rai and five other persons. Mst. Subhagi's claim to the property was that it had been given to her by Sheoraj Das a former *mahant*.

The trial Court found that the property belonged to the *math* and should not have been transferred by Sheoraj Das but holding that the plaintiff had failed to prove his own due election as *mahant* dismissed his suit.

Darshan Das appealed and made Musammat Subhagi and all her transferees respondents. During the pendency of the appeal Gobind Rai died. No application was made to have his legal representatives made parties to the suit and no notice was taken of his death in the lower appellate Court.

The learned Judge found that Darshan Das had proved his title and decreed his suit against all the respondents including Gobind Rai.

Only one point has been argued in this Court. That is that the whole appeal had abated as against all the respondents and the decree of the Court below had become null and void.

Order 22, rule 4 (3) provides that when no application is made to cause the representative of a deceased defendant to be made a party, the suit shall abate as against the deceased defendant, and rule 11 of the same order makes the order applicable to appeals.

The appellants' contention is that though the rule in question only provides that the appeal shall abate as against the deceased respondent, there are cases such as the present one in which it must abate as against all the respondents. The test is whether the result of leaving the decree to stand would be to have two inconsistent or contradictory decrees relating to the same subject-matter. Where the interest of the respondents can be distinguished and separated then the appeal will abate as against the deceased respondent only, but where no such determination is possible it must abate against them all. Several rulings of the Calcutta High Court have been cited in support of this proposition; in particular *Dendoo* v. *Sachoo* (1), *Sarat Kamini Dasi* v. *Chaitanya Chandra Prohoraj* (2), and *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (3). In the present case the sale-deed is a joint one in favour of six defendants. If the present appeal is not allowed then there will be two decrees—both of them final—under one of which the right of Gobind Rai to any part of the property in suit has been denied while in the other it has been allowed. At the same time it will be impossible for anybody to ascertain without a suit for partition over what part of the property his right extends.

In my opinion this view is the correct one and must prevail. It has been taken by

---

(1) 1924 Cal. 399.
(2) 1923 Cal. 289.
(3) (1919) 30 C.L.J. 217=54 I.C. 822=24 C.W.N. 44.

the Lahore High Court in *Sirdari Lal* v. *Ram Lal* (4) and the principle underlying it has been more than once affirmed by this Court in cases under section 368 of the former Code of Civil Procedure, *e. g. Hem Kunwar* v. *Amba Prasad* (5). In that Code the words " as against the deceased defendant " did not find a place, but the Courts generally held that a distinction ought to be made between the case in which a suit on appeal could proceed in the absence of legal representatives and those in which it could not. It is clear that this is an instance of a case in which the absence of any representative of Gobind Rai makes it impossible that the lower appellate Court's decree should be allowed to stand.

The appeal is allowed, the decree of the Court below is set aside and that of the Court of first instance restored. The appellants will get their costs in both Courts including in this Court-fees on the higher scale.

Appeal allowed.

(4) (1920) 1 Lah. 225=57 I.C. 199=1 L.L.J. 225.
(5) (1900) 22 All. 430=(1900) A.W.N. 136.

---

* 1925 Allahabad 142.

WALSH, A.C.J. AND SULAIMAN, J.

Mohan Lal and others—Defendants-Appellants

v.

Bhuteshwar—Plaintiff-Respondent.

F. A. No. 20 of 1924, decided on 8th July, 1924, from an order of District Judge of Agra.

• (a) *Civ. Pro. Code, S. 153—Overvaluing a suit to get round a previous decision is an abuse of the Court.*

Overvaluing the suit in order to get round a previous decision is an abuse of the process of the Court and the proper thing for the Court is to return the plaint for presentation to the proper Court. [P. 142, C. 2.]

(b) *Court Fees Act, S. 7, cl. 11—Sub-cl. CC—Suit for possession on ground of forfeiture is governed by the clause.*

Value of a suit for possession of lease property on the ground of termination of tenancy by forfeiture is not the value of the property itself but amount of rent payable for the year next before the date of the plaint. [P. 143, C. 2.]

Narain Prasad Asthana—for the Appellants.

Girdhari Lal Agarwala—for the Respondent.

Walsh, A.C.J. :—There are so many points upon which it seems possible to defeat the plaintiff's attempt to dodge the previous judgment, that it is somewhat difficult to select, and personally I have abandoned the task. I am inclined to think that if I were driven to it, I should hold that, inasmuch as the plaintiff as a matter of grace—to use his counsel's expression—succeeded in extracting from the Munsif a decree giving him possession of the property in a suit in which he had merely made a claim for rent, he is estopped in this Court, or any other, from saying that the Munsif was not competent to decide the question of title in that suit, if he should come to the conclusion that there was no tenancy. If he is estopped from disputing that point, then he is in this suit raising an issue which the Court is undoubtedly competent to try, which has been in issue in a suit which the previous Court was also competent to try. But I should prefer not to express a final decision upon that point without further argument, because it is a new form of estoppel to me, and I am not satisfied that it is sound. But if the plaintiff's vakil is correct in his view that the Munsif as a matter of grace was justified in giving him a decree for possession as owner, after deciding that there was no tenancy, then it seems to me that the plaintiff brings himself within the mischief of the 2nd rule of order 2, because it is quite clear to my mind that the plaintiff knew that the Court which tried his suit, would find as a fact that there was no tenancy, and that he deliberately refrained from, and therefore within the meaning of the rule, relinquished his alternative claim for possession in the event of the tenancy not being established and of the defendants denying his title. This again is one of those points on which I should prefer to hear further argument before I make up my mind that it was the right point for disposing of this case. I am also satisfied that this suit is an abuse of the process of the Court within the meaning of section 153, having been deliberately chosen for the purpose of getting over the difficulty created by the judgment of the appellate Court in the first suit. It looks rather as if the plaintiff had some reason for expecting success as a matter of course in the Munsif's Court in the first suit, otherwise it is difficult to understand why he did not value the suit

as he has now done, at Rs. 1,600, and bring it in the Subordinate Judge's Court. However, these observations are mere *dicta*, and my brother being quite satisfied that the better and safer course is to hold that this suit has been improperly valued, and ought to have been rejected on that ground, I agree with that view, and allow the appeal, reverse the decision of the lower appellate Court, and direct the plaint to be returned to the Munsif's Court with the value of Rs. 24. The appellants will have the costs in all Courts, including in this Court, fees on the higher scale.

Sulaiman, J.:—It is necessary to recite the allegations in the plaint in order to make the point clear. The plaintiff alleged that he was the owner of the house in dispute, and that the defendant No. 1 had been a tenant for about seven years. That as he did not pay rent for three years, the plaintiff instituted a suit against him for for ejectment and for arrears of rent, and in the written statement filed by the defendant to that suit, he expressly denied the tenancy and the plaintiff's title. It was further alleged that that suit was decreed by the first Court on the ground of title, though the tenancy was not proved, but on appeal, the learned Judge dismissed the suit altogether. The cause of action for the present suit is stated to be the date of the written statement, in which the defendant denied the plaintiff's title. The plaintiff originally claimed a declaration that he was the owner of the house in dispute, but that relief was subsequently struck out, and a relief for recovery of possession was substituted.

The defendant in his written statement denied that the Court of the Subordinate Judge had jurisdiction to entertain the claim. The learned Subordinate Judge however overruled this plea, but dismissed the suit on the ground that the previous finding and decree were a bar to the present claim. When the plaintiff went up in appeal to the District Judge, the defendant filed an application stating that the suit was not cognizable by the Subordinate Judge, inasmuch as the valuation had been deliberately inflated. The learned Judge, however, has overruled this plea and allowed the appeal, decreeing the suit on the ground that there was no bar of section 11 of the Code of Civil Procedure.

I quite agree with the learned Chief Justice that this suit was apparently a dodge to get round the previous decision. In fact in paragraph 9 of the plaint, the plaintiff himself admits that he has apprehension that his rights will be prejudiced by the previous judgment, and it was to remove that cloud that he has instituted the suit.

I think the easiest way to dispose of this case is to direct the plaint to be returned for presentation to the proper Court.

On the allegations in the plaint as recited, there can be no doubt that the claim was brought by the plaintiff in the capacity of a land-holder against a tenant, who having denied his title, had forfeited his lease. There can be no doubt that the allegations contained in the plaint amount to this, that there had been a forfeiture and that the lease had terminated. It is not disputed before us that the previous suit related to the whole house.

Under section 8 of the Suits Valuation Act, in suits other than those referred to in the Court Fees Act in section 7, paragraphs 5, 6, 9 and 10, the value as determinable for the computation of Court-fees and the value for the purposes of jurisdiction shall be the same.

Under section 7, clause XI, sub-clause (*cc*), in a suit between landlord and tenant for the recovery of immoveable property from a tenant, including a tenant holding over after the determination of a tenancy, the Court-fee has to be determined according to the amount of the rent of the immoveable property to which the suit refers, payable for the year next before the date of presenting the plaint.

It is clear therefore that when a suit is brought for possession of leased property on the ground that the tenancy has terminated by forfeiture, the proper valuation of the suit is not the value of the immoveable property itself, but the amount of the rent payable for the year next before the date of presentation of the plaint. On the admitted facts the alleged rent payable by the defendant used to be Rs. 2 per month, and therefore the rent for one year would be Rs. 24 only. The plaintiff, however, values the claim at Rs. 1,600 which is the market price of the entire house. I am therefore of opinion that the valuation was purposely inflated in order to provide a ground for getting round the previous decision. The suit should have been filed in the Court of the

Munsif and not in that of the Subordinate Judge. I therefore agree that the plaint should be returned for presentation to the proper Court. The plaintiff will of course pay costs to the defendant in all Courts.

By the Court:—The order of the Court is that the appeal is allowed, the decrees of the Courts below set aside, and it is directed that the plaint be returned to the plaintiff for presentation to the proper Court. The defendants will get their costs from the plaintiff in all Courts, including in this Court-fees on the higher scale.

Appeal allowed.

---

*1925 Allahabad 144.

DALAL, J.

Badri Prasad—Plaintiff-Appellant

v.

G. I. P. Railway—Defendants-Respondents.

S. A. No. 113 of 1923, decided on 25th June, 1924, from a decree of the Sub-Judge, Agra, dated 4th October, 1922.

*(a) *Railways Act, S. 77—No notice is necessary where Railway Company does not allege loss but non-receipt of articles.*

Unless the Railway Company alleges and proves that the package has been lost, no notice would be necessary only on the ground that there had been loss to the consignor whatever may have happened to the package while in the custody of the Railway Company. Where goods have been delivered inadvertently to the wrong person by the Railway Company the case would be different from the case where the Railway Company denies receipt of a package. This enactment of the giving of notice is intended to enable a Railway Company to make enquiry promptly. Where however the Railway Company denies receipt of a parcel there can be no occasion for any inquiry as to what has happened to that parcel in transit and no notice is necessary.

*(b) *Railways Act, S. 77—Compensation for pilfered goods—Notice must be given within six months from delivery of goods to Company.*

As regards compensation for pilfered goods a notice is necessary. The time of six months does not commence from the date of delivery of the damaged parcel by the Company to the consignor, but from the time of delivery of the goods to the Company by the consignor for carriage.

K. N. Katju—for the Appellant.

L. P. Zutshi—for the Respondent.

Judgment:—The plaintiff Lala Badri Prasad delivered according to his statement five packages to the Railway Company at Dholpur for being booked to Agra to be carried in the brake van. This was done on 19th April, 1920. On 22nd October, 1920, he drew the attention of the Railway authorities that these five packages had not been delivered to him. This notice was given to the Railway Company three days more than six months from the date of delivery of the luggage. On 19th November, 1920, only four packges were made over by the Company to the plaintiff and out of one of these it is alleged that certain articles of the plaintiff were stolen during transit. On 28th February, 1921, he gave a notice to the Company of his claim for the value of the one package not delivered to him and of the articles missing from a package which was delivered to him in a damaged condition.

He instituted a suit for the recovery of Rs. 516 with the following details: Rs. 431, price of goods contained in the missing package and Rs. 85, price of articles found short in one out of the four packages returned to him by the Company. As regards the missing package the plea in para. 2 of the plaint was that it was withheld by the Railway Company. The reply of the Company was that only four packages were delivered by the plaintiff to the Company and no fifth package was received by the Company.

In the first Court one of the pleas was that notice within time had not been given by the plaintiff to the Company as required by section 77 of the Railways Act No. 9 of 1890 and that, therefore, the plaintiff was not entitled to compensation for his loss. The first Court of the Munsif of Agra held that the period of six months for a notice begins to run from the date on which delivery of packages is made by the Company to the consignor. The learned Munsif therefore decreed the suit holding that the missing package was worth Rs. 431 and the value of the pilfered goods Rs. 85. On appeal by the Railway Company the learned Subordinate Judge as an appellate Court held that notice was not given within time and further that notice was necessary under the circumstances of the present case.

In this second appeal two points were argued by the learned counsel for the plaintiff (1) that as regards the package which was not delivered and withheld by the Company no notice was necessary and (2) that time for the giving of a notice by a consignor to the Railway Company begins to run from the date of the delivery

of goods by the Company to the consignor as held by the first Court.

In my opinion the first argument is correct but not the second. Under section 77 a notice is essential when a consignor desires compensation "for the loss, destruction or deterioration of animals or goods delivered to be carried" by the Company. The question is whether the claim in the present suit is based on loss, destruction or deterioration of the package which was not delivered. In the plaint it was specifically alleged by the plaintiff that the package was withheld by the Company. The Company itself did not plead any loss or destruction of this package but alleged that no such package was delivered to it. This allegation of the Company has been found to be false by both the Subordinate Courts. The Company has not explained what became of this missing package. A learned Judge of this Court Mr. Justice Lindsay approved of a Bench ruling in *Changa Mal* v. *Bengal and North-Western Ry. Co.* (1) where it was held that the word loss in section 77 of the Railways Act means loss by the railway and not simply loss to the owner: *Secretary of State* v. *Jiwan* (2). On behalf of the respondent another Punjab ruling, *Hills Sawyers & Co., Ltd.* v. *Secretary of State* (3) was quoted. In this Court that ruling has been dissented from in *East Indian Railway Company* v. *Kishan Lal* (4) When the burden of notice is laid on the consignor the words of the section must be strictly construed. Unless the railway company alleges and proves that the package has been lost no notice would be necessary only on the ground that there had been loss to the consignor whatever may have happened to the package while in the custody of the railway company. The facts of the Madras case quoted on behalf of the respondent were different. In the *Madras and Southern Mahratta Railway* v. *Haridoss Banmalidoss* (5) it was known that the railway company delivered the package to a person who was not the consignee but claimed to be entitled to it. In such a case it may be said that there was loss to the company. Where goods have been delivered inadvertently to the wrong person by the railway company the case would be different from the present where the railway company denies receipt of a package. It is obvious that this enactment of the giving of a notice is intended to enable a railway company to make enquiry promptly. Where however the railway company denies receipt of a parcel there can be no occasion for any inquiry as to what has happened to that parcel in transit. The present case is therefore distinguishable from the one reported in the Madras Law Reports. As no notice was necessary the plaintiff's suit must succeed for Rs. 431.

As regards compensation for pilfered goods the plaintiff's learned Counsel admitted that a notice was necessary. His contention was that the time of six months commenced from the date of delivery of the damaged parcel by the company to the consignor. In my opinion the words of the section are clearly against such an interpretation. They are "within six months from the date of the delivery of the animals or goods for carriage by railway." Where there is loss or destruction there will be no delivery by the company to the consignor and the words would not be applicable. In their ordinary interpretation also the words enact that the date of the notice must be within six months of the date of the consignment. It was asked how a consignor was to know of loss, destruction and deterioration until he received some intimation from the company or there had been delivery of a damaged parcel by the company to him. In my opinion the consignor should take action immediately the delivery is delayed and such action must be within six months of the delivery of the goods to the company. This short time is fixed in order to warn the responsible officials of the company and enable them to make an inquiry when an inquiry would be possible and would be likely to be fruitful. The suit as regards price of pilfered goods is barred under the provisions of 77 of the Railways Act.

In the result I set aside the decree of the lower appellate Court and decree the plaintiff's suit for the amount of Rs. 431 with proportionate costs of all the courts.

Decree set aside.

(1) (1897) 6 P.R. 1897.
(2) 1923 All. 426=45 All. 380=21 A.L.J. 220=4 L.R.A. Civ. 166.
(3) (1921) 2 Lah. 133=61 I.C. 926=3 L.L.J. 297 (F.B.).
(4) 1924 All. 7=45 All. 530=21 A.L.J. 438=4 L. R.A. Civ. 249.
(5) (1918) 41 Mad. 871=35 M.L.J. 35=24 M.L.T. 38=49 I.C. 69=8 L W. 340.

1925 Allahabad 146.

MUKERJI AND DALAL, JJ.

Bhagwan Das Marwari and others—Plaintiffs-Appellants

v.

Suraj Prasad Singh and others—Defendants-Respondents.

F.A. No. 235 of 1922, decided on 23rd July, 1924, from a decree of the Subordinate Judge, Gorakhpur, dated 9th May 1922.

(a) *Civ. Pro. Code, S. 47—Collector is not a Court.*

Collector executing a decree transferred to him is not a Court and therefore cannot entertain an application under S. 47. [P. 149, C 2.]

(b) *Civ. Pro. Code, O. 21, R. 92 (3)—Suit lies to set aside decision of Collector confiming a sale.*

Where a decree was transferred to Collector for execution and the Collector to whom an application to set aside the sale was made, dismissed the same and confirmed the sale: *held*, that a suit to set aside the sale on the ground of fraud covering a wider ground than the one in O. 21, R. 90 (1) *i.e.*, fraud in publishing or conducting a sale, is maintainable and is not barred by any provision of law. [P. 150, Cs. 1 and 2.]

Tej Bahadur Sapru, Haribans Sahai and *Piary Lal Banerjee*—for the Appellants.

Sankar Saran, Harnandan Prasad, Kailas Nath Katju and *S. S. Sastry*—for the Respondents.

Mukerji, J.:—The suit out of which this appeal has arisen was dismissed by the learned Subordinate Judge on a preliminary ground without trying whether the allegations of fact made in the plaint were correct or not. In this Court his judgment has been sought to be supported not only on the ground on which it is based, but also on the ground that the plaint discloses no cause of action.

The history leading to the institution of the suit is as follows:—The plaintiff Bhagwan Das who has since died and the father of Kanhaiya Lal, the defendant No. 11, Duli Chand were brothers. Babu Basdeo Narain Singh and Ram Udit Narain Singh, defendants third party to the suit owned the entire *mahal* No. 10 in the village of Dudhai, a portion of which, *viz.*, a 10 anna share is in suit. It appears that the entire *mahal* was mortgaged with Bhajan Rai under two transactions, one being usufructuary and the other a simple mortgage. Duli Chand took a third mortgage which was usufructuary with respect to a 14 anna share in the *mahal* and paid off the usufructuary mortgage. Bhajan Rai, the father of the defendants second party, brought his suit for sale on foot of his simple mortgage and made Duli Chand a party to the suit. The suit was decreed and a little over a sum of Rs. 10,000 was declared to be payable under the decree. This decree was passed on the 13th of July, 1918. On the 20th of September, 1918, Duli Chand and his brother Bhagwan Das, the original plaintiff of the suit, purchased a 13 annas 6 pie share out of the entire *mahal* for a consideration of Rs. 36,000 and odd. The largest portion of the consideration money went to satisfy the debts already due to the two brothers under the previous mortgage and other transactions and the balance, a sum of Rs. 10,000, was left with the vendees for payment to Bhajan Rai. This money, however, was not at once paid. About a year after this purchase, three sets of plaintiffs brought suits for pre-emption against Bhagwan Das and Duli Chand. One suit was instituted by the defendant No. 7 Musai Singh *alias* Udai Bhan Singh. Another suit was instituted by Ram Partab Singh, the defendant No. 8, in the suit. These two pre-emptors have been described as defendant's fourth party. The third suit was brought by the defendants described as fifth party. The suits brought by the defendant's fourth party were decreed and the suit brought by the defendants fifth party was dismissed. The Court ordered that the two successful plaintiffs should each pay one-half of the purchase-money already paid by the vendees, *viz.*, one-half of Rs. 26,000 and odd and that the balance payable to Bhajan Rai should be paid by them in equal moieties. It was further ordered that if one of the plaintiffs failed to pay the amount payable by him and thus to pre-empt one-half share in the property, the other plaintiff might pay this amount and obtain possession over the other half. It appears that as a matter of fact the decretal amount due to Bhajan Rai was not paid and Bhajan Rai brought about a sale of a 10 anna share. The property being ancestral, the decree was transferred to the Collector for execution and he held a sale on the 21st of June, 1920, and the entire 10 anna share was purchased by the defendant first party Suraj Prasad Singh for the sum of

Rs. 10,000. At the sale a subsequent mortgage was notified because the Deputy Collector, who was acting for the Collector, discovered the existence of an incumbrance over the property. The learned Assistant Collector admits in his proceedings that the Civil Court had not ordered the notification of any such mortgage. The defendant first party does not admit that he is liable to pay any prior mortgage. The fact of the sale having come to his knowledge, Duli Chand deposited in Court the entire decretal amount with 5 per cent. on the sale price and prayed for the sale to be set aside. This application was opposed not only by the auction-purchaser, but also by the mortgagors-judgment-debtors and the decree-holders. The Assistant Collector held that on account of the pre-emption decrees passed against him, Duli Chand had ceased to have any interest in the property and he could not make a valid deposit. He accordingly recommended to the Collector that the sale should be confirmed. The sale was accordingly confirmed on the 12th of October, 1929. An appeal was taken to the Commissioner but he upheld the order of the Collector. A petition to the Board of Revenue for revision was also unsuccessful. Bhagwan Das and Duli Chand had filed appeals against the pre-emption decrees and they were pending before this Court. An application was made by the respondents that they might be allowed to withdraw their suits and they offered to pay the costs of the appellants. This application was allowed. The date of this application as given in our printed record seems to be incorrect. In the plaint the factum of this Court having permitted the pre-emptors to withdraw their suits is mentioned and this shows that the order must have been passed before the institution of the suit, out of which this appeal has arisen. It also appears that Duli Chand made an application to the Subordinate Judge asking him to set aside the sale held by the Collector and confirmed by him. This application was rejected by the Subordinate Judge and the judgment was upheld by this Court on the sole ground that Civil Court had no jurisdiction to interfere with the proceedings of the Collector. These two last-mentioned facts are not to be found on the record of the present case. But we were referred to the file of the Ex. F.A. No. 208 of 1923 of this Court which was decided on the 15th of April 1924 by two learned Judges of this Court.

Now, the suit, out of which this appeal has arisen was brought on the following allegations. Bhagwan Das said that he was no party to the decree. He and his brother Duli Chand were the victims of a fraud committed jointly by the judgment-debtors, the decree-holders, the auction-purchaser and the pre-emptors. Evidently by 'pre-emptors' the plaintiff means the successful pre-emptors. The plaintiff says that these persons combined to deprive the purchasers, namely, Bhagwan Das and Duli Chand, of their property and with this view they in the first instance kept them in the dark as to the fact that execution proceedings were being taken and how they were going on. After the sale was held Duli Chand came to know of the sale and he made a deposit. The application was opposed. The pre-emptors, as they were anxious that the property should go to them through the auction-purchaser, never made any attempt to pay the decretal amount. When they found out that the auction-purchaser had succesefully resisted Duli Chand in his attempt for the sale being set aside, they withdrew their suit by an application in the High Court. This act of theirs was a part of the same conspiracy. On these allegations, Bhagwan Das asked that the auction sale of the 21st of June, 1920, might be declared to be void and he should be maintained in possession. In the alternative he asked for possession.

It has been argued that the plaintiffs' case has really been elaborated in the High Court and that it was originally much more confined. It is pointed out that the plaintiff furnished further particulars by his application dated the 1st of March, 1922, and that the Court should not take cognizance of any allegation other than what is to be found in the said application. But that application was intentionally confined to matters relating to the sale. This application was filed in reply to defendants' application dated the 22nd of February, 1922. Both the applications are printed as Nos. 8 and 9 at pages 14 and 15 of the printed record. The defendants' application will show that he wanted particulars 'in connection with sale proceedings' and he was supplied with these.

It will be seen that the plaintiff and Duli Chand purchased property worth Rs. 36,000 (speaking roughly) and paid a substantial portion (Rs. 26,000 and odd) of the consideration money. They had undertaken to pay off the balance and they did make a genuine attempt to pay off the decree. Whether they were kept in ignorance of the execution proceedings or not is a matter which will have to be tried. They further say that the conspiracy between the pre-emptor and the decree-holder and the auction-purchaser was that the property should be wrested from Bhagwan Das and Duli Chand either by means of a pre-emption decree or if possible by an auction-purchase, of which Bhagwan Das and Duli Chand should be kept in ignorance. Although the pre-emptor Musai Singh paid into Court the sum of Rs. 26,000 it is alleged that, they never paid the money which the Court had directed them to pay to Bhajan Rai. It is pointed out that this was done at the risk of losing the pre-empted property simply because the idea was that if they could obtain the property by a purchase at auction in execution of a decree passed on a first mortgage they would get the property very cheap and in that case they would forego their claim for pre-emption. It is urged that, the result of the pre-emption decree was that on foot of it the decree-holder was enabled to resist Duli Chand's application before the Assistant Collector for the setting aside of the sale. It was contended before the Assistant Collector that owing to the pre-emption decrees Duli Chand had left in him no interest to pay the decretal amount and penalty and thus to save the property. It is pointed out that when Duli Chand's application failed, no necessity was left for the pre-emptor Musai Singh to resist the appeal of Bhagwan Das and Duli Chand, and they withdrew their suit. The result of all that has happened is absolutely clear. Whoever may be to blame for it, Bhagwan Das and Duli Chand have lost not only 10 annas share out of 13 annas 6 pies purchased by them, but they have also lost a sum of Rs. 26,000 which they had already paid for the purchase of the property. It is not the case that these men were unwilling or unable to pay the balance of the purchase money and to redeem the promise to pay the whole of the purchase money. The question is whether this unfortunate result was the outcome of a conspiracy as alleged by the plaintiff or whether it was due to an unfortunate combination of circumstances over which the defendants had no control. It will thus be seen that if the plaintiffs' allegations be true he ought to be entitled to relief. Where there is a wrong there is a remedy is a maxim of old standing, specially as fraud vitiates all proceedings, not only transactions between private parties, but even all proceedings held in a Court of law.

Now, let us see whether there is anything in law to bar the trial of the plaintiffs' suit.

The learned Subordinate Judge threw out the suit by a short judgment holding that it was barred by provisions of Order 21, Rule 92, Clause 3 of the schedule of the Civil Procedure Code. It has been further contended on behalf of the respondents that in any case a suit will not lie. The remedy lay by an application under section 47 of the Civil Procedure Code and that remedy has already been exhausted.

To take the second point first—it appears that although Bhagwan Das was not a party by name to the decree obtained by Bhajan Rai who is now represented by his sons, the defendants second party, Bhagwan Das must be deemed to be a representative of the judgment-debtor as he purchased subsequently to the passing of the decree the interest of the mortgagor. Ordinarily therefore his relief could be granted only under section 47 of the Civil Procedure Code and not by a suit.

When Duli Chand made an application to the Subordinate Judge for the setting aside of the sale held by the Collector his application was thrown out on the ground that the Civil Court had no jurisdiction to interfere with a sale held by the Collector for executing a decree against ancestral property. The order of the Subordinate Judge was affirmed by this Court. This order, speaking respectfully, was a perfectly right order. It is difficult to see how the Civil Court executing the decree can interfere with an order passed by the Collector to whom the decree had to be sent for execution on account of the property being ancestral. The Collector exercises his powers under the authority of the Local Government and he is in no way subordinate to the Civil Courts. An application

therefore before the Subordinate Judge under section 47 of the Civil Procedure Code will be and was held to be misconceived. It is not pretended that an application under section 47 of the Civil Procedure Code lay before the Collector. The Collector is not a Court executing the decree. He is nowhere mentioned as a Court and the legislature therefore found it necessary to say specifically that when a Collector exercises his jurisdiction in the matter of the execution of decrees he should be deemed to be acting judicially (see section 71 of the Civil Procedure Code). If the Collector had been a Court it would not have been necessary to say that he should be deemed to be acting judicially. On this point some cases were cited by Dr. Katju, the learned Counsel appearing for the respondents. These are *Muhammad Said Khan* v. *Prayag Sahu* (1) and *Kushal Chand* v. *Nand Ram* (2). In the former case, a question arose whether a certain adjustment of the decree certified before the Collector who was executing a decree against ancestral property was or was not a valid adjustment and whether the acknowledgment of the decree made by the judgment-debtor before the Collector could or could not be relied upon by the decree-holder for the purposes of saving his decree from limitation. All that was held by Burkitt, J., was that it was the duty of the Collector to execute the decree and he was therefore properly seized of the application for adjustment. It followed therefore that an acknowledgment of the decree made before the Collector was held to be a right acknowledgment. I do not find anything in this decision supporting the contention of the learned counsel for the respondents that a Collector is a Court and he can entertain an application under section 47 of the Civil Procedure Code after he has confirmed a sale. In the case in 35 Bombay, all that was held was (so far as is relevant for our purposes) that while a Collector is executing a decree he is entitled to act upon a statement of the decree-holder that his decree has been satisfied. It was pointed out that while the Collector was executing the decree he was in charge of the execution and an intimation to the Collector of the fact of payment satisfied the conditions of section 258. The third case relied upon by Dr. Katju is that of *Shriniwas* v. *Jagadevappa* (3). In that case it was held that where an execution of a decree was proceeding before the Collector, he was the only authority to whom an application should be made for permission to bid at the auction sale by the decree-holder. The Local Government of Bombay have made rules by which the power of the Civil Court to grant permission to the decree-holder to bid have been granted to the Collector while executing a decree. This case therefore is no authority for the proposition that the Collector executing a decree against ancestral property was a Court and could entertain an application under section 47, of the Civil Procedure Code. The rulings quoted, therefore, are of no avail to the respondents.

It follows that the Collector could not take cognizance of the present complaint of Bhagwan Das as an application under section 47 of the Civil Procedure Code. If there is a wrong there is a remedy and if there be a remedy that remedy must be by a suit unless the institution of such a suit is barred by law.

I come therefore now to examine the provisions of Order 21, rule 92, sub-rule 3. This rule lays down that no suit to set aside an order made under that rule shall be brought by any person against whom such an order is made. The order referred to is an order confirming or setting aside a sale. I will assume that for the purposes of the application of this rule Bhagwan Das was a party against whom an order confirming a sale has been made, he being the legal representative of a judgment-debtor. But what is the scope of the ruling? Rule 92 says in sub-rule 2 that where such application is made and allowed, that is to say, where an application to set aside a sale on the several grounds mentioned before is made and allowed and where a deposit under rule 89 is made within the limited time the Court shall pass an order setting aside the sale.

In sub-rule 1, rule 91 says where any such application as is mentioned in rules 89, 90 or 91 has been made and has been disallowed or no such application has been made, the Court shall pass an order confirming the sale. To understand therefore the scope of rule 92, we have to examine

(1) (1894) 16 All. 228=(1894) A.W.N. 55.
(2) (1911) 35 Bom. 516=12 I.C. 572=13 Bom. L.R. 977.
(3) (1918) 42 Bom. 621=46 I.C. 653=20 Bom. L.R. 708.

the rules 89, 90 and 91. Rule 91 is not relevant for our purposes because it relates to an application by the purchaser to set aside the sale on the ground that the judgment-debtor had no saleable interest. Rule 89 relates to an application by a judgment-debtor or any person interested in the property to set aside the sale after deposit of the decretal amount and the penalty. The present suit does not seek to set aside the sale on any such ground. It seeks to have the sale set aside on much larger grounds. Rule 90 applies to the case where there has been material irregularity or fraud in publishing or conducting a sale. It is true that the plaintiff alleged in the plaint that owing to fraud he was kept in ignorance of the proceedings ending in the sale, but that is only a minor part of his case. He does not seek to have the sale set aside on the ground of material irregularity or fraud in publishing or conducting the sale. The plaintiffs' case has already been stated. It may be re-iterated in brief. His case is that there was a conspiracy by which the plaintiff was to be deprived of the property which he had properly purchased on payment. The conspiracy was not merely that he should be kept in ignorance of the execution proceedings leading up to the sale, but he was not to be allowed to even get the sale set aside on payment. The pre-emption suits were meant to deprive him of the property, fairly if necessary, or the pre-emption decree might be utilised in showing that Duli Chand or the plaintiff had no interest left in the property so as to entitle them to make a depcsit under rule 89, Order 21 of the Civil Procedure Code. I may point out here the significant fact that when the application for setting aside such sale was before the learned Assistant Collector—Mr. Sri Bilas—the application was opposed not only by the decree-holder, but also by the judgment-debtor. What interest judgment-debtor had left in him in the property I fail to see. But he fought to have the application of Duli Chand dismissed. At page 77 of the record the learned Assistant Collector says that Basdeo, whom he calls the 'real judgment-debtor' said that Duli Chand had no status and could not deposit the money and that he, Basdeo, would suffer pecuniary loss if the sale was set aside. By setting aside the sale of property worth at least Rs. 26,000 for Rs. 10,000 the judgment-debtor had nothing to lose but only to gain. As a matter of fact in this case Basdeo had left in him no interest in the property and it was immaterial whether Duli Chand's application succeeded or failed, yet he opposed the application. As I have already stated the learned Assistant Collector thought that Duli Chand had no interest left in the property and he could not make the deposit. The conduct of the judgment-debtor would go to partially substantiate the story of conspiracy. The fact that the pre-emptors made no attempt to save the property which they had obtained by decrees of the Court points to the fact that their interest and the interest of the auction-purchaser were one and the same. Thus, it will be seen that the case of the plaintiff is based on much larger grounds, than merely of fraud in the publishing and conducting of a sale. My remarks on the merits of the case are not to be taken as in any way decidingt he case. I had to refer to facts only to show that the plaintiff had a substantial story of grievance and that story would entitle him to a trial of his case and there is no rule of law which prevents a Court of justice from entering into the merits of the plaintiffs' case.

It was argued that the plaint did not disclose the date when the fraud came to be known to the plaintiff and that, when the petition printed at page 67 of the record was made or when the case was heard by the court and the order printed at page 71 was made, every one of the facts now alleged by the plaintiff were known to him. I do not think that there is any substance in this argument. It is true the plaintiff does not say when the fraud came to the surface. He does not give the date, but that is really immaterial. He discovered all the facts on a date which must be a date subsequent to the withdrawal of the suits by the pre-emptors in the High Court. That fact is a substantial part of the alleged conspiracy among the several parties accused of it. The want of specific date therefore is immaterial. As for the petition at page 67 it was the petition by which Duli Chand offered to pay into Court the decretal amount and the penalty. Duli Chand did not then know and could not have known that the pre-emptors were also in league with the auction-purchasers and the decree-holders and the judgment-debtors. For, the pre-emptors had not as yet withdrawn their

suit by an application to the High Court. As for the judgment of the Court of the Subordinate Judge printed at page 71 the matter related only to Musai Singh pre-emptor's application for being put into possession of the property he had pre-empted. This was also before Musai Singh had withdrawn his suit by an application to the High Court.

The result is there is no legal bar to the maintenance of the suit by the plaintiff and the suit was wrongly thrown out on a preliminary point.

The argument of the appellants' counsel that the Collector had no jurisdiction to confirm the sale has no force and does not require serious consideration.

I would therefore, allow the appeal, set aside the decree of the Court of first instance and remand the suit for being disposed of according to law. I would point out that issue No. 4 is not sufficiently wide to cover the plaintiffs' case.

Dalal, J :—The matter for decision in this first appeal is short though the facts are somewhat lengthy. The plaintiff's suit sought the following reliefs :—

1. That the auction sale of 21st June, 1920 be declared invalid and set aside, and that the plaintiff and his brother Duli Chand be declared owner and in possession of the 10 annas share of village Dudhai.

2. That in the alternative to a declaration and possession over the property may be granted.

The suit was based on allegations of fraud, which the lower Court did not enquire into. It dismissed the suit as barred by rules framed by the Local Government under section 69 of the Civil Procedure Code similar to the provisions of Order 21, rule 92 (3).

The litigation giving rise to the present suit may be shortly recapitulated here. An entire 16 annas *mahal* (formerly 13 annas 6 pies) of village Dudhai was mortgaged and the mortgagee obtained a decree for sale of this property on 13th July, 1918, against the mortgagors Basdeo Narain and others, defendant's third party. The plaintiff's brother Duli Chand was a party to the decree as a subsequent mortgagee under a deed, dated 7th July, 1913. On 20th September, 1918, Basdeo Narain and others sold their interest in the property to the plaintiff and his brother (p. 39) for Rs. 36,911 out of which Rs. 10,000 was left with the vendees to pay the decree of Bhajan Rai and others, defendants second party, and the balance to pay the mortgage of Duli Chand and some decrees and pro-notes due to the plaintiff and his brother.

The plaintiffs did not pay off the decree at once; obviously they were apprehensive of pre-emption suits which were actually brought on 27th October, 1919. There were three suits. On 30th March, 1920, two succeeded and the third was dismissed in the Court of the Subordinate Judge of Gorakhpur. The plaintiffs appealed to this Court against the decrees in favour of Musai Singh and Rampartab Singh, defendant's fourth party. Under the pre-emption decrees the pre-emptors were directed to deposit Rs. 26,911 in Court and pay the decree of Bhajan Rai.

The decree was put into execution and the property for sale being ancestral, execution proceedings were transferred by the Civil Court to the Collector of the district under section 68 of the Civil Procedure Code. The Collector sold it on 21st June, 1920, and the auction purchaser was defendant No. 1, Suraj Prasad. On 15th July, 1920, Duli Chand deposited the sale money with penalty and applied to have the sale set aside. The purchaser opposed the application and the Deputy Collector, acting for the Collector, refused to set aside the sale. This order was passed on 11th October, 1920, on the ground that Duli Chand had no longer any interest in the property which had been pre empted. Basdeo judgment-debtor also opposed the application for setting aside of the sale. The Court did notice that Duli Chand was subsequent mortgagee and a party to the decree but appears to have thought that the mortgage was merged in the transfer by way of sale, which in its turn had been cancelled by the pre-emption decree after the pre-emptor had deposited money in Court for payment to Duli Chand. The sale was confirmed by the Collector on 12th October, 1920. An appeal to the Commissioner was dismissed. On application to the Board of Revenue, it held that no revision lay.

On 8th November, 1921 both the successful pre emptors withdrew their suits in this Court and they were dismissed. The result is that defendant No. 1, Suraj Prasad has become owner of the property on payment of Rs. 10,000 and the plaintiff

has lost Rs. 26,911, which he cannot recover now from any one.

Duli Chand is dead and his son is sixth party formal defendant to this suit.

The first contention of the learned Counsel that the Deputy Collector's order of 11th October, 1920 is not binding, without any allegation of fraud, is not tenable. Under rule 32 (2) framed by the Local Government corresponding to rule 92 (3) of Order 21 such an order is final. It was argued that where a person interested in the property deposited money in the way directed in rule 89 (1) (there is a corresponding rule framed by Government) the Collector must automatically make an order under rule 92 (2) setting aside the sale. So in refusing to do so, he acted without jurisdiction. This is begging the question that the person applying is held by the Collector to have an interest in the property. The Collector may wrongly decide that he has not, and yet such an order will not be open to inquiry by a Civil Court. This is what has happened here. The case in *Tuhi Ram* v. *Izzat Ali* (4) was based on the wording of section 320 and Local Government rule corresponding to section 312 of the former Code of 1882 and is not applicable now.

The attempt to distinguish between the plaintiff and Duli Chand must fail because the plaintiff has specifically accepted Duli Chand's action in the Sale Officer's Court as his own. On 2nd September, 1920 he objected to delivery of possession of property to the pre-emptor in the Court of the Additional Subordinate Judge of Gorakhpur. He declared in his application that he had deposited the entire decretal amount with penalty in the Sale Officer's Court. A copy of this application has been admitted as correct in the lower Court by the plaintiff's pleader. It is clear, therefore, that the plaintiff cannot plead ignorance of the sale and cannot disclaim responsibility for his brother's proceedings in the Sale Officer's Court.

The argument which deserves consideration is that the order confirming sale is liable to be set aside on the ground of fraud. Fraud is specifically urged in the plaint. The issue No. 4 framed by the lower Court narrows the scope of the inquiry contrary to the pleadings of the plaintiff. The issue runs:—Has there been any fraud in conducting the sale?

The fraud alleged by the plaintiff covers a very wide ground. He alleged a conspiracy between the decree-holder, judgment-debtor, pre-emptor and auction-purchaser to cause him loss by depriving him of the property and of the money recoverable by him from it. He alleged that the pre-emption suits were fictitious, only filed to prevent the plaintiff from paying off the decree in the apprehension that he may lose the property in the pre-emption suits. When the plaintiff applied to have the sale set aside, the auction-purchaser and judgment-debtor objected though full price with penalty was deposited. The auction-purchaser was a friend of the decree-holder who was displeased at the private purchase by the plaintiff and wanted the property himself (page 14 replication by the plaintiff.) The collusion of the pre-emptors was indicated by their not paying off the decree, though they deposited the far larger sum in Court for payment to the plaintiff, and by their withdrawing the suits after the auction sale was confirmed. The respondents' counsel drew our attention to the fact that the present suit was filed on 25th September, 1921, that is, prior to the date of the High Court's order permitting withdrawal of the pre-emption suits. The fact however is mentioned in paragraph 5 of the plaint. Possibly the pre-emptors applied for withdrawal before the present suit was filed.

The respondents' counsel argued that the plaintiff confined his allegation of fraud to sale proceedings only and referred us to the plaintiff's replication. The replication, however, was an answer to the defendant first party's specific inquiry as to details of fraud alleged by the plaintiff to have been practised in connection with the sale proceedings.

We hold that the correct issue arising on the pleadings is:

Is the auction-sale voidable by reason of the fraud practised in obtaining its confirmation? To put it shortly, the charge against the defendants is that they conspired together to file fictitious pre-emption suits and by means of such fraud misled the Sale Officer into the belief that the suits were genuine and that therefore the plaintiff had no interest in the property and could not make a deposit. The Commissioner's order is not relevant because if the Sale Officer had not been

---

(4) (1908) 30 All. 192=5 A.L.J. 253=(1908) A.W. N. 77.

misled no opinion of the Commissioner would have been necessary. The principles on which a decree may be set aside on the ground of fraud are laid down by a Bench of this Court in *Janki Kuar* v. *Lachmi Narain* (5). Reference is made there to an English case. Sir John Rolt in *Batch* v. *Ward* (6) discussing what is meant by fraud when a decree may be impeached for fraud, said: "The fraud must be actual positive fraud, or meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining the decree by that contrivance". Fraud of such a character is alleged in the present suit.

Under section 44 of the Evidence Act every party is competent to prove that any judgment or order proved against him was obtained by fraud or collusion. A Civil Court has jurisdiction to grant relief where it is sought on the ground of fraud.

The first argument on behalf of the respondents was that the plaintiff had suffered no damage and his position was in no way altered by the sale, so he had no cause for redress. As we have already pointed out, the success of the pre-emptors deprived him of property but he got his money back, while the auction sale deprived him of a large sum of close on Rs. 27,000 as well. It will be difficult to conceive of a more flagrant case of damage.

The question, why plaintiff's brother Duli Chand did not allege fraud in his petition to have the sale set aside and the plaintiff when he objected to delivery of possession to the pre-emptor, can only be answered when the evidence is gone into. It will be inadvisable for us to express any opinion on mere arguments and pleadings of parties.

It was pressed in argument that the remedy of the plaintiff lay under section 47 in execution proceedings. The answer is short. The plaintiff did apply to the Civil Court in execution proceedings and he was told both by the first Court and by this Court in appeal that a CivilCourt executing the decree had no jurisdiction to interfere with a sale confirmed by the Collector under rules framed by the Local Government under section 70 (Execution First Appeal from Order No. 208 of 1923). A separate suit would not be maintainable if sale had been held by the Civil Court, and the plaintiff had desired to have it set aside on the ground of fraud, *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (7). Reference was made to *Sadho Chaudhri* v. *Abhenandan Prasad* (8) in support of the powers of the executing Civil Court to set aside such a sale. The decision however is of 1903 when the Code of 1882 was in force.

The next question is whether the plaintiff could have applied to the Collector. We are of opinion that he could not. There is no rule framed under section 70 to give the Collector such power. Various cases were quoted in support of different powers of the Collector while executing a decree of sale of ancestral property. *Muhammad Said Khan* v. *Payag Sahu* (1), *Khushal Chand* v. *Nand Ram* (2), *Shriniwas* v. *Jagadevappa* (3), *Sheo Ram Koeri* v. *Ikram-un-nissa* (9).

We have examined all these cases. Every one of them covers some specific power granted to the Collector under rules framed by respective Local Governments. We may also point out that the first two cases considered the provisions of the Code of 1882 and not of the present Code.

The plaintiff cannot apply to the Collector under section 47 because the Collector is not a Court. In sections 68 to 72 the Court and Collector are kept distinct. If the Collector had been treated as a Court there would have been no necessity to enact section 71 to give judicial authority to the orders of the Collector and his subordinates while conducting sales of ancestral property.

Much stress was laid on Government rule corresponding to Order 21, rule 90 (1), the suggestion being that it covered cases of general fraud. The rule covers cases of fraud of a particular kind in "publishing or conducting" sale and not such wide collusion and fraud as are alleged in the present case. The authority of (1) *Farhat-un-nissa Bibi* v. *Sundari Prasad* (10), (2) *Chulhi Upadhya* v. *Badri Upadhya* (11), (3) *Badri Singh* v. *Tulsi Ram* (12) were cited for the proposition that an order by a

(5) (1915) 37 All. 535=30 I.C. 789=13 A.L.J. 753.
(6) 5 Ch. App. 203.
(7) (1892) 19 Cal. 683=19 I.A. 166=6 Sar. 209 (P.C.)
(8) (1904) 26 All. 101=(1903) A.W.N 203.
(9) 1923 All. 282=45 All. 316=4 L.R.A. Civ. 129. =21 A L.J. 176.
(10) (1920) 18 A.L J. 124=54 I.C. 801.
(11) (1921) 19 A.L.J. 232=62 I.C. 672.
(12) 1923 All. 186=45 All. 203=21 A.L.J.53= 4 L.R.A. Civ. 43 (F.B.).

Collector confirming a sale was final and cannot be revised by a Civil Court. In none of these cases it was alleged that the sale was voidable by reason of collusion and fraud which misled the Sale Officer. In the case reported in 18 A.L.J. 124 the details of the facts are not clear from the judgment but it appears that the fraud alleged was in connection with the publishing and conduct of the sale. Such a fraud would be covered by the Local Government rule corresponding to the provisions of Order 21, rule 90 and it would be within the province of the Collector to set aside the sale if satisfied with respect to the fraud. The ground for the setting aside of the sale was similar in the case reported in 45 All. 203. The case in 19 A.L.J. 232 affirms the well-established proposition that a Civil Court has no power to interfere with the procedure of the Collector in the execution of a decree which has been transferred to him under section 68 of the Civil Procedure Code. In that case the action of the Collector was questioned and there was no allegation of a fraud committed by other parties so as to mislead the Collector into wrongly confirming the sale.

We have come to the conclusion that the allegations of fraud made by the plaintiff in the plaint must be enquired into and that the suit is not liable to dismissal summarily under the provisions of Order 21 rule 92 (3) or of any rule framed by the Local Government corresponding thereto.

By the Court:—We set aside the decree of the lower Court, alter issue No. 4 of that Court in terms noted above and remand the suit to it under Order 41, rule 23 for trial on the merits. Costs here and heretofore shall abide the result.

Case remanded.

1925 Allahabad 154.

MUKHERJI AND DALAL, JJ.

Firm Kachauri Mal-Kalyan Mal—Defendant-Applicant.

v.

Firm Wali Muhammad Abdul Latif—Plaintiff-Opposite Party.

Civ. Rev. No. 57 of 1924, decided on 21st July, 1924, from an order of the District Judge, Cawnpore, dated 28th November, 1923.

(a) *Civ Pro. Code (1908)—Code applies to proceedings under Arbitration Act.*

The provisions as to arbitration as laid down in the Civ. Pro. Code do apply to proceedings under the Arbitration Act of 1899. [P. 155, C. 1.]

(b) *Civ. Pro. Code, S. 104 - Appeal—Arbitration Act, S. 19*

Order granting stay of suit pending arbitration is appealable. [P. 155, C 1.]

N. P. Asthana—for the Applicant.

K. N. Katju—for the Opposite Party.

Judgment:—This is an application in revision asking this Court to set aside an order passed by the learned District Judge of Cawnpore on appeal.

It appears that the parties to this application are members of a sugar committee. Under the rules framed by the committee to which parties have committed themselves, all disputes arising among them should be referred to arbitration. A dispute arose and it was referred to arbitration. Ignoring this reference the plaintiff brought a suit in the Court of the Subordinate Judge of Cawnpore. The defendant applied under section 19 of the Arbitration Act (Act IX of 1899) for a stay of the suit pending the making of the award. The Court of first instance ordered a stay. The plaintiff appealed and the learned District Judge has set aside the order. It is contended before this Court by the defendant that the District Judge had no jurisdiction to entertain an appeal and that his order should be set aside.

The Arbitration Act of 1899 does not provide for an appeal. It is a very short Act and by section 20 provision for framing rules has been made. It is common ground that this High Court has as yet made no rules on the points referred to in that section. Among other matters a rule was to be provided for "the stay of any suit or proceeding in contravention of submission to arbitration".

In this Court the opposite party contends that an appeal lay under section 104 of the Civil Procedure Code. The question is whether the provision as to arbitration as laid down in the Civil Procedure Code and schedule 2 has any application to proceedings under the Arbitration Act of 1899. There is a case decided by a Division Bench of this Court, namely, *Nainsukh Das Nagar Mal* v. *Gajanand Shyam Lal* (1) in which

---

(1) (1921) 43 All. 348=61 I.C. 269=19 A.L.J. 132.

it was held that in the absence of any rules framed under section 20 in the Act of 1899 the provisions of the Civil Procedure Code should be applied. The ground given is that something had to be done and the application of the Civil Procedure Code was not inconsistent with the provisions of the Arbitration Act. We have every reason for following this precedent. We are prepared to follow this precedent on even larger grounds. Section 89 of the Civil Procedure Code says (omitting the first few words) "all reference to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

An exception is made in the following terms "save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force." This would mean that unless the provisions of the Indian Arbitration Act, 1899, are contrary to any of the provisions of the second schedule that schedule must apply to a reference made under the Arbitration Act of 1899. If that be the case it would follow that the provisions of section 104 of the Code of Civil Procedure will apply, because the schedule 2 is governed by that section. There can be no force in a contention that, while the second schedule may be applied the main provisions of the Code by which orders passed under the second schedule are made appealable should not apply. We hold that the appeal to the District Judge was competent.

We dismiss the application in revision with costs which will include Counsel's fees in this Court on the higher scale.

Application dismissed.

1925 Allahabad 155.

KANHAIYA LAL AND MUKHERJI, JJ.

Harbaksh Singh—Defendant-Appellant.

v.

Dal Bahadur Singh and others—Plaintiffs-Respondents.

F.A. No. 215 of 1921, decided on 21st July, 1924, from the decision of Sub-Judge, Allahabad.

(a) *Hindu Law—Succession—Primogeniture—Existence of custom whereby estate descends to single heir does not raise presumption of primogeniture—Custom.*

The fact that there is a custom in a family whereby the estate descends to a single heir does not raise necessarily a presumption that the rule of primogeniture applies to the family. If the heir according to lineal primogeniture is more remote in degree from the ancestor than the other persons who may be collaterals coming within the line of heirship then unless there is proof to the contrary nearness of the degree will prevail over directness of line. [P. 161, C. 2.]

(b) *Hindu Law—Succession—Mode of succession repugnant to the law can't be prescribed.*

The person is not at liberty to dictate the mode of succession to the property when such mode is opposed to the ordinary law. [P. 160, C. 1.]

(c) *Land tenures—Properties purchased from* talukdari *income are not* talukdari.

The mere fact that the absolute owner of a certain *talukdari* as well as non-talukdari properties mixed together the incomes of both the properties and purchased further properties does not impress the subsequently purchased properties with the character and status of *talukdari* property and it is only the ordinary rule of succession that would apply to it. [P. 157, C. 2.]

Surender Nath Sen—for the Appellant.

P. L. Banerjee and *Balmakund*—for the Respondents.

FACTS:—The dispute in this appeal related to certain house property situated at Allahabad. The owner of the property was Thakur Bajrang Bahadur Singh, who died on the 16th November, 1900, leaving two widows, Mt. Harnath Kuer and Mt. Sartaj Kuer, and a daughter Mt. Bhagwat Partab Kuer. He was the Taluqdar of the Baispur estate in the Partabgarh District, Oudh; and besides the Baispur estate and the house property in dispute, he owned some zamindari property in the Partabgarh District known as the Sarai Murar Singh or Ramnagar property, some other zamindari property and an occupancy holding in the Allahabad District, known as the Bahdaul property, and a house in Partabgarh and another large bungalow in Allahabad.

On the death of Bajrang Bahadur Singh, the mutation of names was obtained in respect of the entire property situated in the districts of Partabgarh and Allahabad by his senior widow, Mt. Harnath Kuer. Mt. Harnath Kuer built a new house on a portion of plot No 130, situated in Colonelgunj, Allahabad, forming a part of the property left by her husband; and that house is also in dispute. Mt. Bhagwat Partab Kuer died on the 12th of May, 1910, without leaving any issue.

Mt. Harnath Kuer died on the 27th March, 1914, and was succeeded by Mt. Sartaj Kuer, the junior widow, who died on the 15th June, 1916. On her death several claimants turned up to claim the Baispur estate and the other properties left by Thakur Bajrang Bahadur Singh. One of those claimants was Alopi Din Singh, who professed to be the nearest reversionary heir and entitled as such to the estate and other property of the deceased under section 23 of Act I of 1869 read with the Hindu Law. Another claimant was Har Baksh Singh, who based his title to the property on his being the senior male heir in the senior branch of the family to which Thakur Bajrang Bahadur Singh belonged, under section 22 of Act I of 1869.

The Revenue Courts directed the mutation of names to be effected in favour of Har Baksh Singh in respect of the Baispur estate and in favour of Alopi Din Singh in respect of the zamindari property situated in the Partabgarh and Allahabad districts and the cultivatory holding situated in the latter. The Municipal Board of Allahabad entered the name of Har Baksh Singh in respect of the leasehold rights in the plots Nos. 130, 130-A and 131 situated in mohalla Colonelganj, Allahabad, on which the house property now in dispute stands.

Kanhaiya Lal, J.:—[His Lordship after stating facts as set out above, proceeded :—]

The present suit was filed by Alopi Din Singh for the possession of the house property, standing in plots Nos. 130, 130-A and 131 aforesaid, including the lease-hold rights possessed by Thakur Bajrang Bahadur Singh in the above land, against Har Baksh Singh for a declaration that he was the owner of the said property as the nearest reversionary heir of Thakur Bajrang Bahadur Singh. His allegation was that he was in actual possession of the said property and that the defendant wrongfully got his name entered in the Municipal registers and on the strength thereof was denying the right of the plaintiff and interfering with his possession.

The defendant denied that the plaintiff was in possession of the disputed property and claimed to be entitled to the same as the senior male heir of the senior branch of the family, to which Thakur Bajrang Bahadur Singh belonged. He further pleaded that according to the custom of the family and clan to which Thakur Bajrang Bahadur Singh belonged, the entire property, whether ancestral or self-acquired, left by Thakur Bajrang Bahadur Singh, became a part of his estate and the heir to the estate was entitled to get the acquired property too. He also asserted that the house property in question had been purchased by Thakur Bajrang Bahadur Singh on the 13th February, 1890, from the income of the Baispur estate for the benefit and perpetual use of the owner in possession of the Baispur estate, and that it was treated as a part of the estate and became heritable as a taluqdari property. He also mentioned that the house standing on plot No. 130-A was built by Mt. Harnath Kuer at a cost of Rs. 15,000 from the income of the Baispur estate and that the said house must also be treated as an accretion to the Baispur estate.

The Court below found that the house property in dispute had not been purchased or built with the income of the Baispur estate, that there was no satisfactory proof of a custom applicable to the family or clan to which Thakur Bajrang Bahadur Singh belonged, entitling the defendant to the non-taluqdari property left by the deceased; and that as the plaintiff was the nearest reversionary heir of Thakur Bajrang Bahadur Singh and in actual possession of the disputed property by the receipt of rent from the tenants occupying the same, he was entitled to the declaration asked for.

[His Lordship mentioned the questions of fact to be considered and held on the evidence that the plaintiff was the nearest reversionary heir of Thakur Bajrang Bahadur Singh if section 23 of Act I of 1869 or the Hindu Law was applicable to the case.]

The property now in dispute is not shown to have become an accretion to or formed a part of the Baispur estate. The Baispur estate was situated in Oudh and was held by Thakur Bajrang Bahadur Singh and was managed during his minority by the Court of Wards. While the Court of Wards was in possession of the estate, the zamindari property, known as the Sarai Marar Singh or Ramnagar property, was acquired by the Court of Wards for the benefit of the minor. Shortly after the release of the estate by the Court of Wards, the Bahdaul villages are stated to have been purchased by Thakur Bajrang Bahadur Singh out of the savings said to

have been made over to him, but there is no direct evidence produced on the point. The houses in dispute were purchased long afterwards for a consideration of Rs. 4,500 which, according to the account books produced on behalf of the defendant, were paid from the *Tahvil* or estate treasury in which the income derived from the estate and the Ramnagar and Bahdaul villages used to be kept. Thakur Bajrang Bahadur Singh had an absolute right as much to the Baispur estate as to the Ramnagar and Bahdaul villages which he had acquired; and as there was no person to whom he was liable to account for profits, it is but natural that he kept the income of all the different properties, which he owned at the time, together without any particular differentiation or distinction. But such a commingling of the income cannot necessarily imply that he intended to incorporate the villages, which he had acquired, into the estate and make them descendible, as if they had been a part of the estate, from the income of which they are said to have been purchased.

An estate as defined by section 2 of Act I of 1869 means the taluqa or immoveable property, acquired or held by a taluqdar or grantee in the manner mentioned in sections 3, 4 or 5 of that Act. It includes certain estates not confiscated by the Government, others specifically granted by it, and those obtained under a Taluqdari *sanad* granted after the 1st April, 1858, and before the passing of the Act I of 1869, or held under a summary settlement made between the 1st day of April, 1858 and the 10th day of October, 1859 inclusive of any other property for which a decree may have been subsequently obtained at the first regular settlement. By section 32-A, which was inserted by the Oudh Estates Amendment Act, 1910, a power is given to a Taluqdar or grantee or his heir or legatee to declare that any immoveable property situated in the United Provinces, in which he has a separate permanent heritable and transferable right, shall be a part of his estate for the purposes of the Act, but that provision has no retrospective effect.

A Taluqdar is defined as a person whose name is entered in the first of the lists mentioned in section 8. Section 10 provides that no person shall be considered a taluqdar or grantee within the meaning of that Act, if he is not named in such original and supplementary lists as have been prepared and notified under section 8. It also requires that the Court shall take judicial notice of such lists and regard them as a conclusive evidence that the persons named therein are such taluqdars or grantees, that is to say, hold their estates under the tenures which the lists respectively ascribe to them.

It is contended on behalf of the plaintiff-respondent that it is impossible that an estate, so entered, could be enlarged by any process of purchase or acquisition of other property, not subject to similar conditions or by any act or volition of the taluqdar or grantee in regard to it except a declaration made under section 7 or section 32-A of the Act, as amended by the U. P. Act III of 1910. Indeed there was no provision before the above Amending Act was passed under which immoveable property subsequently acquired, otherwise than by a special grant of the British Government burdened with such conditions could be made descendible as if it were a part of the estate.

The houses in question were obviously acquired from the joint income of the estate and the Sarai Ramnagar and Bahdaul properties, the collections made from which were kept together without any differentiation or distinction. But neither that fact nor the subsequent commingling of the income derived from these houses in the joint stock or the expenditure incurred over their repairs, reconstruction, or improvement therefrom is sufficient to impress that property with the character and the status which the law assigns to the estate as defined in section 2 and the lists appended to Act I of 1869. In *Maharajah Pertab Narain Singh* v. *Subhao Kooer* (1) where a suit was brought for a declaration that the plaintiff was entitled to a certain estate, the decree passed by their Lordships of the Privy Council provided that the declaration must be limited to the taluqa and what passes with it, and that if the last owner had personal or other property, not properly a parcel of the taluqdari estate, that would seem to be descendible according to the ordinary law of succession. Their Lordships went on to add that the plaintiff would be entitled to succeed under

(1) (1878) 3 Cal.626=4 I.A. 228=1 C.L.R. 113=3 Sar. 740 (P.C.)

section 22 of Act I of 1869 as *ab intesto* to the taluqdari estate of the late proprietor including whatever was descendible according to the provisions of the said statute. In *Jagdish Bahadur* v. *Sheo Pertap Singh* (2) the moveable and immoveable property, held by the last female holder, was treated as falling in the same category with the taluqa itself and governed by the same considerations as were applicable to whole property, as if it were one corpus, because no differentiation between the two classes of properties was made in the plaint and no issue was directed to any distinction between them.

In *Sheo Singh* v. *Raghubans Kuer* (3), where the original proprietor of the estate had died before Act I of 1869 came into force and had made a bequest by which he had devised his property, in favour of his nephew to the exclusion of his brother the father of the aforesaid nephew and the said nephew had died childless after Act I of 1869 came into force, their Lordships of the Privy Council, applying the rule of primogeniture embodied in the *sanad* granted a declaration that the entire taluqa as constituted at the date of the *sanad* with the accretions, if any, or properties appurtenant to the taluqa passed to the surviving brother of the last proprietor in preference to his widow. That decree led to an elaborate inquiry the result of which is embodied in *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (4). The contention there was that the villages purchased with the income of the taluqa were accretions to the estate along with the house and certain moveable property left by the deceased. But their Lordships of the Privy Council repelled that contention in regard to such properties, as had not been obtained in exchange for those included in the *sanad*, or had not been granted under conditions similar to those applicable to the estate: and some of the villages, which had been purchased by the last holder after the *sanad* were excluded.

The decisions in *Thakur Ishri Singh* v. *Baldeo Singh* (5) and *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (6) proceeded on the basis of a family custom as applicable to the subsequently acquired property and have no direct bearing on the present issue.

On the other hand, in *Srimati Rani Parbati Kumari Debi* v. *Jagadis Chander Dhabal* (7) where certain villages had been acquired by the Court of Wards on behalf of the proprietor out of the savings of the ancestral estate and the rents of the villages so acquired and of the ancestral estate were collected by the same servants and the collection papers kept with the papers of the parent estate, their Lordships of the Privy Council held that on those meagre facts they would nof be justified in holding that the Raja intended to incorporate the villages purchased out of the savings of the ancestral estate for the purpose of succession.

In *Janki Prasad Singh* v. *Dwarka Prasad Singh* (8) their Lordships of the Privy Council pointed out that the question whether the properties acquired by an owner become a part of his impartible estate for the purpose of succession depended on his intention to incorporate the acquisition with the original estate. But that intention can only be gathered in most cases from his declaration, conduct or treatment, or, in other words, from the mode of his dealing with the property or its income; and the mere fact that the purchase of the subsequently acquired property was made from the savings of the impartible estate cannot by itself be always regarded as sufficient proof of his intention to incorporate it. If a person is the absolute owner of the income derived from an impartible estate, it is open to him to spend that income in any way he likes or to invest it in the acquisition of the other

---

(2) (1901) 23 All. 369=28 I.A. 100=5 C.W.N. 602 =11 M.L.J. 178=3 Bom. L.R. 228= 8 Sar 19 (P.C.)

(3) (1905) 27 All. 634=32 I.A. 203=15 M.L.J. 352 =2 C.L.J. 194=8 O.C. 317=9 C.W.N. 1009 (P.C.)

(4) (1918) 40 All. 470=45 I.A. 134=21 O.C. 106= 24 M.L.T. 284=5 O.L.J. 401=8 L.W. 570 =(1918) M W.N. 831=28 C L.J. 456=23 C.W.N. 101=48 I.C. 213=20 Bom. L.R. 1075 (P.C.)

(5) (1884) 10 Cal. 792=11 I.A. 135=4 Sar. 529 (P.C.)

(6) (1916) 38 All. 552=43 I.A. 269=14 A.L.J. 1083=20 M L.T. 362=18 Bom. L.R. 884= 31 M.L.J. 804=25 C.L.J. 1=(1916) 2 M. W N. 555=19 O.C. 290=1 Pat. L.W. 122= 21 C W.N. 410=36 I.C. 289=40 O.L.J. 8= 4 L W. 538 (P.C.).

(7) (1902) 29 Cal. 433=29 I.A. 82=6 C.W.N. 490 =4 Bom. L.R. 365=8 Sar 235 (P.C.).

(8) (1913) 35 All. 391=40 I.A. 170=17 C W.N. 1029=14 M.L.T. 110=25 M.L.J. 34= (1913) M.W.N. 630=18 C.L.J. 200=11 A.L.J. 818=15 Bom. L.R. 853=20 I.C. 73=16 O.C. 216, (P.C.).

property. If he invests it in the acquisition of other property, the property so acquired partakes of the nature of the income which contributed to its acquisition and continues to be his self-acquired property in the same sense as the income of the impartible estate, which is absolutely his. The mere fact that he keeps the income of such subsequently acquired property with the income of the impartible estate does not establish such an incorporation as to make the subsequently acquired estate an accretion to or a part and parcel of the impartible estate for the purpose of its succession.

In *Rani Jagdamba Kumari* v. *Wazir Narain Singh* (9) their Lordships of the Privy Council, referring to the purchase of certain properties acquired out of savings of the Sarampur Gaddi, observed :—

"Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja other than the impartible Raj was derived from the income of the Raj itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lacs, and other moveable and immoveable properties. With the exception of the Government promissory notes, the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it. Their Lordships think that this conclusion is wrong, and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property In fact, where the true position is considered, there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have acquired by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the Raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character".

They pointed out the confusion which was likely to result from the application of the doctrine appertaining to the incorporation of a separately acquired estate into the ordinary joint family property to the question of the incorporation of property subsequently purchased out of the income of an impartible estate, for in the former case the income equally with the corpus forms a part of the family property, and if the owner mixes his own moneys with the moneys of the family, for example, by putting the whole into one account at the bank, or by treating them in his accounts as indistinguishable, his own earnings share with the property, with which they are mingled, the character of joint family property ; but no such considerations necessarily apply to the income from impartible property.

The evidence adduced in the present case merely goes to show that the proprietor of the Baispur estate kept the income of the zamindari property with that derived from the Baispur estate in a common treasury. The evidence of Muhammad Yaqub, who used to write the accounts, shows that the income of all the three properties used to be written in one and the same account books ; and the accounts produced show that the money required for the purchase of the house property in dispute was paid out of the common treasury. Thakur Bajrang Bahadur Singh used to live in one of the houses purchased by him at Allahabad and died there. After his death Mt. Harnath Kuer, his senior widow, built a new house over a portion of plot No. 130 at a cost of Rs. 10,000 or Rs. 12,000 and that money too, according to the account books for 1316 to 1319 F. and the evidence of Md. Yaqub and Mata Bhik, was paid out of the common treasury. It follows that the income derived from the rent of those houses, such as were not occupied by the proprietor or his widows, was deposited in and the expenses for their repairs and the ground rent and taxes payable for the said property were paid out of the common stock. These facts are not, however, inconsistent with an intention to keep the house property aforesaid separate from the parent estate for the purpose of succession. There is nothing to show that Thakur Bajrang Bahadur Singh dealt with the house property in such a way as to make it a part and parcel of the Baispur estate. He had another house in Partabgarh, which he had similarly purchased presumably out of the income or savings which he had at his disposal ; and that house was held in a suit to which the present defendant-appellant was a party not to have been incorporated with the estate and to be descendible as if it were distinct from the Baispur estate.

---

(9) 1923 P.C. 59=2 Pat. 319=50 I.A. 1=44 M.L.J. 503=37 C.L.J. 287=4 Pat. L.T. 319=32 M.L.T. 157=25 Bom L.R. 676=(1923) M.W.N. 460=28 C.W.N. 98=18 M.L.W. 555=4 L.R.P.C. 65 (P.C.).

The Oudh Estates Act was intended to define the rights of Taluqdars and others in certain estates in Oudh and to regulate the course of succession thereto; and section 1 of that Act limits its operation to the estates therein referred to. Unless by an act of deliberate incorporation or declaration or other method recognised by law any property subsequently acquired becomes a part of the estate itself, the rule of succession prescribed by the Act cannot be applied to regulate its devolution. A transfer of such property, for instance, by a gift or bequest would not attract the provisions of sections 16, 17 or 18 of Act I of 1869, as they stood before they were amended by the U.P. Act III of 1910, and unless a declaration is made in the manner required by section 32-A, which was added by section 20 of the Amending Act, the provisions of sections 16 and 18 would still be inapplicable to such property. If that is so, such a property cannot be incorporated with the estate for the purpose of succession, unless it was, prior to such acquisition, held under similar conditions or there is some act or declaration showing an unmistakeable intention to incorporate it, and sufficient in law to make it descendible in the same manner as the estate. As pointed out by CHAMIER, C.J., whose observations were quoted with approval by their Lordships of the Privy Council in *Rajendra Bahadur Singh* v. *Rani Raghubans Kuar* (4), it is a settled law that a subject cannot make his property descendible in a manner not recognised by the ordinary law; and it appears to follow that he cannot by express declaration, stillless by mere volition, whether actual or presumed, subject the property acquired by him to a rule of succession applicable to the property which he had received by a grant to which certain conditions were attached.

It is, moreover, doubtful how far Act I of 1869 can apply to the devolution of property situated outside Oudh except in the cases covered bv section 32-A of Act I of 1869, as amended by the U.P. Act III of 1910 It is impossible, in these circumstances, to hold that the house property in dispute was incorporated with the estate so as to be descendible according to the special rules of succession laid down in Act I of 1869.

It, however, remains to consider how far the defendant-appellant has established a custom of the family or clan to which Thakur Bajrang Bahadur Singh and the parties belong, entitling him to inherit the property in dispute in preference to the plaintiff. The word "Taluqdar" as defined by section 2 of Act I of 1869 means any person whose name is entered in the first of the lists appended to Act I of 1869. The name of Thakur Saltanat Bahadur Singh, the father of Bajrang Bahadur Singh, was entered at No. 167 in the list No. 1 and at No. 126 in the list No. 2 appended to Act I of 1869 in respect of the Baispur estate. He was, therefore, a "*taluqdar*" within the meaning of section 8 and section 22 of Act I of 1869. Thakur Saltanat Bahadur Singh died sometime in 1861, *i.e.*, before Act I of 1869 was passed. That fact is borne out by a narrative prepared by Mr. Walker, an Extra Assistant Commissioner of Partabgarh, which is appended to the printed register of Taluqdars kept in the office of the Deputy Commissioner of Partabgarh, which was summoned and examined by the Court below (Exhibit 38). That narrative shows that Saltanat Bahadur Singh left at his death only one son, Bajrang Babadur Singh, then a minor, and two marriageable daughters. Both under the Hindu Law and under section 22 of Act I of 1869 subsequently enacted, the heir of Saltanat Bahadur Singh was the same; and no question of diverting the succession from him by the application of section 22 of Act I of 1869, as amended by section 21 of the Oudh Estates Amendment Act, to the estate of Saltanat Bahadur Singh could, therefore, arise.

Under sections 8 and 10 of Act I of 1869 there is a conclusive presumption that the estate of Saltanat Bahadur Singh according to the custom of the family on or before the 13th February, 1856, ordinarily devolved on a single heir. The provision as to conclusiveness contained in section 10 cannot apply to property which is not an estate, but unless the family is known to possess different kinds of properties held under diverse tenures, the existence of a custom in the family and governing the devolution of the estate gives rise to a presumption, by no means conclusive, that the entire family property devolves in one and the same manner. Saltanat Bahadur Singh had an absolute right to the property, which he held at the time of his death; and Bajrang Bahadur Singh similarly possessed an absolute right to the property.

which he had inherited from his father, and he had subsequently acquired. There is no evidence to show that the family custom, the existence of which received statutory affirmation in 1869, was confined in its operation to the estate, and was inapplicable to the property subsequently acquired; and as observed in *Murtaza Husain Khan* v. *Yasin Ali Khan* (6), the same custom of devolution would, unless rebutted, be deemed to apply to the acquired property left by Bajrang Bahadur Singh at his death.

In *Ibrahim Ali Khan* v. *Ashanullah Khan* (10) a family custom applicable to an impartible estate was similarly applied to the property subsequently acquired by the holder of the estate. Where a family possesses ancestral property, governed by one rule of devolution, and a member of that family acquires other property by his personal exertions and without any detriment to the ancestral estate, different considerations may arise. But when, as in this case, the taluqdar holds an absolute estate in his own right and acquires property for his own use out of the income of that estate or otherwise, any custom relating to the devolution of the property in the family, unless it is limited in its application, would apply equally to the property inherited by him and that acquired by him in his own right.

In *Achal Ram* v. *Udai Partab* (11) a custom of impartibility applicable to the estate was applied to the property subsequently acquired; and in *Mt. Parbati Kunwar* v. *Rani Chandrapal Kuar* (12) a family custom excluding daughters from inheritance from an impartible estate was similarly applied in regard to the devolution of an estate belonging to the same family which was partible.

The defendant has, however, given no evidence to show what the special incidents of that custom were. The custom was one of single heir descent; and whether Bajrang Bahadur Singh inherited the estate under the Hindu Law or under Act I of 1869, it descended, on his death, according to the custom of single heir descent, obtaining in the family, on his senior widow, and after her, on his junior widow; and the person would be entitled to the property on the death of the latter would be the person who would be the nearest heir under the ordinary law. As pointed out in *Achal Ram* v. *Udai Partab* (11) and *Bhai Narendra Bahadur Singh* v. *Achal Ram* (13) where according to the family custom the estate descends to a single heir, there is no necessary presumption that it descends by the rule of primogeniture, and if the heir according to the lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals coming within the line of heirship, then in the absence of any proof to the contrary, nearness of degree prevails over directness of line. The plaintiff being the nearest reversionary heir of Bajrang Bahadur Singh is, therefore, entitled to the disputed property in preference to the defendant both under section 23 of Act I of 1869 and under the Hindu Law.

[His Lordship then held that the plaintiff was in possession of the disputed property and that he was entitled to a declaratory decree and concluded by dismissing the appeal with costs.]

Mukerji, J.:—The suit out of which this appeal has arisen was instituted by one Babu Alopi Din Singh, the father of the present respondents, against the appellant to obtain a declaration of title with respect to certain house property situate in the town of Allahabad.

It is common ground that the last male owner of the property was one Babu Bajrang Bahadur Singh. He died sometime in 1900 and was succeeded by, one after the other, his two widows. The junior of the two widows, Mt. Sartaj Kunwar, died in 1916 and thereupon the question as to the succession to the property arose. Babu Bajrang Bahadur Singh owned, among other properties, a taluqa known as Baispur in the district of Partabgarh in the province of Oudh. That taluqdari property is in the possession of the defendant-appellant. The plaintiff claimed as the nearest male agnate of Bajrang Bahadur Singh. The defendant claims that the right of succession is governed by Act

(10) (1912) 39 Cal. 711=39 I.A. 85=11 M.L.T. 225=(1912) M.W.N. 316=50 P.W.R. 1912 =15 C.L.J. 352=9 A.L.J. 390=14 Bom. LR. 270=22 M.L.J. 478=16 C.W.N. 625= 13 I.C. 695=168 P.L.R. 1912 (P.C.),

(11) (1883) 10 Cal. 511=11 I.A. 51 (P.C.).

(12) (1909) 31 All. 457=36 I.A. 125=10 C.L.J. 216=13 C.W.N. 1073=6 A.L.J. 767=11 Bom. L.R. 890=4 I.C. 25=12 O.C. 304= 19 M.L.J. 605 (P.C.).

(13) (1893) 20 Cal. 649=20 I.A. 77 (P.C.),

No. I of 1869 (governing the succession to taluqdari estates) and he, as the eldest son in the eldest line, is entitled to succeed. The appellant denied that the plaintiff was in possession of the property and contended that by a family custom the property acquired by the taluqdar (it being common ground that the property in suit was purchased by Bajrang Bahadur Singh) and other taluqdars of the same clan, passed to the person succeeding to the taluqdari estate and that, in any case, the property in suit became incorporated with the taluqdari property of Baispur.

The learned Subordinate Judge found that the plaintiff was the nearest male agnate, that he was in possession, that the custom alleged by the defendant-appellant was not proved and that Act No. I of 1869 did not govern the succession to represent property. He did not come to any definite finding as to whether the property in suit had been incorporated or not with the estate in Oudh. He accordingly decreed the suit.

[His Lordship set out the points raised in appeal and after discussing the evidence held that the plaintiff had established his relationship as alleged in the plaint.]

The third point (as set forth above) that requires determination is whether there is any custom by which the property in suit may be regarded as a part of the Baispur taluqa estate. At the outset I may point out that the custom as propounded, in paragraph II of the written statement, at page 4 of the printed record is a very wide one. It is said that the custom obtained not only in the family but also in the entire clan and among all the taluqdars of Oudh, specially those in the district of Partabgarh. If such a custom existed, it would be easy to prove because the range from which instances could be quoted would be very wide. But evidence on the point consists of the statements of only three witnesses, namely Babuain Sartaj Kunwar, Raja Partab Bahadur Singh and Raghunandan Singh. The evidence of these witnesses is entirely vague and unsatisfactory and it would be sheer waste of time to seriously discuss it. Agreeing with the Court below I hold that this custom has not been established.

In support of the plea that the property in suit has been incorporated into and has become a part of the estate of Baispur, the learned Counsel for the appellant has relied on certain rulings of the Privy Council as establishing the proposition that if any such accretion or incorporation could be proved, the succession to the accreted property would be governed by the same rule of law as the main estate itself. The learned Counsel however, admitted that no case could be cited by him in which it had ever been held by their Lordships of the Privy Council that a property subsequently acquired by a taluqdar had been treated as an accretion and the succession to that accreted property had been held to follow the estate. It appears to me that there is an essential difference between accretion to an estate, the succession to which is governed by pure custom and property which may have been acquired by a taluqdar out of his savings from the taluqdari estate. Speaking broadly, where property is acquired out of the income of an impartible estate governed by a custom as regards succession and the acquired property is allowed to merge in the main property with a view to its passing to the heir to the main estate, the accreted property is governed by the custom. But where *by statute* a special rule of succession is enacted with respect to a *particular property*, it would appear to me that unless there is an express statutory sanction for it, it is not open to the owner of the property to add to it other properties, so that the succession to the added property may also be governed by the statute aforesaid. The reason is clear. In the former case it is a custom which governs the entire estate and the properties which constitute the estate may increase or decrease. But where the law imposes particular rules of succession as opposed to the ordinary rule of succession with respect to a certain property, that rule of succession can govern that property alone. It is not in the power of a subject of the Crown to alter the law of the land as to succession even by purporting to add property to his original estate.

There is only one case which has been cited on the point and it related to a property succession to which was governed by the terms of a sanad or written grant. It was held that only the properties which were the subject-matter of the grant could be governed by the terms of the grant and any property that was acquired by the grantee out of the income of the granted property could not be made subject to the terms of the grant. This principle, in my opinion, applies to all taluqdari properties.

the succession to which is governed by the special statute of law enacted in section 22 of Act I of 1869.

The case mentioned is that of *Rajendra Bahadur Singh* v. *Raghubans Kunwar* (4).

The view that has been urged for the respondents and which has found acceptance with me is corroborated by the fact that the legislature thought it necessary to enact a special rule of law as regards properties other than the taluqdari property—the succession to which was originally governed by Act No. I of 1869. By the amending Act No. III of 1910 a section was added to the original Act as section 32*a*. It authorised any taluqdar or his grantee or heir or legatee by a registered instrument to be executed in a certain manner to declare that any property owned by him and situate within the United Provinces, other than his taluqdari property, shall become a part of his estate. It is significant that this enabling clause limits the situation of the property to be so added to the estate. The clause does not permit any property situated outside the United Provinces to be made a part of the taluqdari estate.

The view taken by me is further strengthened by the fact that the language of the preamble indicates that the Government wanted to enact rules with respect to certain specified properties situate within Oudh. The properties with respect to which the rules were to apply were so described as to be confined within the limits of Oudh.

In the absence of any direct ruling of the Privy Council that it is possible for a taluqdar to add to his taluqdari property a property succession to which would be governed by the same rules as govern the taluqa itself, I am of opinion that it is not open to do so to a taluqdar. This point was directly answered, as I answer it, by two eminent Judges of the Judicial Commissioners Court, namely Mr. (afterwards Sir) Sunder Lal and Mr. (afterwards Sir Theodore Caro) Piggott in the case of *Janki Prasad Singh* v. *Dwarka Prasad Singh* (14). This case went before their Lordships of the Privy Council, but there was no pronouncement on the question whether the self-acquired property of a taluqdar would be governed by the same rules of succession as the taluqdari property itself. *Janki Prasad Singh* v. *Dwarka Prasad* (15).

[His Lordship found on the evidence in the case that the suit property had not been incorporated with the talukdari property].

It is difficult to get an authority on matters of evidence which may be of any use. But unfortunately for the appellant, there is one and it entirely demolishes his case. In the case of *Rani Jugdamba Kunwari* v. *Wazir Narain Singh* (9), a dispute arose as to succession to an impartible estate known as Serampur Raj. The last owner of the property was one Raja Saroda Narain. The plaintiff in the suit was his widow and the defendant was the late Raja's undivided cousin. By custom, the Serampur estate was impartible and went to a single male owner. It was held under the circumstances that the main estate was bound to go to the defendant. the parties being subject to Mitakshara law. But there was considerable amount of zamindari and moveable property which had been acquired out of the income of the main estate by Saroda Narain. It was found, to quote the words of the counsel for the respondent in the case, that "the collections were made by one set of servants and the entries were made in one set of books". Both the Courts in India had found from this fact that there was an intention of incorporation on the part of the late Raja Saroda Narain, of the zemindari properties with the main estate. Their Lordships of the Privy Council quote in their judgment the statement of the Manager—the statement which was supposed to have been made in the interest of the respondent—and came to the conclusion that that evidence did not justify an inference of any intention of incorporation. After this pronouncement of opinion it is impossible for the appellant to contend successfully that the property in suit has become an accretion to the Baispur estate and it must go to the party who should succeed to the latter.

This contention, therefore, fails.

In view of my finding on point No. 4 it seems to be needless to discuss whether in the circumstances of the present case the

(14) (1911) 9 I.C. 83.

(15) (1913) 35 All. 391=40 I.A. 170=17 C.W.N 1029=14 M.L.T. 110=25 M.L.J 34=(1913) M.W.N. 630=20 I.C. 73=18 C.L.J. 200=11 A.L.J. 818=15 Bom. L.R. 853=16 O.C. 216 (P.C.).

succession to the Baispur estate would be governed by the Hindu Law or by Act I of 1869. It was stated at the Bar that the respondents contemplated a litigation with the appellant for the Baispur estate. In view of this proposed litigation, it is all the more desirable to avoid any pronouncement of opinion on any matter, the decision of which is not an absolute necessity for the disposal of the present appeal. I, therefore, decline to express any view on the fifth point raised.

In view of my finding, the present appeal should fail and I would dismiss it.

By the Court:—The appeal is dismissed with costs including fees in this Court on the higher scale.

Appeal rejected.

1925 Allahabad 164.

BOYS, J.

Mohamed Naqi—Defendant-Applicant

v.

Hargu Lal—Plaintiff-Opposite Party.

Civ. Rev. No. 62 of 1924, decided on 24th June, 1924, from an order of the Judge of Small Causes, Roorki, dated 12th December, 1923.

Limitation Act, Art. 81—Where date of payment by surety to creditor is uncertain, discretion should be exercised in favour of the surety.

After a suit by creditor against surety was decided against surety, the surety applied for review after depositing decretal amount in Court. Review was dismissed and the creditor withdrew the money deposited. In a suit by surety against the debtor, *held*, that the time ran not from the date of deposit and in the particular case, the date of dismissal of review not being known, the date of withdrawal was the starting point. [P. 164, C. 2.]

Kumda Prasad—for the Applicant.

Nehal Chand—for the Opposite Party.

Judgment:—In this case one Kamal Uddin brought a suit against Mohammad Naqi on behalf of whom the present plaintiff Lala Hargu Lal stood security for Mohammad Naqi, that the latter would pay the price of the coal sold to him by Kamal Uddin. Kamal Uddin obtained a decree against the present plaintiff as surety. In order to obtain a review the plaintiff deposited the amount of the decree under section 17 of the Provincial Small Cause Courts Act. He made the deposit on the 5th of September, 1919. The application for review was dismissed and the creditor withdrew the money on the 21st of April, 1920. Subsequently the plaintiff brought the present suit to recover the money from his principal filing his suit on the 20th of April, 1923. A plea was taken in the Court of Small Causes that the suit was barred by limitation under article 81 of the Limitation Act. That article allows a period of three years from the date "when the surety pays the creditor". It is urged that the date of the payment to the creditor was the 5th of September, 1919 *i.e.*, the date of the deposit and the defendant has relied on the case reported in *Yinka Supaya* v. *Maung Kin* (1). The plaintiff urged and the lower Court accepted the plea that limitation commenced to run from the 21st of April, 1920, and held that the suit was within time. It is open to argument that the date on which the creditor was paid was the date on which the application for review was actually dismissed because from that date the creditor was entitled to withdraw the money but this at least is quite certain that he was not entitled to withdraw the money immediately it was deposited and before the application for review had been dismissed. The plea therefore as urged by the defendant could certainly not be sustained. Neither party can tell me on what date the application for review was dismissed and, failing to make good his plea that the date of deposit was the date from which limitation commenced to run, the defendant applicant here asks me to send for the record in order to ascertain the date on which the application for review was dismissed. On the other hand, the plaintiff opposite party here urges that this Court should not interfere in civil revision upon a question of limitation and has referred me to *Raghunath Sahai* v. *The Liquidator of the Himalaya Bank, Limited* (2) and *Sarman Lal* v. *Khuban* (3). The latter case is not so clearly in point as the former, for it is not clear that in the latter case the question of limitation did not depend upon a question of fact as well upon a question of law. The earlier case is however directly in point. For the opposite party I am referred to *Lt.-Col. J. G. Turner* v. *Jagmohan Singh* (4). Whatever else that case may have decided

---

(1) (1921) 60 I.C. 23.
(2) (1893) 15 All. 139=1893 A.W.N. 59.
(3) (1895) 17 All. 422=1895 A.W.N. 112.
(4) (1905) 27 All. 531=2 A.L.J. 297=1505 A.W.N. 77.

it certainly did not decide that the Court should interfere on a technical ground where substantial justice had been done. It is perfectly clear in this case that whether the period of limitation should be held to run from the date when the application for review was dismissed or from the date when the creditor withdrew the money, the debt which has been sued for in this case was undoubtedly due from the principal to the surety and unless this Court was to hold that it had no discretion whatever it is indubitably a case in which a discretion should be exercised in favour of the opposite party in this case. I therefore decline to interfere and dismiss this application.

Application dismissed.

1925 Allahabad 165.

WALSH, AG. C.J. AND SULAIMAN, J.

King-Emperor—Appellant

v.

Raghunath Venaik Dhulekar and another—Accused-Respondents.

Cr. (Govt.) App. No. 454 of 1924, decided on 22nd July, 1924, from an order of the S. Judge, Jhansi, dated 3rd March, 1924.

(a) *Penal Code, S. 188—'Promulgate' indicates some form of publication.*

Per *Walsh, Ag. C.J.*—*Prima facie* "promulgate" seems to indicate, if not a formal document printed or written, at any rate some form of publication. The view that it must be printed or written may be rejected. [P. 167, C. 2.]

(b) *Crim. Pro. Code, S. 149—'Interpose'.*

Per *Sulaiman, J.*—'Interpose' connotes the idea of actively intervening and not merely a prohibition by word of mouth. [P. 169, C. 2.]

(c) *Penal Code, S. 188—'To be legally empowered' is different from 'to be justified.'*

Per *Sulaiman, J.*—To be justified in directing a certain act to be done or not to be done is one thing, and be legally empowered to order its commission or omission, with the consequence of the disobedience being punishable under S. 188 of the Indian Penal Code, is quite another. [P. 169, C. 2.]

(d) *Crim. Pro. Code, S. 149—Section does not empower police officer to pass any order he likes.*

Per *Sulaiman, J.*—To hold that under S. 149 a police officer can pass any oral order he thinks desirable, would be to hold that his word is law. If his powers were to be so wide, it would be unnecessary for the Magistrate or the police to take any precautionary measures in advance, it would be quite sufficient to send down a Sub-Inspector to the scene and let him pass all sorts of sweeping orders, disobedience of which will entail conviction. Such a method, if sanctioned, would deprive the persons concerned of all opportunity to appeal to higher authorities, and they would have to submit to such orders at the peril of a prosecution. Such wide powers vested in a police officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated to be within the scope of S. 149, Crim. Pro. Code. [P. 169, C. 2.]

Assistant Government Advocate—for the Crown.

P. L. Banerjee, U. S. Bajpai and *K. N. Laghate*—for the Accused.

Walsh, A.C.J.:—This is an appeal by Government against an acquittal by the Sessions Judge of Jhansi of two members of the public, who had been convicted and severely sentenced by the District Magistrate for an offence under section 188 of the Indian Penal Code. They had been charged both under sections 151 and 188 and the Magistrate, without acquitting under section 151, held that it was superfluous to consider it. The appeal filed by Government treats the charge as one under section 188. The complaint against the accused is that they, being two Brahmans, and men of education engaged in public life in Jhansi, one of them Raghunath Venaik Dhulekar being a High Court Vakil, and the other Atma Ram Kher being also a High Court Vakil and Chairman of the Municipal Board of Jhansi, deliberately disobeyed a lawful order of the Sub-Inspector in the streets of Jhansi in the presence of a large number of people. The Sub-Inspector says that he was fetched by a message, and went on a bicycle in consequence of a report that a procession of a considerable body of Hindus, headed by persons playing English musical instrument, was threatening to pass a Muhammedan mosque playing music, and that there was reason to fear the outbreak of a riot. The witnesses on both sides agree that the playing of music in a procession passing the Muhammedan mosque was known to everybody to be a cause of offence to Muhammedans, and was just the conduct that was likely to lead from small beginnings into an extended fight and riot, with the risk of loss of life. The Sub-Inspector's evidence was that he ordered the music to stop, and he ordered the procession not to advance while playing music in the direction of the mosque, and that the two accused who were by this time in charge of the procession, and who

were at the head of it playing musical instruments, defied his authority, told him that he had no power to give such an order, and did in fact make a definite and determined show of disobedience by continuing to play the music, and by advancing a certain number of steps in the direction of the mosque, challenging the Sub-Inspector to use force and to take the nstruments from them. That this is a substantially accurate account is perfectly clear upon the evidence. It is sufficiently established, even if one confines oneself to the written statement put in by the accused, and the witnesses whom they called. Chand Singh one of their witnesses stated that after the Sub-Inspector had ordered them to stop, the two accused took up a drum and drum-sticks, and advanced in the direction of the mosque, saying that they would advance playing the instruments, while the Sub-Inspector declared that he would never allow them to do so. The same witness also stated that the Hindus wanted to play music in front of the mosque, and the Muhammedans objected to music being played in front of their mosque. A witness, Debi Prasad, called for the defence, stated that the Darogha gave a verbal order, "stop the music and stop the procession", and that the accused insisted on advancing with music, and did so for two or three paces. He further stated that there had been trouble between the Hindus and the Muhammedans before the Ramlila, during Ramlila, and since Ramlila, over the question of music in front of the mosque. Babu Bodh Raj, who is also a Vakil in Jhansi, and a correspondent for various newspapers, also stated that the communal feeling was very strained over the question of music in front of the mosque, and although the accused declared in their written statement that they intended the Sub-Inspector no harm, this witness states that the Sub-Inspector asked him not to mention the matter in his newspapers, clearly showing that the conduct of the accused was not in the public interest, but was calculated to put the Sub-Inspector in a difficulty, so that if a riot took place, which he might have prevented, he would get into trouble, whereas on the other hand if he exceeded his rights and went beyond what was justified in his interference with the accused, he might equally get into trouble with his superiors. There is a serious conflict between the written statement of the accused and the evidence of one of the prosecution witnesses whom they have mentioned. They declare that there were no Muhammedans before the mosque that several were summoned to the spot and were asked by the Sub-Inspector whether they had any objection to the music, and they said "yes", but that they also said that there were no Muhammedans who would attack the procession if it passed the mosque. The point made by the written statement is a foolish one, because nobody can guarantee that no Muhammedan will use force. The accused professed, by their superior wisdom, to know that there was no risk of a riot, and both in the street to the Sub-Inspector, and in their written statement, they have definitely taken the ground that the Sub-Inspector was wrong in thinking that there was any risk, and that they, the accused, know better, but the prosecution witness Musawwir Husian said that he was at the mosque, that there were about 250 Muhammedans inside and outside the mosque, and that they were threatening to lay out corpses if the music was not stopped. On this evidence it is perfectly clear that the Sub-Inspector was interposing within the meaning of section 149 of the Criminal Procedure Code for the purpose of preventing a cognizable offence, namely riot and grievous hurt. If the evidence for the prosecution is accepted, the defiance and disbedience to the Sub-Inspector's order by the accused is made much more apparent. I am of opinion that the Sessions Judge took an altogether erroneous view of the evidence, and misunderstood the charge. He treated the charge as though it was for breach of an order given by the Sub-Inspector not to pass the mosque, but the order clearly was to stop the music and to stop the procession then and there. The Sessions Judge agrees that the accused continued to advance beating drums and indicated that they would only stop to force and he came to the conclusion that they did not in fact disobey the order, because eventually the drums were taken away and the assembly dispersed, and that they only refused to obey without carrying their refusal into actual disobedience. This view seems to me inconsistent with the evidence. To take a simple illustration, if a father forbade his child to light a match in the presence of some highly combustible material, and the child lit the match, the

child would be none-the-less guilty of disobedience, because he immediately blew it out and no explosion took place.

Whether the offence is one, which, on the facts as I find them, come within section 188 of the Indian Penal Code, is no doubt a debatable question, The principal argument addressed to us was that there was no lawful order by the Sub-Inspector; in other words that he was not authorised to promulgate an order to the accused to stop the music, or to stop the procession. I find great difficulty in accepting this view. But as my brother is of opinion that an offence has been committed under section 151, it seems to me that justice can be done by convicting the accused under this section, and that it is unnecessary to press the charge under section 188 as in the circumstances of this case they over-lap, and we have power under section 423 to convict under either of them. I merely content myself with saying, that with reference to the question whether an order by the Sub-Inspector in the street to a person to desist from a particular piece of conduct, or from an act which he threatens to perform, or repeat, is a lawful order within the meaning of the section, it is sufficient to turn to section 149, Criminal Procedure Code, or to section 23, or section 31 of the Police Act V of 1861. I do not refer to these sections for the purpose of defining the offence in this case, nor for ascertaining the penalty for a breach of the sections mentioned. To my mind they are relevant as evidence of what may, or may not, be a lawful order by a Sub-Inspector. Section 149, Criminal Procedure Code, authorises him to intervene for the purpose of prevention of a cognizable offence, and I am unable to see why—if he found that intervention in the form of a verbal order given to persons whose conduct appears likely to lead to the commission of such an offence is necessary and sufficient—he should not be held to be authorised to give such verbal order, and to promulgate it in such a manner as he thinks best. Similarly the sections of the Police Act prescribe among other things his duty to prevent the commission of offences and to keep order in the public streets. The point was not argued before us, but the real difficulty which I feel about applying section 188 is the use in the section of the word "promulgate". This is rather an unusual and technical term for a mere verbal order to halt or stop, such as a commanding officer might give to troops. *Prima facie* "promulgate" seems to indicate, if not a formal document printed or written, at any rate some form of publication. The view that it must be printed or written may be rejected, because a large proportion of the public in India are illiterate and cannot read orders so promulgated, and if a Sub-Inspector definitely conveys order in a loud voice to a crowd in the street to stop, so that those who are addressed may understand it to be a definite order promulgated by a public officer in authority, it is difficult to see how, on the one hand, a sudden crisis is to be otherwise dealt with, and how a person defying the policeman is to be punished, and, on the other hand, where the line is to be drawn between a verbal order loudly promulgated and a mere verbal communication in the nature of persuasion or even command quietly communicated to the person whose conduct is complained of, but out of the hearing of other members of the public. This is a question seriously affecting the protection which Courts of law must necessarily give within the law to police officers acting within the scope of their authority, and I find a difficulty in holding that the offence in this case does not come within the express terms of section 188. But as I have said, it is not necessary for me to do more than express my opinion upon this point, as both members of the Court are agreed that an offence has been committed under section 151, for which we may either order them to be re-tried, or may find them guilty and sentence them under section 423 and section 561-A of the Criminal Procedure Code.

Sulaiman, J.:—This is a Government appeal from an acquittal. The case was instituted under sections 151 and 188 of the Indian Penal Code, but the Magistrate considered that the latter section was more appropriate and convicted the accused under it, sentencing them to six months' rigorous imprisonment and a fine of Rs. 500 each. The Sessions Judge has acquitted them.

Certain facts are not in dispute. There had been considerable religious excitement for some months in Garhia Phatak, a settlement of Railway workmen situated on the outskirts of Jhansi, over the question as to

whether Hindu processions with music should be allowed to pass in front of a mosque. In October 1923, during the celebration of the Ramlila, a riot had only just been averted by the intervention of the police and Magistrates.

On November the 13th, the Secretary of the Jhansi Gaoshala informed the Superintendent of Police that his society would take out a procession on November the 19th in that quarter. It is strange that if there was really a serious apprehension of a breach of the peace, no steps were taken by the police to forbid the procession or to require licenses under the Police Act. In fact, as the learned District Magistrate himself has remarked, proper police arrangements were not made in advance, but when on the 19th of November a Gaoshala procession with a band of musical instruments was passing along a route which was to be past the front of the mosque and was actually in sight of it, Sub-Inspector Raghunandan Singh, the police officer in charge of the station, came running on a bicycle with the intention of stopping the advance of the procession with music. The Sub-Inspector's statement is that he was aware that there was a strong feeling between Hindus and Muhammedans in Garhia Phatak. On that day he was informed by a constable that a procession had arrived and that there was a danger of trouble in front of the mosque. He ran to the place, saw the procession consisting of some 700 or 800 men and heard the music. He also says that he heard a cry from the Muhammedans (200 or 300 in number and assembled near the mosque) to stop the music. Babu Raghunandan Singh says that he cried out in a loud voice several times, addressing the procession generally and the two accused in particular "Stop the music or there will be a riot". He says, he had also called out, "Stop the band, don't advance". He further states that he called out to the crowd "Go away from here, a riot will occur". And said to the accused, "Remove the crowd from here". The Sub-Inspector says "The band went on playing 15 to 20 minutes after I had ordered them to disperse and half an hour after my first order to stop the music". As to the advance he says that the procession advanced six or seven paces in spite of his order. He says that the accused were themselves beating drums and advanced a few steps and said that they would not obey orders until force was used. When however a constable attempted to take the instruments from the accused's hands they offered no resistance and deposited them on the ground. He says that he threatened to call a supposed guard behind the mosque to fire and then the crowd retired. This is the gist of the prosecution case.

The accused filed a joint written statement in the Magistrate's Court and their version was as follows:—Sub-Inspector Raghunandan Singh came on a bicycle and shouted, "Stop, lorry has come, you will all be blown up". The procession stopped and at his direction it also moved a few paces back. The two accused advanced forward and asked whether there was any magisterial order prohibiting them from marching with music; the Sub-Inspector said that there was none but that he apprehended a breach of the peace. He would not let them proceed, so they went back to the procession where it stood. Dhulekar accused took the small drum in his hands and Kher accused the beating sticks. The two beat the drum and took one or two steps asserting their right. The Sub-Inspector asked them to stop drum-beating. They protested and suggested that the only course open for the Sub-Inspector was to take the drum from them. The Sub-Inspector took up the suggestion and asked a constable to take the drum from them. When the latter approached and touched the drum they put it down. They then asked the people to go to their houses, and they all departed.

It is, therefore, common ground that the Sub-Inspector prohibited the accused from playing music or advancing. In the written statement however, the accused did not, in express terms, admit that the Sub-Inspector also called on the assembly to disperse, nor did they clearly deny that the procession had been ordered to disperse.

The District Magistrate was of opinion that the order to stop the music and not to advance was an order which the Sub-Inspector was legally empowered to make under section 149 of the Code of Criminal Procedure and that therefore its disobedience was an offence under section 188 of the Indian Penal Code. The learned Sessions Judge agreed with this view of the law, but came to the conclusion

that the conduct of the accused amounted to a mere refusal to obey and not an actual and final failure to comply. He therefore acquitted them.

On the evidence it is impossible to hold that there was no disobedience of the order to stop the music and not to advance. The accused themselves were not the drummers. They took over the drum and advanced a few steps while beating the drum. They made it quite clear that they were determined not to obey the order until force was used. They did disobey it, though they offered no resistance when force was attempted. There cannot be the least doubt that they meant to defy the Sub-Inspector's order, and meant to flout him. Even if it be conceded that the accused never intended to persist in their disobedience after force was used, I have no hesitation in saying that they did disobey the order inasmuch as they did advance a few steps and did continue to beat the drum though ordered not to do so.

The accused however cannot be held to have committed an offence under section 188 of the Indian Penal Code unless it be found that the order to abstain from playing the music or advancing was (*a*) promulgated by a public servant to the knowledge of the accused, (*b*) that that public servant was legally empowered to promulgate such an order, and (*c*) its disobedience caused or tended to cause obstruction, annoyance or injury, or risk of it, to a person lawfully employed, or danger to human life, health or safety, or tended to cause a riot or affray.

The Sub-Inspector was a public servant and the accused had undoubtedly heard his order. As the order was announced publicly and was addressed to the crowd generally as well as to the accused in particular, it certainly had been "promulgated", and it is not necessary that such an order should be in writing.

I am also of opinion that the disobedience of the accused did cause, to say the least, annoyance to the Sub-Inspector lawfully employed to prevent a breach of the peace. It also did tend to cause a riot as there was no knowing to what extent the procession might not have been incited to go by the open defiance of the accused.

But it is necessary for the prosecution to establish that the Sub-Inspector was "lawfully empowered to promulgate such an order". The contention on behalf of the Crown is that under section 149, Criminal Procedure Code, every police officer can "interpose" for the purpose of preventing the commission of a cognizable offence. It is urged that the word "interpose" is wide enough to cover not only all acts done by him but also all orders given by him. I am unable to give to this word any such wide meaning. Interpose connotes the idea of actively intervening and not merely a prohibition by word of mouth. I am not saying that a police officer would not be justified in asking people to do or not to do a thing. Under certain circumstances even a private citizen may be justified in making such requests. But to be justified in directing a certain act to be done or not to be done is one thing, and to be legally empowered to order its commission or omission, with the consequence of the disobedience being punishable under section 188 of the Indian Penal Code, is quite another.

To hold that under section 149, Criminal Procedure Code, a police officer can pass any oral order he thinks desirable would be to hold that his word is law. If his powers were to be so wide, it would be unnecessary for the Magistrate or the police to take any precautionary measures in advance, it would be quite sufficient to send down a Sub-Inspector to the scene and let him pass all sorts of sweeping orders, disobedience of which will entail conviction. Such a method, if sanctioned, would deprive the persons concerned of all opportunity to appeal to higher authorities, and they would have to submit to such orders at the peril of a prosecution. I am of opinion that such wide powers vested in a police officer would interfere unreasonably with the ordinary liberty of private citizens and could not have been contemplated to be within the scope of section 149, Criminal Procedure Code.

It is still more difficult to hold that a police officer can pass orders not only against the persons from whom the commission of an offence is apprehended but also against would-be victims. By considering extreme cases it can be seen at once to what consequences a contrary view is likely to lead. Suppose a dacoit aims a gun at the victim of the dacoity; a police officer instead of rushing at the

dacoit and preventing him from shooting the victim, orders the victim to run away; the victim does not move, the dacoit shoots but fortunately misses the shot. Is the victim guilty of the offence of disobeying the order to run away promulgated by a public servant lawfully empowered to promulgate such an order for the purpose of preventing his murder? Or, take the case of a police officer who, apprehending that certain robbers are coming to loot a Bank, orders the manager to close the Bank, the manager does not do so. Is he guilty of the offence of disobeying the order?

Of course, a police officer is empowered to do many things specifically mentioned in the Code. For instance, under section 42 he may demand aid in the prevention or suppression of a breach of the peace; or under section 151 he may arrest a person designing to commit an offence; he may under section 127 command an assembly of five or more persons, likely to cause a disturbance of the public peace, to disperse; and if it does not disperse he may, under section 128, proceed to disperse it by force, and he may under section 149 "interpose" for the purpose of preventing an offence, or under section 152, to prevent an injury to property. Persons who refuse to disperse or who resist him (and not merely refuse to obey his oral orders) in the discharge of his legal duty, are liable to punishment. But he cannot shirk his duty of interposing effectively by being content with an oral order not to do a certain act and then make the persons ordered, liable for disobedience of his orders.

It has next been suggested by the learned Assistant Government Advocate that the officer might have been empowered to pass the order under the Police Act. Sections 30, 30-A and 31 have been referred to. One may say at once that the Sub-Inspector nowhere suggested that he purported to act under any of the provisions of the Police Act. He frankly admitted that he acted under section 149, Criminal Procedure Code. Further, section 30 does not apply to a Sub-Inspector. Section 30 (A) is inapplicable as there had never been any license previously insisted upon and no conditions were therefore violated. The provisions of sections 30 and 30 (A), if they had been resorted to, would have provided ample powers for the police (including the Sub-Inspector) to interfere and stop the procession. But that was not done. As to section 31 it was never suggested at the trial that when the Sub-Inspector ordered the music to be stopped and the procession not to advance, he was trying to keep order on the public road or preventing an obstruction. Section 31 therefore can have no application; nor have the accused been prosecuted under section 32 of the Police Act.

I have therefore come to the conclusion that the Sub-Inspector was not legally empowered to promulgate the order that the music should be stopped or that the procession should not advance. The accused were accordingly not guilty of any offence under section 188 of the Indian Penal Code.

I have however already said that they were prosecuted under section 151 of the Indian Penal Code also. The District Magistrate was inclined to believe the prosecution evidence that the Sub-Inspector did tell the public to disperse. He considered this to be "most probable" and emphasised that "all the prosecution witnesses say he did". He however considered that as sections 151 and 188 were practically equal in gravity it was unnecessary to apply both, particularly as, in his opinion section 188, both as regards its explanation and its illustration seemed more directly applicable. He therefore convicted the accused under section 188 only. The learned Sessions Judge did not at all direct his attention to the offence under section 151 of the Indian Penal Code.

It cannot be doubted that under section 127, Criminal Procedure Code, the Sub-Inspector was legally empowered to order the assembly to disperse when he was convinced that it was likely to cause a disturbance of the public peace. There can be no doubt that the Sub-Inspector was fully justified in his apprehension that if the procession advanced while playing the music there would be a riot. It was altogether immaterial whose action would provoke it. Having regard to the fact that feelings were running high, there would most probably have been a free fight on both sides. Under section 151 of the Indian Penal Code, whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace after such assembly has been lawfully ordered to disperse, is liable to punishment.

There can be no doubt that the accused as well as the other members of the procession did not disperse for a considerably long time. If, therefore, the Sub-Inspector did actually order them to disperse, they would be guilty under section 151.

As the accused in their written statement did not expressly admit that the Sub-Inspector had given an order that the assembly should disperse, and as they actually produced a witness named Chand Singh to say that he never heard the Darogha ordering the crowd to disperse, it is necessary to consider what other evidence there is to corroborate the Sub-Inspector's version.

Jagannath Singh, Brahmin, who lives near the mosque in question, has stated that the Darogha did address the assembly and told the people to disperse but they did not do so, and that it was when the Darogha said to the head constable 'call the guard, order them to shoot' that the crowd dispersed.

Similarly, Durga Prasad, another witness, has stated that the Darogha said 'disperse this assembly or there will be a 'riot' and that in spite of what the Darogha had said the band went on playing and the people did not disperse, and the two accused also were there.

A third witness, Musawwir Husain also says that the people did not retire until the Darogha produced his pistol and that they dispersed only after he said that he would call on a guard to fire.

Another witness, Abdul Karim, says that eventually the Darogha threatened fire. To his previous orders no one had paid any notice, either to the order to disperse or to stop the music.

Thus all the prosecution witnesses corroborate the Sub-Inspector's statement that he did order the crowd to disperse. It is also natural to suppose that when he found that the leaders of the procession were prepared to defy him and disobey his orders, he would have ordered them to disperse. We have already noted that in the joint written statement filed by the accused there was no express denial of this statement of the Sub-Inspector. The other defence witnesses also do not expressly say that no order for dispersing was given. It is possible that Chand Singh might not have heard this order of the Sub-Inspector. He however admits that the discussion between the Darogha and the accused went on for nearly half an hour and that the crowd dispersed at the bidding of the accused after they had put down their musical instruments.

On the evidence, therefore, I am fully satisfied that the Sub-Inspector had ordered the accused and the procession to disperse, and that in spite of that order the accused did continue in the said assembly and did not disperse for a long time. They were therefore guilty of an offence under section 151 of the Indian Penal Code. The whole evidence has been read and discussed before us, and we are justified in convicting them of this offence.

At the same time, I am inclined to believe that the accused persons did not really intend to disobey the Sub-Inspector finally, that is to say, did not intend to force their way forward or to persist in their disobedience even after a show of force. Nor did they in any way intend to physically resist the Sub-Inspector in the discharge of his duty. In view of these circumstances, I am inclined to take a lenient view so far as the question of sentence is concerned. I may however add that the accused were given an opportunity to apologize and express their regret, but by a written application they declined to do so and asked there to be "judged in its true light".

By the Court:—We accordingly allow this appeal and setting aside the acquittal of the accused persons convict them under section 151 of the Indian Penal Code and sentence them each to one month's simple imprisonment to date from 21st of August, 1924 and to pay a fine of Rs. 500 each or six weeks' simple imprisonment in lieu thereof. Let them be taken to the District Magistrate who will make arrangements for their custody and transit to Jhansi.

Appeal allowed.

1925 Allahabad 171.

KANHAIYA LAL, J.

Bishnath Singh and others—Judgment-debtors-Appellants

v.

Basdeo Singh — Decree-holder-Respondent.

E.S.A. No. 1476 of 1924, decided on 28th July, 1924, against the decree of the Judge of Court of Small Causes, Allahabad, dated 9th August, 1923.

Bundlekhand Land Alienation Act (U.P. Act II of 1903), S. 9—Reference is competent even after a decree is made absolute

A reference can be made under S. 9, sub-S. (3) even after a decree has been made absolute. (42 All. 142, *Dist.*; S.A. 1457 of 1920, *Ref.*) [P. 172, C. 1.]

Baleshwari Prasad and *Anant Lal*—for the Appellants.

S. Abu Ali—for the Respondent.

Judgment:—In a suit filed on foot of a mortgage effected by the appellants on the 13th May, 1909, a preliminary decree for sale was passed on the 17th January, 1918, which was made absolute on the 20th December, 1919. The parties are members of an agricultural tribe.

When the decree was put under execution, an objection was filed by the judgment-debtors under section 16 of the Bundlekhand Land Alienation Act (U.P. Act II of 1903), saying that the mortgaged property could not be sold in execution of a decree. The Court upheld that objection. The decree-holder then asked the Court to take proceedings under section 9 of the said Act. That prayer was acceded to by the Court of first instance and the order of that Court was upheld by the lower appellate Court.

The contention here is that no reference can be made under section 9, sub-section (3) of that Act after a decree has been made absolute. But that section contains no such limitation. All that it lays down is, that if a suit is instituted in any Civil Court on a mortgage, after the commencement of this Act, by a member of an agricultural tribe, the Court shall, if it finds that the mortgage is enforceable, refer the case to the Collector with a view to the exercise of the power conferred by sub sections (1) and (2) of section 9. This power can be exercised at any stage *i.e.*, either before a decree has been passed or made absolute, because under section 16 the decree in such a case cannot be enforced by the sale of the mortgaged property and must be left out of account, as if it had in effect never been passed. So long as the decree or mortgage subsists, the claim to recover the money or to enforce the mortgage also subsists; and a reference can be made to the Collector, who can refuse or alter the terms of the mortgage so as to bring it into accordance with the Act and make it conform to the limitation imposed thereby. The decision in *Hanuman Prasad Narain Singh* v. *Harakh Narain* (1), does not apply, because no reference under section 9 was there asked for. On the other hand the decision in *Sheo Pragash Singh* v. *Radha Mohan Singh* (2), supports the conclusion that the claim can be referred to the Collector, though it had nominally matured into a decree which has been since found to be unenforceable.

The appeal therefore fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) (1920) 42 All. 142=58 I.C. 551=18 A.L.J. 59.
(2) S. A. No. 1457 of 1920, decided on 18th July, 1922 (unreported.)

1925 Allahabad 172.

SULAIMAN AND MUKERJI, JJ.

Bengal North Western Railway—Defendant-Appellant

v.

Firm Manorath Bhagat-Dhian Ram and *B. B. and C. I. Railway*—Plaintiff-Defendant-Respondent.

Civil Rev. No. 26 of 1924, decided on 25th July, 1924, from an order of the Judge of the Court of Small Causes, Agra, dated 4th October, 1924.

Provincial Small Cause Courts Act, S. 25—No revision lies unless the finding is perverse or impossible.

Unless there was no evidence before the Judge to support the finding or unless the finding was an impossible or perverse one, it is unfair to interfere on the revision side. (39 All., 418, *Dist.*; 7 A.L.J. 833, *Foll.*) [P. 173, C. 1.]

S. N. Sen—for the Applicant.

K. N. Katju and *L. P. Zutshi*—for the Opposite Parties.

Sulaiman, J.:—This is a civil revision from the decree of a learned Judge of the Court of Small Causes. 93 bags were despatched in one wagon from Turtipur to Agra in a goods train. When the train arrived at Magarwara station, it was reported to the Station Master that a door of the wagon was open. He resealed the door. When the train arrived at Cawnpore, the contents of the wagon were checked and it was discovered that five bags were missing. When the goods were despatched they were placed in the wagon which had been fastened with a piece of twine and seals were put on the doors, but admittedly the

doors were not locked. The learned Judge of the Small Cause Court had before him evidence that thefts were constant so much so that about ten wagons with broken seals were discovered every month, and that in spite of this circumstance no precautions were taken to lock the wagons or to keep any extra watch on the trains or the stations. The learned Judge was not bound to bring on record the whole of the oral evidence which was tendered before him, nor was he bound to refer in his judgment to all the evidence that had been produced before him. He has however referred to the above-mentioned circumstances in the judgment, and has then recorded a categorical finding that the five bags were lost and that it was proved that they were lost by the wilful neglect on the part of the Railway administration in not securing the wagon properly and the wilful neglect of its servants in not watching it properly. The learned Advocate for the applicant contends before us that the learned Judge of the Court below was not justified in drawing this inference from the above circumstances. He urges that the question of wilful neglect is a mixed question of law and fact and that it is open to this Court to go into the matter. It cannot be disputed that when a suit is instituted for damages for the loss of certain packages the burden lies on the plaintiff in the first instance to prove the wilful neglect or negligence on the part of the Railway administration. The Court below has not placed the burden on the Company. It has however recorded a clear finding that that negligence has been established. Unless there was no evidence before the Judge to support the finding or unless the finding was an impossible or a perverse one, it is unfair to interfere on the revision side. We are not even justified in assuming that there was no evidence before him other than what now appears on the record.

Great reliance has been placed by the learned Advocate for the applicant on the case of *East Indian Railway Company* v. *Nathmal Behari Lal* (1). A reference to the facts as stated on page 321 would indicate that probably the Court below had there laid the burden of proof on the Railway Company and held that the Company had failed to discharge that burden. Furthermore, it is to be noted that in that case it had been established that the examination of the seals had been continued at every station until the last but one before the arrival of the train at Cawnpore. The seals had been found intact all along except when the train arrived at Cawnpore. There was no finding that the door was found open. The case also was one under risk-note H and not B. Having regard to these points one may be able to distinguish that case from the present case. On the other hand the case (*Bengal and North Western Railway Company* v. *Haji Mutsaddi* (2)) does help the respondent. That was a case of second appeal where apparently all the evidence had been brought on the record. The only two circumstances pointed out by the Court below to support a finding that the negligence had been established were that the carriages were not properly locked and that thefts were constant. The High Court in second appeal affirmed the finding of negligence and even expressed the view that the finding was justified.

The learned Judge of the Court below had before him all these circumstances and possibly other evidence also and had the case reported in 7 A.L.J. 833 brought to his notice. He has recorded a clear finding that the negligence was established. It is impossible to say that he was wrong. I would therefore dismiss this application.

Mukerji, J.:—I agree that we should not interfere in this revision.

Two cases have been cited-one by the Court below and one in this Court, and it has been contended on behalf of the applicant that the two cases are inconsistent and we ought to follow the later case of *East Indian Railway Company* v. *Nathmal Behari Lal* (1) in preference to the case (*Bengal and North Western Railway Company* v. *Haji Mutsaddi* (2)).

In my opinion both the cases were rightly decided, having regard to the facts found in those cases. The earlier case was decided on facts found by the lower appellate Court as it was a case of second appeal. In the later case the learned Judges differed from the inference drawn by the Judge of the Small Cause Court, and on the facts found by the learned Judge of the Small Cause Court held that no case of wilful neglect had been established.

If we take the findings of the learned Judge in this case, which, by the by, may

(1) (1917) 39 All. 418=39 I.C. 130=15 A.L.J. 321.

(2) 7 I.C. 160=(1910) 7 A.L.J. 833.

not be exhaustive, we find at least this fact established that thefts from trains were constant. They were being reported to the Station Master and according to one of the witnesses produced by the Railway Compay themselves be found 10 cases of breaking of seals of goods wagons in the course of every month. It is clear therefore that, the circumstances were such as to put the Railway Company on their guard and induce them to arrange things in such a way that these constant thefts should become rare. In the circumstances, I am prepared to infer, with the Court below that, a case of wilful neglect on the part of the servants of the Company has been established. In this view, I would uphold the decree of the Court below.

By the Court:—The order of the Court is that the application in the revision is dismissed with costs.

Revision dismissed.

1925 Allahabad 174.

MUKERJI AND DALAL, JJ.

Sanwal Das and others—Defendants-Appellants

v.

Saiyid Ali Madhi and others—Plaintiffs-Respondents.

S. A. No. 27 of 1923, decided on 11th July, 1924, from a decree of the District Judge, Benares, dated 18th September, 1922.

(a) *Limitation Act, S. 22—Impleading simple sub-mortgagee after 60 years bars redemption suit against him.*

Where a sub-mortgage, which was simple, was effected within 60 years on the property sought to be redeemed but the simple mortgagee got a decree and bought the property in auction after 60 years had elapsed, when he was impleaded as defendant in the suit, to redeem the original mortgagee, *held*, that the suit was barred as against him as acquisition of interest by him dated back to the date of simple mortgage. [P. 174, C. 2.]

(b) *Limitation Act, S. 19—Mention of property as a mortgaged property in the list of property to be sold under a decree amounts to acknowledgment.*

Where a sub-mortgagee in submitting a list of property to be sold in execution of his decree, described the proporty as subject to prior mortgage, *held*, that the description amounted to acknowledgment and saved limitation as against him for redeeming the original mortgage. [P. 175, C. 1.]

Kailas Nath Katju—for the Appellants.

Peary Lal Banerjee and *Hyder Mahdi*—for the Respondents.

Mukerji, J.:—This appeal raises two questions:—First, whether having regard to the fact that the appellants were made parties to the suit for redemption after the expiry of sixty years from the date of the mortgage, the suit against them was time-barred, and secondly, whether the statement of the property sought to be sold, dated the 21st June, 1919, signed by Sanwal Das operated as an acknowledgment under section 19 of the Limitation Act, and saved the suit from being time-barred.

The facts briefly are these:—There was an ancient mortgage, dated the 16th July, 1859 for Rs. 1,200. The suit to redeem the mortgage was brought on 29th January, 1918. The mortgagees or some of them made a sub-mortgage of their mortgagee rights with respect to a 7 annas 8½ pies share on 19th September, 1900 in favour of two persons Sanwal Das and Kampta Prasad. The sub-mortgage was a simple one. Sanwal Das and Kampta Prasad obtained a decree for sale against their mortgagors and brought the property to sale and themselves purchased on 20th March, 1920. Kampta Prasad has since died. Sanwal Das, his brother Baldeo Das, Kampta Prasad's sons and other members of the family were impleaded in the suit for redemption by order, dated the 23rd December, 1920. These are the parties who are the appellants before this Court. Three of these contested the suit and pleaded limitation among other matters. In answer to this plea of limitation the plea of acknowledgment was taken and it was further urged that the actual sale having taken place pending the suit the question of limitation does not arise.

As we have stated, there are two points for decision in the case. On the first point it appears to us that the auction purchase by the appellants can be referred only to the simple mortgage they obtained on 19th September, 1900. It is not the case that this auction purchase took place under a simple money decree and the right to the property accrued to the appellants for the first time at the date of the sale. They already had an interest in the property by the mortgage, simple though it was, dated the 19th September, 1900. We are therefore of opinion that the Courts below were

not right in holding that the suit was not barred against the appellants if there happened to be no acknowledgment.

Coming to the second point we think that the Courts below were right in treating the statement of properties, *Fard-i-Taliqa*, signed by Sanwal Das, as a sufficient acknowledgment of the liability of the appellants to be redeemed. The mortgage in suit, namely, the mortgage of 1859 uses a rather peculiar word which has become almost obsolete at this date, namely, *Baiul khayar* in describing the nature of the mortgage. The document was a mortgage by conditional sale. The word that is generally used to denote a mortgage by conditional sale in the Vernacular is, *baiul ufa* or *bai miadi*. In the list of properties to be sold signed by Sanwal Das he described the property 7 annas $8\frac{1}{2}$ pies share in the village Deokali as *baiul khayar*. Clearly he mentioned the very expression which had been used in the mortgage of 1859. We have therefore not the least doubt in our minds that Sanwal Das in describing the property mentioned that the property was subject to the very mortgage of 1859. There is therefore no vagueness about the acknowledgment.

The question now is whether Sanwal Das was authorised to make an acknowledgment on behalf of the family. We have already stated that all the appellants who were in numbers were impleaded as subsequent transferees on account of the auction-purchase, dated the 20th March, 1920. The purchase was made by only two persons, Sanwal Das and Kampta Prasad. It follows, as the lower appellate Court finds, the family being a joint one, the purchase was made for the benefit of the entire family. Sanwal Das alone signed the list for himself and for his co-decree-holder and co-parcener, Kampta Prasad. Evidently he was acting on behalf of the family. Such is the finding of the Court below. We hold therefore that there is a valid acknowledgment of the mortgage on behalf of the family by Sanwal Das.

The result is that the appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Appeal dismissed.

1925 Allahabad 175.

MUKHERJI, J.

Muhammad Hasan—Applicant

v.

Emperor—Opposite Party.

Crim. Rev. No. 297 of 1924, decided on 18th August, 1924, from an order of the Sessions Judge, Azamgarh, dated 7th March, 1924.

Arms Act, S. 19 (f)—Son of a licensee (the latter not being entitled to hand over gun to retainer) was convicted for possessing father's gun for shooting birds.

The accused's father held a license for a gun. The license which had been issued to him did not mention that he was entitled to hand over his gun to a retainer. The accused took out the gun of his father for the purpose of shooting birds. While thus possessing the gun near a pond, he was found out by an officer of the police and the Tahsildar.

Held, that though the spirit of the law was not contravened yet, the letter was certainly contravened but that a fine of Rs. 25 would answer the purpose. [P. 176, C. 1.]

Mukhtar Ahmed—for the Applicant.

Asstt. Govt. Advocate—for the Crown.

Judgment:—This is an application in revision by one Muhammad Hasan who has been convicted by a learned Magistrate under section 19 (*f*) of the Arms Act, 1878. He was sentenced to a fine of Rs. 200 by the Magistrate. On appeal the learned Sessions Judge upheld the conviction but reduced the sentence to a fine of Rs. 75.

In revision it is contended first that the facts found do not make out a case under the section under which the applicant has been convicted and secondly that, the sentence is still too severe.

The facts found are these:—The applicant's father holds a license for a gun. The license which has been issued to him does not mention that he is entitled to hand over his gun to any retainer. The applicant took out the gun of his father for the purpose of shooting birds, and it appears that he shot at least one. While thus possessing the gun near a pond, he was found out by an officer of the police and the Tahsildar. It has been urged for the applicant that his possession was a temporary one, and was one which was not contemplated by law. Two cases have been cited before me, *viz.*, the case of *Prabhat Chandra*

Chowdhry v. *Emperor* (1), and *Queen-Empress* v. *Jotee Ram* (2). In the first case the gentleman who was entitled to the use of the gun was away from the country and the gun was in the house. At the actual moment of its use, a servant of the owner had it in his hands while a mad dog had entered the house. The person charged with the offence in the aforesaid case took the gun from the servant's hand and fired it in order to kill the mad dog. He was convicted of the offence under section 19 (*f*) of the Arms Act. It is clear that the use of the gun for just a minute or two was held to be no such possession as was contemplated by law. On the facts, that case is clearly distinguishable from the case before me. In the case reported in 16 All. a servant was taking his master's gun to a gunsmith for repairs. It was held that the possession was not such as was contemplated by law. In this case the applicant had deliberately possessed himself of the gun and had it under his control for the time being. There is no doubt that his possession was temporary, but it depended on the will of the applicant as to how long he would possess the gun. It may be that he intended to be out for shooting with the gun for the whole day. In my opinion there is no escaping from the clear words of the section, *viz.*, "Has in his possession or under his control an arm.....in contravention of the provisions....." I think on the whole that the conviction is right.

As regards the sentence, it does appear to me that it is still excessive. The spirit of the law was not contravened but certainly the letter has been contravened. I reduce the sentence to a fine of Rs. 25 only.

Conviction upheld, sentence reduced.

(1) (1908) 35 Cal. 219=7 C.L.J. 242=7 Cr. L.J. 112=3 M.L.T. 190.
(2) (1894) 16 All. 276.

1925 Allahabad 176.

KANHAIYA LAL, J.

Ganga Ram—Defendant-Appellant

v.

Lachman Singh and others—Plaintiffs-Respondents.

S. A. No. 101 of 1923, decided on 21st July, 1924, against the decree of the District Judge, Budaun, dated 11th October, 1922.

(a) *Registration Act, S. 17—Family settlement of disputed claims need not be registered.*

A compromise of disputed claim among members of a family operates only as a family arrangement acknowledging or defining an antecedent but disputed title and its registration is not necessary. Such a family settlement does not fall within the purview of any of the provisions of the T. P. Act so as to require an instrument in writing or registration. (20 All. 171 and 18 A.L.J. 877, *Foll.*). [P. 177, Cs. 1 and 2.]

(b) *Limitation Act, S. 19—Law to be considered is the one in force on the date of suit.*

Where an acknowledgment is relied on to save limitation, the law to be applied is not the law in force at the date of the alleged acknowledgment, but the law which was in force at the time of the institution of the suit. (35 All. 227, *Foll.*) [P. 178, C. 1.]

(c) *Limitation Act, S. 19—Agent's authority to acknowledge on principal's behalf may be express or implied, presumable from circumstances.*

It is unquestionable that no valid acknowledgment can be made by a general agent unless he is expressly or impliedly authorised in that behalf; but the authority may be presumed from the attendant circumstances. The question of authority in each case is one of fact or an inference to be drawn from the surrounding circumstances. [P. 178, C. 2.]

N. P. Anthana—for the Appellant.
S. A. Haider—for Respondents.

Judgment:—This appeal arises out of a suit for the redemption of a mortgage effected by Khaman Singh in favour of Shib Lal and Khem Karan on the 8th June, 1850. The Courts below have decreed the claim, allowing the plaintiffs, who are the legal representatives of one of the heirs of the original mortgagor, to redeem their share on payment of a proportionate part of the mortgage money.

The main question for consideration are whether the plaintiffs have a right to redeem the share in question and whether the claim is barred by limitation. It appears that Khaman Singh had two sons, Kehri Singh and Gangaram Singh. The share of Gangaram Singh passed to Khanjan Singh, who died leaving a widow, Mt. Hem Kunwar, and a brother Mewa Ram

Singh, each of whom divided his property by a mutual arrangement in equal shares. Mt. Hem Kunwar was succeeded by Pem Singh, one of the nephews of her husband, either by virtue of some gift or adoption. On the death of Mt. Hem Kunwar there was a dispute about the 1½ biswas share entered in his name, which was settled on the 11th September, 1890, in this way that Mt. Gaura, his widow, was allowed a one-third share, and Bahadur Singh and Partap Singh, the younger brothers of her husband, were allowed the remaining one-third share each. Mt. Gaura and Bahadur Singh subsequently sold their rights to Ganga Ram, the present defendant-appellant, who is also the successor-in-interest of some of the heirs of the mortgagees.

In 1915 Mewa Ram Singh brought a suit for the redemption of a half share of the mortgaged property, impleading the mortgagees and other persons, claiming an interest in the equity of redemption, as defendants. One of the pleas raised in that suit was that Mewa Ram Singh could not sue for anything more than his half share of 2½ biswas, which he had obtained by a settlement with Mt. Hem Kunwar, and another plea was that the claim was barred by limitation. Lachman Singh and Mt. Hira Kunwar, the heirs of Partab Singh, were parties to that suit. It was found in that case that Mewa Ram Singh was entitled to redeem only 1½ biswas representing his share, and that the acknowledgment made by the mortgagees at the time of the attestation of the *Wajib-ul-arz* in 1865 saved limitation: *Dharam Das* v. *Emperor* (1).

The present suit has been brought by Lachman Singh and Mt. Hira Kunwar to redeem their one-third share of 1¼ biswas, which had been allotted to Partab Singh by the compromise of the 11th September, 1890. The learned Counsel for the defendant-appellant contends that that compromise is inadmissible in evidence for want of registration. But the compromise itself does not purport to convey or to create or declare any interest in immoveable property. It merely recognises or confirms an antecedent title, which was till then involved in dispute; and at best it amounted only to an intimation to the Revenue Court, before which the mutation proceeding was pending, that the dispute between Mt. Gaura, the widow of Pem Singh on the one hand and Bahadur Singh and Partab Singh on the other, had been settled out of Court in a particular manner. The settlement aforesaid operated as a family arrangement acknowledging or defining an antecedent but disputed title, and as pointed out in *Bindesri Nath* v. *Ganga Saran* (2), its registration was not necessary. In *Baldeo Singh* v. *Udal Singh* (3) it was accordingly held that such a family settlement, proceeding as it did on the assumption of an antecedent title of some kind in the parties which it merely acknowledged or defined, did not fall within the purview of any of the provisions of the Transfer of Property Act so as to require an instrument in writing or registration. There can be no doubt therefore that Lachman Singh and Mt. Hira Kunwar, the heirs of Partab Singh, are entitled to redeem a one-third share out of 1¼ biswas entered in their names. The remaining two-thirds share has been purchased by the mortgagee from Mt. Gaura and Bahadur Singh and as observed in *Kanhailal* v. *Brijlal* (4) it does not lie in his mouth to impeach the settlement.

The question of limitation is by no means so simple. The suit was filed after the expiry of 60 years from the date of the mortgage and unless the verification of the *wajib-ul-arz* by Shib Lal and by Fazl Ahmad, the general agent of the other mortgagees, can be regarded as sufficient within the meaning of section 19 of the Indian Limitation Act, the claim would obviously be barred by time. It is conceded that under Act XIV of 1859 the acknowledgment made by a person, who was not himself the mortgagee, could not be regarded as sufficient to save limitation. But as held by their Lordships of the Privy Council in *Soni Lal* v. *Kanhaiya Lal* (5) the law of limitation applicable to the present suit

(1) (1910) 33 All. 48=7 A.L.J. 910=7 I.C. 412=11 Cr.L.J. 480.

(2) (1898) 20 All. 171=25 I. A. 9=2 C.W.N. 129=7 Sar. 273 (P.C.).

(3) (1920) 18 A.L J. 877=58 I.C. 732.

(4) 1918) 40 All. 487=45 I.A. 118=22 C.W.N. 914=8 L.W. 212=24 M.L.T. 23=35 M.L.J. 459=16 A.L.J. 825=(1918) M.W.N. 702=28 C.L.J. 394=5 Pat. L.W. 294=47 I.C. 207=22 Bom. L.R. 1048 (P.C.).

(5) (1913) 35 All 227=40 I.A. 74=25 M.L.J. 131=13 M.L.T. 437=17 C.W.N 605=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=19 I.C. 291=15 Bom. L.R. 489 (P.C.).

is not Act XIV of 1859, the law in force at the date of the alleged acknowledgment, but Act IX of 1908, which was in force at the time of the institution of the suit. No title had been acquired by the mortgagee before Act IX of 1908 came into force and section 19 of the Indian Limitation Act now in force must therefore govern the question of the sufficiency or otherwise of the acknowledgment on which the plaintiffs-respondents seek to rely.

It is urged on behalf of the defendant-appellant on the strength of the decisions in *Gokul Singh* v. *Sahib Singh* (6) and *Narain Rao* v. *Mt. Manni Kunwar* (7) that the Court might presume the genuineness of the signature of Shib Lal, one of the mortgagees, who verified the *wajib-ul-arz* and also the genuineness of the signature of Fazl Ahmad, who purported to sign the verification on behalf of Mt. Daro, the widow of Ganga Ram, Gopal Singh and Sita Ram, the sons of Khem Karan, as their general agent, but the Court could not presume that the latter had authority to make an acknowledgment on behalf of his principals. But the circumstances in which the verification was made ought to be taken into consideration in determining the authority possessed by him at the time the verification took place. The settlement in which that *wajib-ul-arz* was verified was effected under Regulation VII of 1822 as amended by Regulation IX of 1833 then in force; and among the directions then issued for the guidance of Settlement Officers to carry out the object of those Regulations it was provided that the signatures of all the *lambardars* and as many as possible of the *pattidars* should be attached to the administrative paper, called the *wajib-ul-arz*, and it should also be attested by patwari and kanungos and be read out before the Settlement Officer in open Court and in the presence of the subscribing parties (Directions for Settlement Officers 1858, p. 78). In other words no settlement could be regarded as complete until the *wajib-ul-arz* was prepared and attested by the signatures of all the *lambardars* and as many as possible of the *pattidars*, who assented to the same and acknowledged its correctness. The co-sharers were required for that purpose to attend or to send their agents, and it must be presumed that Fazl Ahmad was sent on a similar errand in the company of Shib Lal, one of the mortgagees, by the heirs of the other mortgagee, who may have been unable to attend in person themselves. Both Shib Lal and Fazl Ahmad, the general agents of the mortgagees attended to verify the *wajib-ul-arz*, in which Shib Lal and the heirs of Khem Karan were recorded as mortgagees; and the verification made by Shib Lal one of the mortgagees and by Fazl Ahmad on behalf of the other mortgagees must therefore be taken to have been made in acknowledgment of the correctness of the fact that they were such mortgagees. Under section 114 of the Indian Evidence Act the Court can presume that official acts had been regularly performed, that is the Court must have satisfied itself as to the authority of Fazl Ahmad, and that the common course of business had been followed in such cases. The attendant circumstances can lead to no other conclusion.

The decisions to which the learned counsel for the defendant-appellant has referred, are not applicable. In the first of the two cases referred to by him, the signature was made on behalf of an absent co-sharer by the *patwari* who was found to have had no authority to sign on his behalf. In the latter case no fact appears to have been established or brought to the notice of the Court to justify the Court in presuming that the general agent had the requisite authority to make the acknowledgment. It is unquestionable that no valid acknowledgment can be made by a general agent unless he is expressly or impliedly authorised in that behalf; but the authority may be presumed from the attendant circumstances, as the Courts below have presumed in this case. The question of authority in each case is one of fact or an inference to be drawn from the surrounding circumstances, and considering the circumstances here established there is no reason to differ from the view taken by the Courts below.

It is also noteworthy that in the previous suit about this very mortgage it was held between the parties by this Court that the claim was within time and that the acknowledgment made at the time of the verification of the *wajib ul-arz* saved limitation. That suit included the property now in dispute; and the present claimants

(6) (1917) 15 A.L.J. 121 = 38 I.C. 162.
(7) 1922 All. 230 = 44 All. 546 = 20 A.L.J. 359.

were then arrayed as co-defendants with the mortgagees or their heirs, with whom their interest was at conflict. If the suit for redemption was within time as regards the then plaintiff, it cannot be beyond time as regards the present plaintiff, who practically claim immunity on the same grounds as were then urged and accepted.

The appeal therefore fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

1925 Allahabad 179.

DALAL, J.

Shiam Lal—Appellant

v.

Koerpal and another—Respondents.

S. A. No. 446 of 1924, decided on 31st July, 1924, from the decree of District Judge, Agra.

Civ. Pro. Code, S. 41—After issue of certificate whether rightly or wrongly, the Court to whom the decree is transferred cannot deal with execution matters.

The Court to which the decree is transferred under S. 39 has jurisdiction only up to the time that it issues the certificate prescribed by S. 41. After the issue of the certificate that Court ceases to have jurisdiction whether the certificate was issued rightly or wrongly. [P. 179, C. 2]

N. P. Asthana—for the Appellant.

M. L. Sandal—for the Respondents.

Judgment:—I am of opinion that the Subordinate Judge has acted without jurisdiction in this matter. A decree passed by the Court of Small Causes of Agra was transferred for execution under section 39 of the Civil Procedure Code to the Court of the Munsif of Agra. The Munsif took proceedings and finally dismissed the application for execution maintaining attachment of a house. The Munsif then certified the result of execution proceedings under section 41 to the Court of Small Causes. After this the appellant purchased the house. The decree-holder subsequently applied afresh to the Court of the Munsif for execution and the appellant objected. The Munsif held that the house having been pruchased during attachment the appellant could not stop the claim of the decree-holder by virtue of his own sale-deed. On appeal it was pointed out to the District Judge that the Munsif had no jurisdiction because he had certified the result of the execution proceedings to the Court of Small Causes under section 41. The learned District Judge held that the procedure was incorrect and dismissed the appeal.

However incorrect the procedure may be, the Munsif after having certified the result of execution proceedings under section 41, had no jurisdiction to deal with the matter. The application for execution must now lie to the Court which passed the decree. It may be pointed out that there is a mistake in the heading of the form, certificate of execution of decree transferred to another Court (Appendix E, No. 5, C. P. C.). The reference in brackets after the heading should be section 41 and not Order 21, rule 6. The attention of the Registrar of this Court will be drawn to this mistake. The mistake is in the form prescribed by the Act itself and has been followed in the forms printed by the High Court No. 32-xx. In *Maharaja of Bobbili* v. *Narasaraju Peda* (1) it was held by the Privy Council that the proper Court to which an application for execution lay was the Court to which the decree was transferred under section 39 until the Court to which the decree was transferred issued a certificate under section 41 and returned the copy of the decree to the original Court. That ruling referred to corresponding sections of the previous Code of 1882. It is clear therefore that the Court to which the decree is transferred under section 39 has jurisdiction only up to the time that it issues the certificate prescribed by section 41. That stage was passed in this case whether the certificate was issued rightly or wrongly. After the issue of the certificate the Court of the Munsif ceased to have jurisdiction.

I pronounce no opinion as to the effect of continuation of the attachment of the house on a proper application for execution being presented to the Court of Small Causes and a fresh transfer of the decree is made to the Court of the Munsif.

I set aside the decree of the two Subordinate Courts and dismiss the decree-holder's application for execution, dated

(1) (1916) 39 Mad. 640=43 I.A. 238=31 M.L.J. 300=18 Bom. L.R. 909=14 A.L.J. 1129=20 M.L.T. 472=24 C.L.J. 478=4 L.W. 558=(1916) 1 M.W.N. 541=21 C.W.N. 162=36 I.C. 682=1 Pat. L.W. 26 (P.C.).

11th September, 1923. The respondents were not represented. This order is passed *ex parte*. The appellant shall receive his costs in this Court and the Court below.

Appeal allowed.

1925 Allahabad 180.

SULAIMAN AND MUKHERJI, JJ.

Gajadhar Pande and others—Plaintiffs-Appellants

v.

Jadubir Pande and another—Defendants-Respondents.

L. P. A. No. 132 of 1923, decided on 25th July, 1924, from the judgment of Kanhaiya Lal, J., dated 5th July, 1923.

Hindu Law—Father—Decree against—Sons cannot challenge execution sale on the ground that the debt sued on was without necessity.

When the property is sold in auction in execution of a decree against the father it is not open to his sons and grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree had been obtained had been contracted without any legal necessity or was not in lieu of any antecedent debt. It is further necessary for the plaintiffs then to establish that that debt had been tainted with illegality or immorality. (1923 All. 591, *Ref.*; 1924 P.C. 50, *Foll.*) [P. 181, C. 1.]

Harnandan Prasad—for the Appellants.

Kumuda Prasad—for the Respondents.

Sulaiman, J.:—The facts of the case are that a portion of plot No. 44 belonged to a joint Hindu family consisting of Salik Pande and his sons Ram Jag and Gajadhar. The father was the manager and Gajadhar was a minor. On the 2nd of July, 1890, the father and his son Ram Jag made a simple mortgage of the property in favour of Jagannath. Subsequently on the 31st of January, 1900, the father and some other co-sharers mortgaged the entire plot with possession to one Mangru. In 1903 Jagannath filed a suit for sale on the basis of his mortgage-deed, and obtained a decree for sale against the mortgagors alone. To that suit Gajadhar was not made a party. The property was sold in execution of the decree and was purchased by the decree-holder himself. The decree-holder subsequently sold the share purchased by him to Jadubir Pande, who got mutation of names effected in his favour.

It is however a fact that inasmuch as the plot in question was in the possession of the subsequent mortgagee, Jadubir Pande could not have obtained actual and effective possession over the property. Gajadhar and other minor members of his family brought this suit for a declaration that the execution sale, the auction-purchase and the transfer to Jadubir were not binding on them inasmuch as the mortgage of 1890 had been executed without any legal necessity. There was no allegation that the debt had been tainted with any illegality or immorality. The Court below decreed the claim. On appeal a learned Judge of this Court has dismissed the suit. He came to the conclusion that when the property had been sold in auction in execution of a decree against the father, then it was not open to his sons and grandsons to have the sale set aside on the mere ground that the debt on the basis of which the decree had been obtained had been without any legal necessity or not in lieu of any antecedent debt. It was further necessary for the plaintiffs to establish that that debt had been tainted with illegality or immorality. This was the view expressed by one of us in the case of *Ram Chandar* v. *Haji Md. Nur* (1), and is quite in conformity with the latest pronouncement of their Lordships of the Privy Council in the case of *Brij Narain* v. *Mangla Prasad* (2). In that case their Lordships entirely agreed with the view of the learned Chief Justice in the Full Bench Madras case of *Armugham Chetty* v. *Muthu Koundan* (3) where it had been held by him that an independent debt, neither immoral nor illegal, contracted by a father on the security of the joint family estate, antecedent to a mortgage sued on, could be treated as an antecedent debt so as to support a charge on the sons' shares also to the extent of the sums secured on the prior mortgage. That finding drew no distinction between a secured debt and a simple money debt. On the other hand that was a case expressly of a mortgage-debt. Their Lordships of the Privy Council at page 139 in 51 Indian Appeals laid down certain

---

(1) 1923 All. 591=45 All. 545=4 L. R. A. Civ. 237=21 A.L.J. 485.

(2) 1924 P.C. 50=46 All. 95=51 I.A. 129=21 A.L.J. 934=5 L.R. P.C. 1=28 C.W.N. 253=46 M.L.J. 23=5 Pat. L.T. 1=33 M. L.T. 457=19 L.W. 72=(1924) M.W.N. 69=2 Pat. L.R. Civ. 41=26 Bom. L.R. 500=11 O.L.J. 107=1 P.L.R. 1924 (P.C.).

(3) (1919) 42 Mad. 711=37 M.L.J. 166=9 L.W. 565=(1919) M.W.N. 409=52 I.C. 525=26 M.L.T. 96 (F.B.).

propositions as the result of the authorities referred to by them. The second proposition stands as follows :—

"If he is the father and the other members are the sons, he may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree in payment of that debt."

It is obvious that if the word "debt" in this proposition includes both a mortgage debt and a simple money debt, the appellants' contention cannot prevail, because the father, having incurred the mortgage-debt in question which was not for an immoral purpose, did lay the estate open to be taken in execution of the mortgage-decree passed for the payment of that debt. The learned Vakil for the appellants, however, contends before us that the word 'debt' there only means a simple money debt and not a mortgage-debt, and relies on the wording of the proposition No. 5 where it is stated that there is no rule that the result is affected by the question whether the father, who *contracted the debt* or *burdens the estate* is alive or dead. In our opinion this argument cannot be accepted. Their Lordships in the proposition No. 5 were clearly referring to all the previous contingencies and had therefore to use both the expressions.

It is not necessary for us to consider what logical results would follow from this interpretation of the second proposition. The propositions have been laid down recently in order to settle further disputes, and we are bound to accept them as they stand. I am therefore clearly of opinion that it is not open to the present plaintiffs to have the decree, the auction-sale and the subsequent transfer set aside specially when rights of a third party have come in without establishing that the secured debt had been tainted with illegality or immorality. The mere fact that they were no parties to the litigation or that the debt was not incurred for legal necessity or in lieu of an antecedent debt, is no ground for setting aside the decree and the subsequent sale.

Mukerji, J.:—I entirely agree. I wish to say just a few words having regard to the importance of the question involved. The two propositions, *viz.*, a father cannot borrow money on the security of the joint family property without establishing the case of legal necessity, and he can allow the very property to be sold in satisfaction of a debt of his own, not incurred for family necessity, if the debt be not secured on any family property, would appear to be contradictory on principle. Yet there can be no doubt that such is the Anglo-Hindu Law established beyond all possible controversy. The pure Hindu Law did not regard a loan secured on a mortgage, as different from a loan without such security. It prohibited a sale or gift of family property only without justification. Under Anglo-Indian law a mortgage became to be regarded as an alienation and hence the rule of Hindu Law against an alienation by the father was applied. This will probably explain the contradictory nature of the two rules. It would follow from these two propositions, which are undoubtedly correct, that where a debt is incurred on the security of the family property and to realise the debt the property is sold, the result is the same as if the family property had been sold in execution of a simple money decree obtained against the father for a debt purely personal to himself. Such being the case we can easily see why their Lordships of the Privy Council did not make any mention of a case where property is sold out of the family in execution of a mortgage decree obtained against the father alone. If they were not of opinion that the word 'debts' in proposition No. 2 at page 139 of 51 I.A. did not include both a simple debt and a secured debt, they would certainly have said something, whatever it might be, as regards a debt secured by mortgage, where a decree had been passed on foot of it and the decree had been executed effectually by sale. I entirely agree that the propositions of law have been clearly laid down for the purpose of guidance of the Courts in India by their Lordships of the Privy Council, and we ought loyally to administer them as good law till the propositions are re-considered (if ever) and a contrary opinion is expressed.

By the Court:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

1925 Allahabad 182.

MUKERJI AND DALAL, JJ.

Ram Adhin—Applicant

v.

Ram Bharose and another—Opposite Parties.

Civ. Rev. No. 155 of 1923, decided on 21st July, 1924, from an order of the District Judge, Allahabad, dated 12th January, 1923.

Civ. Pro. Code, O. 17, r. 2—Even where defendant is absent on adjourned hearing, the Court ought to pass an ex parte *decree and not a judgment on merits—Case-law reviewed.*

Even where a party has taken time to produce evidence and on the date fixed for hearing of that evidence he is absent the proper course to follow is to pass an *ex parte* decree and not an order under R. 3. The words " make such other order as it thinks fit " in R. 2 do not include an order under R. 3 (1923 All. 153; 1922 All. 68 ; 1923 All. 551, *Foll.*) [P. 182, C. 2]

In such a case even if the Court purports to deliver judgment on merits, the order is to be treated as *ex parte* decree, for the setting aside of which the procedure in O. 9, R. 13 is to be followed. [P. 182, C. 2 and P. 183, C. 2]

Janki Prasad—for the Applicant.

Gulzari Lal—for the Opposite parties.

Dalal, J.:—We shall consider in this judgment the facts of Suit No. 86 of 1920. There is a connected revision relating to a decree passed in Suit No. 124 of 1920. To avoid confusion, we shall deal with the decree in the former suit as from the point of view of the respondents to this application, the decree in Suit No. 86 of 1920 is more in their favour.

This Suit No. 86 of 1920 after various postponements was adjourned on the 23rd June, 1921, on the application of the defendant Ramadhin for the production of defence evidence. 3rd August, 1921, was the date fixed for hearing and on that date the defendant did not appear in person, nor did any pleader of his appear. He did not put forward any evidence for the defence. The Court thereupon wrote a judgment decreeing the plaintiff's suit for redemption.

It is argued here on behalf of the respondents that the decree purports to be one passed under Order 17, rule 3. No order or rule is mentioned in the judgment, but in the order sheet it is mentioned that the decree is passed under Order 17, rule 3. Subsequently, the defendant, treating this decree as one passed *ex parte* under Order 17, rule 2 applied for re-hearing under Order 9, rule 13. The trial Court of the Subordinate Judge decided that the application did not lie and that the defendant ought really to appeal from the decree passed on the merits under Order 17, rule 3. On appeal to the District Judge, that Court came to the same conclusion and dismissed the appeal. This is a revision from the order of the District Judge.

It was first argued by the respondents' learned counsel that no application in revision lay, because the lower appellate Court had decided rightly or wrongly that the original decree was passed under Order 17, rule 3 and that therefore no application for re-hearing lay to the trial Court. In our opinion the provisions of section 115 will apply if we hold that the application was one for re-hearing and the District Judge refused to exercise the jurisdiction vested in him of hearing an appeal from the refusal of the trial Court to grant an application for re-hearing. It will depend upon our subsequent decision whether the lower appellate Court has exercised its jurisdiction or failed to do so.

Coming to the question whether the decree ought to have been passed in the redemption suit under rule 2 or rule 3 of Order 17, our opinion is that the decree in such a case should be passed under rule 2 even where a party has taken time to produce evidence and on the date fixed for hearing of that evidence he is absent. Rule 2 comes first in the order of precedence. It lays down that "where on any day to which the hearing of the suit is adjourned the parties or any of them failed to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 or make such other order as it thinks fit". When a party is not present the Court is bound to proceed under this rule and cannot proceed under the later rule, rule 3.

The next question is whether the words " make such other order as it thinks fit " include an order under rule 3. It has been held by a Bench of this Court in *Ram Charan Lal* v. *Rughubir Singh* (1) that on the proper interpretation of Order 17, rule 2 a Court cannot pass a judgment on the merits under cover of the words " make such other order as is thinks fit ".

(1) 1923 All. 551=45 All. 618=21 A.L.J. 495=4 L.R. A. Civ. 294.

The other order referred to could only mean an order for further adjournment. Mr. Justice Lindsay who delivered the judgment of the court relied on the Bench ruling of *Phul Kuar* v. *Hashmatullah* (2). There has been a certain amount of conflict of authority on this point. In *Gaura Bibi* v. *Ghesitiya* (3) where a suit was dismissed on an adjourned date of hearing on the ground that the claim was not proved, the court held that an application for restoration did not lie under Order 9, rule 4, the plaintiff's remedy being by way of appeal against the court's decree. This ruling of the Bench was followed by a single Judge of this Court, Mr. Justice Tudball in *Ganga Ram* v. *Chhiddu Singh* (4). From observations made by the learned Judge on page 766 of the report, it appears that he was not in agreement with the opinion expressed in the Bench ruling. Next in order is a Bench ruling of 1915 in 37 All. 460, already referred to, by the learned Chief Justice and Mr. Justice Banerji, who observed in the course of their judgment "We are of opinion that in a case like the present the Court ought not to have decided the suit on the merits but ought, if it did not intend to give the plaintiff or his pleader any other opportunity of appearing, to dismiss the suit for default of appearance."

As already pointed out, this case was followed in 1923 in the ruling reported in 21 A.L.J. 495. At the end of 1920 and in 1921 there were two other cases. In *Jangpal Singh* v. *Kushalpal Singh* (5) the judgment of Mr. Justice Piggott is printed on page 103. The learned Judge in a case like the present was of opinion that the proper order would be one of an *ex parte* decree under Order 17, rule 2. In the same volume is reported the case of *Rukam* v. *Tara Chand* (6). The learned Judge Mr. Justice Banerji was of opinion that when one of the parties was absent the proper order would be one under Order 17, rule 2 and the order must be construed to be one passed under that rule, although it purports to be an order of dismissal or decree on the merits.

We agree with the observations of the learned Judge that the Court must be taken to have done that which it could only do under the provisions of the law. It is clear therefore that according to the trend of recent rulings of this Court, excepting the ruling reported in 8 A.L.J., the proper decree in a suit under the circumstances of the present case would be one of an *ex parte* decree.

The respondent's learned Counsel argued that once the Court passing the decree purported to act under Order 17 rule 3 this Court was bound by such action and must accept that the decree was passed under that rule. In support of this contention a Full Bench ruling in the case of *Lalta Prasad* v. *Kand Kishore* (7) was quoted. In that case the point did not really arise. The question was whether an order purporting to have been passed under section 102 of the Code of 1882 dismissing a suit in default should be construed as one under that section or one under section 158.

We were referred to certain observations of the learned Chief Justice that though the naming of a section is not conclusive it may be a useful piece of evidence in construing the order which must be read and construed as a whole. This opinion does not imply that when a Court has acted under a wrong section or quoted a wrong section, the party complaining against that order cannot take action as if the correct procedure had been adopted. It would be interesting to note that Mr. Justice Benerji was a party to the Full Bench ruling and was also the Judge who delivered the judgment which we have already referred to and which is reported in 20 A.L.J.R. 123. We have quoted from that judgment to indicate that learned Judge's opinion that a Court must be presumed to have passed such an order as it could pass according to law, whatever section it may have mentioned in its order.

We are of opinion that the decree was passed *ex parte* and the defendant was entitled to apply for a re-hearing. Both the Subordinate Courts have failed to exercise a jurisdiction vested in them.

Mukerji, J.:—I entirely agree. But having regard to the fact that there has been some conflict of opinion on the point raised in these applications for revision I wish to make one observation.

---

(2) (1915) 37 All. 460=29 I.C. 553=13 A.L.J. 679.
(3) (1911) 34 All. 123=12 I.C. 603=8 A.L.J. 1265.
(4) (1912) 9 A.L.J. 763=14 I.C. 119.
(5) 1923 All. 163=20 A.L.J. 97.
(6) 1922 All. 68=20 A.L.J. 123.
(7) (1899) 22 All. 66=1899 A.W.N. 176 (F.B.).

It has been said that where in spite of the fact that one of the parties to a suit is absent the Court proceeds to decide the case on the merits and not according to the actual circumstance of the case, namely, one of the parties is absent, the remedy of the absent party by an application either for re-hearing or for restoration is barred, and his only remedy is by way of an appeal.

It is therefore admitted that there is a remedy. The question is which is the proper remedy. I will take an extreme case. Say a defendant obtained time to produce his witnesses. On the date fixed for hearing he did all he could do to arrive at the Court in time, but there happened to be a railway accident and he and his witnesses were delayed. Where is he to prove the facts? It must be conceded that the defendant was prevented by a sufficient cause from appearing and he must have a redress. But if the remedy is by way of appeal, will he be expected or will he be allowed to produce evidence in the appellate Court to prove that he had a sufficient reason for his non-appearance? Will the appellate Court entertain fresh evidence or will it dispose of the appeal on merits as recorded on the file of the trial Court? Clearly then the remedy, if one is not denied to the absent party, would be by an application to the Court of first instance and not by way of an appeal. The act of the Court, namely its attempt to decide the case on the merits, cannot prevent a party from seeking his proper remedy.

By the Court.—The orders of the Courts below are set aside and the Court of first instance is hereby directed to hear the application under Order 9, rule 13 of the Civil Procedure Code. Costs here and heretofore to abide the result.

Application allowed.

1925 Allahabad 184.

DANIELS, J.

Mt. Bahal Kuar—Defendant-Appellant.

v.

Narain Singh—Plaintiff Respondent.

Stamp Reference in F.A. No. 360 of 1924, decided on 24th July, 1924.

Court Fees Act, S. 5—Taxing Officer can decide as to deficiency of Court-fee on plaint or memo. of appeal in ower Courts.

By S. 5 the power of the Court to decide disputed questions of Court-fee is vested in the Taxing Officer subject to his power to refer the matter to the Taxing Judge when a question of general importance arises. This authority extends to all such questions arising in the High Court, whether the deficiency alleged is on the memorandum of appeal in the High Court or on a plaint or memorandum of appeal filed in the Court below. [P. 184, C. 1.]

N. P. Asthana—for the Appellant.

Judgment:—The relief asked for in this case was a declaration that the plaintiff was the owner of certain property and an injunction restraining the defendant, who claims the property, from interfering with the plaintiff's possession. This is clearly a claim for declaration with consequential relief. The right to obtain an injunction against the defendant flows from the declaration which the plaintiff seeks of his right to the property. If the plaintiff has that right he is entitled to an injunction in consequence. If he has not that right he is not entitled to an injunction. The Taxing Officer in fact felt no doubt on this point. The only reason that he has made this reference is that he was doubtful of his power under section 12 (ii) of the Court Fees Act to decide that the plaint had been under-stamped in the Court below to the detriment of the revenue. Having regard to section 5 of the Act I have no doubt that this power is vested in him. By that section the power of the court to decide disputed questions of Court-fee is vested in the Taxing Officer subject to his power to refer the matter to the Taxing Judge when a question of general importance arises. This authority extends to all such questions arising in the High Court, whether the deficiency alleged is on the memorandum of appeal in this Court or on a plaint or memorandum of appeal filed in the Court below. This is my answer to the reference. The appellant is allowed up to November 4th to make good the deficiency in Court-fee.

Reference answered in affirmative.

✱ 1925 ALLAHABAD 185

SULAIMAN AND MUKERJI, JJ.

Tulli and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 532 of 1924, Decided on 11th September 1924, from an order of the S. J., Mainpuri.

(a) *Criminal P. C., S. 288—Court can rely on witnesses' statements before committing Magistrate though varied before the S. J., when satisfied of their truth.*

Where the Court is satisfied that statements made by the witnesses before the committing Magistrate were true and the statements made by them subsequently before the Sessions Judge were false the Court is at liberty to rely upon the previous statements. [P 186 C 2]

✱ (b) *Penal Code. S. 302—By-standers encouraging act are guilty.*

Persons who are present at a murder and support the same are as much guilty of murder as the murderer himself. [P 187 C 1]

St. C. Thompson—for Appellants.

R. Malcomson—for the Crown.

Facts.—This was a criminal appeal from a judgment convicting the accused persons under S. 302 of the Indian Penal Code of the murder of one *Mt.* Saraswati and sentencing them to transportation for life In the opening portion of his judgment the learned Judge said:—

"The facts of this case disclose what might be termed a tragedy ending in the death of a helpless and unprotected widow at the hands of her own brother-in-law in a most savage and brutal manner in order to possess the property left by her husband".

In spite of this he refrained from inflicting, as he put it, the extreme penalty of law on the accused persons whom he found guilty of the murder and he sentenced them to transportation for life. A notice was accordingly sent to the appellants to show cause why, in the event of their conviction being upheld, the sentence passed on them should not be altered to one of death.

Mt. Saraswati was admittedly murdered on the night between the 25th and the 26th of February, 1924 in the house of Man Singh, her brother-in-law. At 8 a.m. in the morning a report was made by Laturi chaukidar to the effect that Jhandu Singh had told Pirthi Singh and Dwarka Singh that in the previous night at about 2 o'clock Man Singh, Tulli and Badri had murdered *Mt.* Saraswati.

The prosecution case is that *Mt.* Saraswati was the widow of the deceased brother of Man Singh. During the life-time of Zor Singh, her deceased husband, there was an ill-feeling between the brothers and Zor Singh left the ancestral village Tindauli and went over and began to live in Mahgawan. He died about July 1923. An application for mutation of names was made on behalf of *Mt.* Saraswati, but it was opposed by Man Singh on the allegation, among others, that his son had been adopted by the deceased and was the rightful heir. In these proceedings *Mt.* Saraswati was supported by Dwarka Singh, a cousin of Zor Singh. Some time, while the revenue case was pending, *Mt.* Saraswati left Mahgawan and came to Tindauli and instead of going to Man Singh's house she stopped in Dwarka Singh's house for some months. Man Singh apparently did not like the idea of *Mt.* Saraswati staying in Dwarka Singh's house, and while Dwarka Singh was absent from his house, Man Singh and his friends forcibly brought her over and kept her in his own house. Dwarka Singh returned on the 25th of February and naturally took umbrage over the forcible abduction of *Mt.* Saraswati. It was rumoured that she had not taken any food for some time, and to satisfy Dwarka Singh a note was sent to him supposed to have been written by the lady to the effect that she had

taken some food. On that date, however, Dwarka Singh got a report made at the police station ragarding the abduction. Dwarka Singh's son, Thakur Harnath Singh, who is a Deputy Collector, arrived the same evening and an attempt was made to settle the dispute by means of a panchayat. A panchayat was called consisting of some eight men, among whom the present accused, Tulli and Badri, were present, and it lasted till about midnight. It appears that Man Singh was not willing that *Mt.* Saraswati should live in Dwarka Singh's house and was agreeable to her going away to live to Mahgawan. It was settled by the panchayat that next morning she should go for an hour to Dwarka Singh's house and thence go on to Mahgawan. The panchayat dispersed; but soon after the panchayat had dispersed the murder took place. The prosecution case is that Man Singh sent for Jhandu Singh and actually told him that he had committed the murder and requested him to look after his family. Jhandu Singh informed the mukhia, Pirthi Singh, who went over to Dwarka Singh and informed him about this murder. It was after this that the chaukidar was sent and a report made at the police station. The Sub-Inspector arrived next morning and found that the dead body was lying in a room inside Man Singh's house. The neck had been cut and there were several wounds on the body.

Judgments.—[His Lordship after setting out facts as given above and dealing with the evidence proceeded as follows:—]

It has been strongly contended on behalf of the appellants that the statements of the witnesses who have resiled from their former statements, though admissible, are not satisfactory proof of the accuseds' complicity. Reliance has been placed on three cases roported in *Queen-Empress* v. *Jeochi* (1), *Queen-Empress* v. *Nirmal Das* (2) and *Emperor* v. *Dwarka Kurmi* (3). It was conceded in all those cases that previous statements of the witnesses made before the Committing Magistrate were admissible though of course ordinarily they should not be acted upon if the witnesses have gone back upon them and there is no evidence to corroborate them. It was nowhere laid down that such statements are not evidence and can never be acted upon. We may also point out that in the amended Code of Criminal Procedure S. 288 now stands as follows:—

"The evidence of a witness duly recorded in the presence of the accused under Chapter 18 may in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case *for all purposes subject to the provisions of the Indian Evidence Act*". The words (here Italicized) have been newly added. It is quite clear that if we are satisfied that the previous statements made by the witnesses are the true statements and the statements made subsequently are false, then it is open to us to rely upon the previous statements for the purpose of upholding the conviction of the appellants.

Having regard to the state of evidence and the opinion already expressed, we have no doubt in our mind that Badri and Tulli who were partners in the cultivation of Man Singh and who, on our finding, were in the house that night, did go inside the room where *Mt.* Saraswati was sleeping and came out with Man Singh who had a gandasa in his hand. The murder was obviously committed during that interval.

It is next to be seen whether on this finding it is possible to convict the appellants under S. 302. It has been urged that there is really no evidence that they took part in the murder. It is also urged that in some of the previous statements of the witnesses it was said that Man Singh admitted that he himself had killed the deceased. We are prepared to assume that

(1) [1898] 21 All., 111=(1898) A.W.N. 196
(2) [1900] 22 All., 445=(1900) A.W.N. 169
(3) [1906] 28 All., 683=(1906) A.W.N. 187=3 A.L.J. 352=4 Cr.L.J., 61.

there is no direct evidence on the record to suggest that the accused physically assisted Man Singh in murdering the deceased. One cannot, however, get over the fact that they did go in with Man Singh and awakened *Mt.* Gayasi and asked her to go out. They never used to sleep in the house and had stayed there for the night. They were undoubtedly present at the time when and at the place where the murder was actually committed. Even if they did not actively assist Man Singh by, for instance, holding *Mt.* Saraswati, they must have by their very presence given moral support and abetted. It is impossible now to find out what actually happened inside the room, as Man Singh is absconding and the only other person who could have given evidence against the appellants is now dead. But having regard to the circumstances mentioned, we are satisfied that it must be held that the accused were guilty of the murder just as much as Man Singh was. Even if they did not take part in the actual murder, they would under S. 114 of the Indian Penal Code be deemed to have committed such act or offence.

As we have already remarked, the murder was a cold-blooded and altogether an unjustified one and was carried out in a most brutal manner. We are accordingly of opinion that the accused persons must be convicted under S. 302 and sentenced to death.

We accordingly dismiss the appeal and uphold the conviction of the appellants under S 302 of the Indian Penal Code, but enhance the sentence to one of death and we order that both the accused be hanged by the neck till they are dead and that this order be carried out according to law.

Appeal dismissed.
Sentence enhanced.

✱ 1925 ALLAHABAD 187

MUKERJI AND DALAL, JJ.

Kishori Mohan—Applicant.

v.

Chhanga Lal—Opposite Party.

Civil Rev. No. 168 of 1923, Decided on 22nd July, 1923, from the order of Dt. J., Farrukhabad, D/- 17th Sep. 1923.

(a) *Civil P. C. S. 115—No revision would be accepted if the lower Court has exercised discretion under S. 152 rightly.*

Where a Dt. Judge, in the exercise of his discretion vested in him under S 152, refused to correct a decree passed by a Court subordinate to him and confirmed by him on appeal on the ground that the applicant was guilty of laches: *Held*: that the discretion was rightly exercised and that the High Court would not interfere. [P 188 C 2]

✱ (b) *Civil P. C. S 152—Correction of error is discretionary.*

Under S. 152 of the Civil P. C. there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. [P 188 C 2]

Durga Prasad—for Applicant.

Bishweshwari Prasad—for Opp party.

Judgment—This application in revision came before one of the learned Judges of this Court and he referred the case to a Bench of two Judges, being of opinion that there was somewhat of a conflict between two cases decided by this Court, *viz*—*Balgovind Rai* v. *Sheoraj Rai* (1) *Sahadeo Gir* v. *Deo Dutt Misir* (2). We shall consider whether there is really any conflict between the two cases or not in the course of this judgment. But it will be necessary to state the facts of the case.

It appears that the applicant before us was a defendant in a suit for sale, he having been treated as a subsequent purchaser. The Subordinate Judge passed a decree for sale on the 10th of December 1920. The decree that was framed was incorrect in so far as it ordered the payment of a larger sum than was really due on a proper calculation of the amount payable according to the judgment of the Subordinate Judge. The applicant submitted to the decree although it ordered him to pay a sum larger than was really due under the judgment of the Subordinate Judge. The plaintiff was dissatisfied with the decree as he

(1) (1918) 16 A. L. J. 451=46 I. C. 376
(2) (1915) 37 All. 323=29 I. C. 50=13 A. L. J. 449.

claimed a larger amount. He filed an appeal and the learned District Judge dismissed the appeal on the 12th of July 1921. A final decree for sale followed on the 6th of May 1922. On the 9th of March 1923 an execution of the final decree for sale was taken out by the plaintiffs and the defendant applicant paid up the amount for which the decree was executed and then made an application to the learned Subordinate Judge asking him to correct his decree. This application was made on the 21st of March 1923. The opposite party, the plaintiff, took objection to the hearing of this application on the ground that the court of the District Judge was the only court which could correct the decree if any correction was needed. The applicant thereupon made an application to the learned District Judge on the 21st of July 1923. On the 8th of September 1923 the learned Judge passed the order which is sought to be revised. He held that there ought to be some limit to a party's making an application for correction of a decree and he refused to grant the application although he thought that there was some error in the decree of the learned Subordinate Judge.

In this Court in the case of *Balgovind Rai* v. *Sheoraj Rai* (1) there was an application in revision against the order of a District Judge who amended a decree which he had affirmed in appeal and which was passed by a Munsif. In the circumstances of that case this Court held that, the District Judge had no jurisdiction to correct the error in the decree of the Munsif. It will be noticed that the decree of the Munsif had been passed under the old Code and the language employed by their Lordships who heard the application shows that they were considering the provisions of S. 206 of the Code of Civil Procedure. It is true that S. 206 of the old Code is not specifically mentioned, but the learned Judges used the following language: —

"It was necessary for the applicant to show not a variance between the judgment of the Munsif and the decree of the Munsif, but a variance between the judgment of the District Judge and the decree of the District Judge".

Clearly therefore they were not considering the language of S. 152 of the present Code of the Civil Procedure. In the case of *Sahadeo Gir* v. *Deo Dutt Misir* (2) already referred to, this Court had no hesitation in ordering the correction of a judgment and a decree of a subordinate court. There was, however, no appeal to any appellate court and this Court was concerned only with one decree and one judgment. In our opinion there is really no conflict between the two cases mentioned.

Coming to the present case, from the statement of facts already made, it would appear that the applicant has been guilty of laches to a very great extent. He did not examine the decree that was passed against him in the first instance. There was an appeal and he was a party to that appeal. He did not bring the fact to the notice of the appellate court that the decree of the court below had been framed for a sum in excess of what was really due under the judgment of that court. When the final decree was passed he did not bestir himself. When the decree was executed he quietly paid up and then discovered that he had paid a sum larger than what was really due by him. Under S. 152 of the Civil Procedure Code, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the court and the discretion has to be exercised in view of the peculiar facts of each case. In this case the District Judge did exercise that discretion and was of opinion that in view of the peculiar facts of the case he should not correct the mistake which was after all for a sum which was about one-seventh of the total amount payable. We cannot say, sitting in revision, that the learned Judge failed to exercise his jurisdiction or that in the exercise of his jurisdiction he acted illegally or with material irregularity.

We therefore dismiss the application with costs which will include counsel's fees in this Court on the higher scale.

Application dismissed.

1925 ALLAHABAD 189

KANHAIYA LAL, J.

Ram Dulare and others—Plaintiffs—Appellants-

v.

Sahdeo and others—Defendants—Respondents.

S. A. No. 387 of 1923, Decided on 17th July 1924, against a decree of the Sub. J., Mirazpur, D/-16th January, 1923.

(a) *Landlord and Tenant—Tenants successors in interest are bound by rent decree aganist tenants.*

The successors-in-interest of tenants are bound by the landlord's decree for arrears of rent against the tenants and a valid sale can be effected to satisfy that liability. [P. 190 C.1]

(b) *T. P. Act, S. 76 (c)—Mortgagee bound to pay only rent on mortgaged property accruing after mortgage.*

A mortgagee under S. 76 is not bound to pay the arrears of rent which accumulate in respect of that portion of a fixed rate holding which is not mortgaged to him. What he can be made liable for under that section is the rent or other charges which fall due in respect of the mortgaged property after the date of the mortgage. [P. 190 C. 1]

H. Cecil Desanges—for Appellants.

Ram Nama Prasad—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-appellants for the recovery of possession of a fixed rate holding, measuring 8 *bighas* 18 *biswas* situated in the village Bisora Khurd with mesne profits for the three years preceding the suit. It appears that Bisheshar and Durga were brothers, who owned 22 *bighas* 10 *biswas* of a fixed rate holding in the village Misrapura, and 17 *bighas* 1 *biswa* of a fixed rate holding in the village Bisora. Durga died, leaving a widow *Mt.* Mahesha. Bisheshar died next, leaving a widow *Mt.* Neola. The plaintiffs are the sons of the daughters of Bisheshar by *Mt.* Neola. Their allegation was that Bisheshar and Durga lived separately; but the Courts below found that they were joint. Anyhow the fixed rate tenancies in question were held after the deaths of Durga and Bisheshar by their widows *Mt.* Mahesha and *Mt.* Neola. *Mt.* Mahesha died in April 1893. *Mt.* Neola died in 1912. They had in their life-time mortgaged 2 *bighas* 19 *biswas* of land in the village Misrapura, it is said, with possession in favour of Bindeshri on the 20th October 1885. They had similarly mortgaged 3 *bighas* 10 *biswas* of land in the village Bisora with possession in favour of Dhanpat in 1891. The remainder of the fixed-rate holding in either place was in their possession.

In 1892 *zemindars* of the village Misrapur filed a suit for arrears of rent for 1297 to 1299 *Fasli* in respect of the fixed-rate holding situated in the village Misrapura, including the land mortgaged with Bindeshri, and obtained a decree for Rs. 58-1-6 to which Bindeshri and both the ladies were parties. It is alleged that a portion of the above arrears was due in respect of the land mortgaged with Bindeshri and the rest was about the remainder of the fixed-rate holding in that village, which was held by the ladies. Neither the mortgagee nor the ladies, took any steps to pay the decretal money. The result was that the *zemindars* got the motgagees and the ladies ejected from the entire fixed-rate holding in the village Misrapura under S. 35 of the N. W. P,-Rent Act (XII of 1881) and also took steps to realise the decretal money by the arrest of the mortgagee. The mortgagee then paid Rs. 76-2 to the *zemindars* and secured his release; but he did not do so till after the ladies and he himself had been ejected from the fixed-rate holding including the portion which was included in the mortgage.

Bindeshri next filed a suit for the recovery of the money paid by him to the *zemindars* against *Mt.* Neola as *Mt* Mahesha had died meanwhile. That suit was decreed *ex parte*; and in execution of that decree he brought 17 *highas* 1 *biswa* of the fixed-rate holding situated in the village Bisora to sale, and purchased it himself. In other words he discharged by that method a liability a portion of which was, at all events, due by himself.

The present suit has been filed by the plaintiffs to get rid of the auction-sale and to recover 8 *bisghas* 18 *biswas* out of the fixed-rate holding, which was sold by auction and purchased by Bindeshri, the father of the present contesting defendants, on the 21st

May 1896. The original mortgage deed, said to have been executed by *Mt.* Mahesha and *Mt.* Neola in favour of Bindeshri on the 20th October 1885, has not been filed nor proved, and in the absence of anything to show that there was a contract to the contrary it was the duty of Bindeshri, the mortgagee, under S. 76 clause (*c*) of the Transfer of Property Act (IV of 1882), to pay any rent or other charges which fell due in respect of the mortgaged property after the date of mortgage. If he did not pay those arrears the *zemindars* rightly made him a party to the suit for the recovery of those arrears and they were equally justified in ejecting him from the mortgaged land and seeking to recover the decretal money by his arrest and imprisonment. He was not, however, liable for the arrears of rent, if any, which were due in respect of that portion of the fixed-rate holding which was not mortgaged with him, and he was entitled to recover what he had paid on that account from *Mt.* Neola or her successors-in-interest.

There are no materials on the record to indicate how much of the rent-decree was due in respect of the mortgaged portion, and how much was due in respect of the portion, which was not covered by the mortgage. Had the mortgagee paid the money when the notice was issued to him under S. 35 of the N. W. P. Rent Act (XII of 1881) the holding would have been saved, and he would have been entitled, in equity, to recover from the ladies the amount which he would have paid on their account. He did not, however, do so, and waited till the *zemindars* took steps to execute the decree by his arrest. He could not in those circumstances have sued to recover that portion of the amount which he was liable to pay himself as a mortgagee of a portion of the holding.

The rest of the decree for arrears of rent would, however, be binding on the ladies and also their successors-in-interest, namely, the present plaintiffs, and as held in *Jhari Koer* v. *Bijai Singh* (1) a valid sale could be effected to satisfy that liability. The learned Counsel for the plaintiffs-appellants relies on the decisions in *Kristo Gobind Mazumdar* v. *Hem Chander Choudhury* (2) and *Bisheshar Das Dey* v. *Kaval Kumar Dat* (3) and his contention is that the sale aforesaid will be deemed to have passed only the life-interest possessed by *t.* Neola. The decisions in those cases were, however, based on the provisions of the Bengal Tenancy Act, and the peculiar circumstances there established; and they cannot be regarded as an authority for the proposition that in all cases decrees for arrears of rent must necessarily be treated as a personal liability. The entire tenure was liable to be lost to the family for the non-payment of the arrears decreed in process of execution partly by sale and partly by ejectment. The entire liability cannot, therefore, be regarded as personal. As the materials on the record are not sufficient to determine the extent of that liability, the lower Appellate Court is directed to determine, after taking such additional evidence as the parties may adduce, how much of the debt for the payment of which the property in dispute was sold, was binding on *Mt.* Neola and *Mt.* Mahesha or on their reversionary heirs.

Three months' time will be allowed for the return of the finding and ten days will be allowed after the return of the finding for filing objection.

Case remanded.

(1) 1924 All. 109=45 All. 613=21 A. L. J. 563=5 L.R.A. Rev. 11

(2) [1889] 16 Cal. 511.

(3) [1912] 17 C.W.N. 337=16 I. C. 437.

✱ 1925 ALLAHABAD 190

KANHAIYA LAL, J.

Gopi Koeri—Defendant—Appellant.

v

Mt. Raj Roop Koer and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 525 of 1922, Decided on 24th July, 1923, against the decree of the Dt. J., Benares, D/- 11th March, 1922.

✱ (a) *T. P. Act S. 35 - Life tenant granting perpetual lease—Reversioner accepting rent from lessee—Ignorance of true facts—No election arises.*

Where a perpetual lease was granted by the holder of a life estate and the reversioner accepted rent from the lessee for three years after the lessor's death.

Held: that this alone could not support a plea of election by the reversioner unless the latter was aware of his duty to elect, i. e., of the perpetual lease. [P 200 C 2]

✱ (b) *Hindu Law—Widow has larger power than holder of life-estate in-lieu of maintenance.*

A Hindu widow, holding a life-interest has a larger power than a lady holding an estate in lieu of maintenance for her life without any power of alienation. [P 200 C 1]

✱ (c) *T. P. Act, S. 51—Perpetual tenant induced by life-tenant—Ejection by Reversioner—Improvements made bonafide should be made good.*

Where the holder of a life-estate granted a perpetual lease and after his death the reversioner sought to eject the lessee.

Held: that the latter could claim the value of the improvements made by him if he had made them in the *bona fide* belief that he as the lessee was entitled to make them. [P 200 C 2]

P. L. Banerjee - for Appellant.

K. N. Katju—for Respondents.

Judgment.—The dispute in this appeal relates to plot No. 735 *khasra* which is situated in Mauza Shakulpura outside the skirts of Benares City. The village Shukulpura was granted to Mt. Asmeda Kanwar by the father of the plaintiff on the 9th of April 1889 by an agreement which provided that she was to hold the same in her possession and enjoy the profits thereof for her maintenance during her life-time without any power of alienation.

While Mt. Asmedh Kunwar was so in possession of that village she granted a perpetual lease of the plot in dispute to Gopal, Ganga and Gopi for a premium of Rs. 100/- on an agreement that the lessees would pay her a rent of Rs. 12/- per annum and be entitled to use the land for planting a grove, constructing buildings or for any other purposes they liked. On the strength of that lease a grove consisting mostly of guava trees, was planted over the said land by the lessees and a ridge or mud wall was built around it for the protection of the trees.

The lease was granted on the 11th of May 1905. On the 16th of March 1918 Mt. Asmedh Kunwar died. The plaintiff as the successor-in-interest of her father, the original proprietor of the village, sues to eject the lessees from the land of the said grove and for mesne profits, contending that the lease in question became inoperative after the death of Mt. Asmedh Kunwar Gopal and Ganga have since sold their interest in the said grove to Gopi for Rs. 100/- on the 12th of August 1916. The defence of Gopi was that the plaintiff had accepted the rent of the land in question since the death of Mt. Asmedh Kunwar, that the defendant had spent about Rs. 2000/- in making improvements over the said land, and that the plaintiff was not entitled to the relief claimed.

The trial Court found in favour of the plaintiff and allowed the defendant to remove all the constructions made and trees planted by him within a month from the date of its decree. The lower appellate Court upheld the decree for possession but dismissed the claim for mesne profits, holding that the plaintiff was not entitled to the same by reason of her having accepted the rent of the holding from the contesting defendant for three years after the death of Mt. Asmedh Kunwar.

It is urged on behalf of the defendant-appellant that the acceptance of rent by the plaintiff operated as a ratification by her of lease granted by Mt. Asmedh Kunwar and that in any case the plaintiff is not entitled to claim possession without paying for the improvements made by the defendant during the subsistence of the lease. S. 35 of the Transfer of Property Act lays down that where a person proposes to transfer any property which he has no right to transfer and as a part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it, but an acceptance of a benefit by the person on whom it is conferred does not cons-

titute an election by him to confirm the transfer, unless he is aware of his duty to elect and of those circumstances, which would influence the judgment of a reasonable man in making an election. The receipts filed show that the rent in the present case was received by Gaya Prasad, an agent of the plaintiff, and there is nothing to show that either the plaintiff or her agent was aware of the circumstances in which the lease was granted or of the terms on which it was held by the person paying the rent. There can be no election where the person receiving the rent is not aware of his duty to elect or in other words of the fact that a perpetual lease had been granted by the intermediate holder which it was in his power to repudiate or confirm. An acceptance of rent in these circumstances even for a period of three years cannot operate as an estoppel or waiver by the plaintiff of the invalidity of the lease after the death of Mt. Asmedh Kunwar.

The decision in *Modhu Sudhan Singh* v. *Rooke* (1) does not apply, because in that case the rent had been accepted with a full knowledge of the *patni* lease, sought to be repudiated. In fact the tenant had filed a petition, depositing the rent in Court to the credit of the oppcsite party, stating that the rent was being paid on account of a *patni* lease granted to him by the intermediate holder. The intermediate holder in that case was a Hindu widow. On the said deposit having been made an application was filed on behalf of the reversionary heir of the said widow agreeing to accept the said payment. A Hindu widow, holding a life interest has a larger power than a lady holding an estate in lieu of maintenance for her life without any power of alienation. In *Beni Prasad Koeri* v. *Dudhnath Roy* (2) where a grant of a village for maintenance was made by a zamindar to his nephew, operating only for life, and the grantee executed a permanent lease in favour of another, it was held in a suit brought by the successor-in-interest of the original grantor that the mere acceptance of rent by such successor-in-interest at the rate stipulated in the permanent lease could not have the effect of confirming the lease in its entirety : nor could the duration of the lease exceed that of the original grant. In the absence of any evidence to show that the plaintiff or her agent was aware of the terms and conditions of the lease, under which the grove was planted, an acceptance of rent from the person in possession of the land could not estop the plaintiff from claiming possession and seeking to avoid the lease so far as it granted the plaintiff a perpetual right.

As regards the improvements alleged to have been made by the lessees and referred to in the written statement and in the grounds of appeal to the Court below, it is not clear from the evidence when they were made and whether they were made in good faith within the meaning of S. 51 of the Transfer of Property Act. No issue was framed on that point by the Court of first instance or evidence taken. The lower appellate Court is therefore directed to determine after taking such additional evidence as parties may adduce :—

1. Whether the improvements in question were made by the defendants or any of them in good faith, believing that they were absolutely entitled as lessees to make the same ?

(2) Whether these improvements were made in the life-time of Mt. Asmedh Kunwar or partly in her life time and partly after her death and the acceptance of rent by the plaintiff, and if so to what extent ?

(3) What was the value of the said improvements, as it would accrue to the transferee, if the ejectment is effected ?

Three months time will be allowed for recording the findings On receipt of the findings ten days will be allowed to the parties for objections.

Case remanded.

---

(1) [1898] 25 Cal. 1=22 I. A. 164=1 C. W. N 433=7 M. L. J. 127=7 Sar. 194 (P. C.)
(2) [1900] 27 Cal. 156=26 I. A. 216=4 C.W.N. 274=7 Sar. 580 (P. C)

1925 ALLAHABAD 193

STUART, J.

Bhup Narain Rai and others—Defendants—Appellants

v.

Sri Thakur Radha Krishna and others—Plaintiffs—Respondents.

Second Appeals Nos. 1052 to 1060 of 1922, Decided on 21st January, 1924, against the decree of the Dt., J., Ghazipur, D/- 20th April 1922.

Landlord and Tenant—Land eventually distributed in several villages—Rent Suit for each village will lie separately.

Where the lands held in tenure by the defendants and their predecessors in title got eventually distributed into several separate villages and the fields in each village were amalgamated into a separate area held in occupancy tenure.

Held: that a separate suit for rent in respect of each village could lie. [P. 193, C. 2.]

K. N. Laghate—for Appellants.

U. S. Bajpai—for Respondents.

Judgment.—These nine connected appeals arise out of nine suits for arrears of rent brought against the appellants. It appears that as far back as 1868 certain zemindars in what was known as the *taluka* Birpur in the Gnazipur district agreed that the predecessors in interest of the present appellants should cultivate 96 bighas 19 biswas in the *taluka* at a certain rent. At the next settlement the area and the rent were increased. As time has gone on the fields held in tenure by these persons have been distributed amongst no less than nine villages and the fields in each village have been amalgamated into a separate area held in occupancy tenure. These appeals arise out of suits for arrears of rent in respect of these nine areas. The main point pressed in appeal by the learned Counsel for the defendants—appellants is that the suits should be dismissed *in toto* because nine suits have been brought instead of one. His argument is that all these nine areas are one holding and that under the law one suit should have been brought for the arrears of rent of one holding. The first point to consider is whether, these areas are one holding or nine holdings. Now there might be some force in an argument to the effect that originally 96 bighas and 19 biswas were one holding because the whole area at that time consisted of parcels of land held under one tenure and one engagement, and it might be argued that when the area increased at the time of settlement it still remained one holding. But once the nine villages were formed (whenever they were formed) it seems to me impossible to hold that the area held in each village under occupancy rights was not a separate occupancy holding. I do not understand how there could be one occupancy holding consisting of fields which lay in nine different villages and nothing could be worse from the point of view of the appellants than deciding in their favour upon this point, for, if it were held, that all this land was included in one holding a decree for arrears of rent in respect of an occupancy holding in one village would suffice to eject them from all nine villages under the provisions of S. 57 Local Act II of 1901. It certainly is true that in the past they were sued in single cases in respect of all the areas and that the areas were treated as one holding. But I think the Courts in the past were wrong, and that the Courts which decided these present cases have taken the right view of the subject. I rely in support of these views on the decision in *Jagannath Prasad* v. *Tore* (1). The facts there were certainly not the same as here fer in that case there was not the slightest doubt as to the separation of the holdings and here the point at any rate is arguable. But the argument derived from the provisions of S. 57 is the same here as it was there. For the above reasons I consider that nine separate suits were rightly instituted.

I now come to the last point. There are a large number of defendants and some were impleaded so late in the day that the recovery of a small portion of the arrears against them was time-barred. The Courts below have awarded this amount against the remainder on the ground that they

(1) [1906] 26 All. 18—3 A. L. J. 611—1906 A. W. N, 253.

shared in the cultivation. I accept his view as correct

I accordingly dismiss these nine appeals with costs on the higher scale.

Appeals dismissed.

1925 ALLAHABAD 194 (1)

WALSH, AG. C. J., AND RYVES, J.

Narain Das and another—Objector—Appellants.

v.

Bankim Chandra Deb—Respondent.

First Appeal No. 190 of 1923, Decided on 19th June 1924, from an order of the Dt. J., Jhansi. D/- 15th May 1923.

Hindu Law—Joint family — Manager — Insolvency of junior member managing family business—Prior transfer by senior members to avoid creditors can be annulled.

On the insolvency of the Manager of a Hindu joint family business, the official receiver can attack colourable transfers of the family property made shortly before the adjudication though such transfers were made by the senior members of the family and the manager was only a junior member. [P 194, C 1]

G. L. Agarwala—for Appellants.

A. Samyal—for Respondent.

Facts.—A junior member of a Hindu joint family who was the manager of the joint family business was declared an insolvent. About 20 days prior to his adjudication certain family properties were transferred to a third person not by the manager junior member but by the senior members of the family. After adjudication the official receiver seized most of the transferred properties. The Dt. Judge of Jhansi decided in the official receiver's favour and against the transferee. The matter then went in appeal to the High Court.

Judgment.—We agree with the decision in *In re Sellamuthu Servai* (1), which fully supports this decision. There is also a decision of this Court in *Bawan Das* v. *Chiene* (2), to the same effect. The appeal must therefore be dismissed with costs.

Appeal rejected.

(1) [1923] 47 Mad., 87.
(2) [1931] 53 All., 316.

1925 ALLAHABAD 194 (2)

DANIELS, J.

Gobind—Defendant—Appellant.

v.

Ammar and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1494 of 1922, Decided on 22nd February 1924, against the decree of the Dt. J., Farukhabad, D/- 8th May 1922.

Agra Tenancy Act, S. 167—Matter within S. 167—Decision of Revenue Court—Civil Court will not try suit calculated to reverse Revence Courts decision.

Where during the continuance in force of an *ex-parte* decree for arrears of rent in defendant's favour and against plaintiffs, plaintiffs sued in Civil Court for declaration that they were joint tenants with defendant.

Held: that as the effect of the suit was to reverse the decision of the Revenue Court, it was barred under S. 167. Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under S. 167 of the Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form. [P 195, C 1]

Baleshwari Prasad—for Appellant.

U. S. Bajpai—for Respondents.

Judgment.—This is an appeal by the defendant in a case in which the plaintiffs asked for and have been given a declaration that they are joint tenants with him in a certain occupancy holding. The only plea pressed at the hearing of the appeal is that the suit is barred by S. 167 of the Agra Tenancy Act. The facts are these.;—The defendant alleging that the plaintiffs were his sub-tenants sued them in the Revenue Court for arrears of rent and obtained an *ex-parte* decree against them. While this *exparte* decree was in force the present suit for a declaration was filed. The defendant pleaded in his written statement that the suit had been instituted on account of the claim for arrears of rent which he had brought against the plaintiffs. It appears from the Munsif's judgment that when the present suit was decided in the trial Court an application for

setting aside the *exparte* decree had been preferred and was pending. That application was afterwards allowed and the learned District Judge states in his judgment that after the Munsif's decision in the present suit the Revenue Court dismissed the suit for arrears of rent.

It is now settled law that the Civil Courts will not entertain a suit the object of which is to reverse a decision of a Revenue Court in a matter which is, under S. 167 of the Tenancy Act, within the Revenue Court's exclusive jurisdiction, and if this is the substantial object of the suit it is immaterial that the plaintiff may have framed his relief in a form in which it could not have been granted by the Revenue Court. The Courts will look to the substance of the matter and not to the form.

In *Narain Singh* v. *Gobind Ram* (1) the plaintiff had sought to eject the defendant as a sub-tenant in the Revenue Court but the Revenue Court had held that the defendant was a sharer in the occupancy holding. It was held that the plaintiff could not thereafter sue for the ejectment of the defendant as a trespasser in the Civil Court. In *Kishore Singh* v. *Bahadur Singh* (2) a suit for ejectment was brought against the respondents in the Revenue Court on the ground that they were sub-tenants. While that suit was pending they sued in the Civil Court for a declaration that they were co-tenants with the appellants in the occupancy holding. It was held that the suit was not entertainable. This is a very similar case to that now before me. The same principle is laid down in *Baljit* v. *Mahipat* (3) and has been recently re-affirmed in the case of *Ram Das* v. *Dubri Koeri* (4).

The present suit is barred by the principle laid down in these rulings. It was brought with the effect of setting aside a decree for ejectment which was then in force. It is irrelevant that the plaintiffs have since been able to get from the Revenue Court a pronouncement that they are not liable to ejectment as sub-tenants. To see whether the suit is mintainable we have to look to the date when it was instituted.

It may further be remarked that it is not entirely correct that the plaintiffs could not obtain from the Revenue Courts substantially the same relief which they seek in this suit. They could do so by means of a suit under S. 95 of the Tenancy Act against the landholder for a declaration of their right as tenants. In such a suit the defendants could have been made parties as persons claiming through the landholder.

The suit being barred by the principle laid down in the rulings cited above the appeal must be and hereby is allowed and the suit dismissed. As on the merits the plaintiffs have been found to be in the right I make no order as to costs.

Appeal allowed.

(1) [1911] 33 All. 523—9 I. C. 1022—8 A.L.J 431.
(2) [1919] 41 All. 97—48 I. C. 470—16 A. L. J. 933.
(3) [1919] 41 All. 203—49 I. C. 118—1 A.L.J. 60.
(4) 1922 All. 336—44 All. 724—20 A.L.J. 606.

1925 ALLAHABAD 195

Full Bench

MEARS, C. J., PIGGOTT AND MUKERJI, J J.

Baijnath Kedia—Petitioner.

v.

King Emperor—Opposite Party.

Criminal Mis. No. 236 of 1924, Decided on 18th November 1924, to revise the order of Governor in Council D/-15th July 1924.

* * (a) *Criminal P. C. (1923) S. 99 D—High Court can only consider whether the document is seditious.*

When an application is made to the High Court under S. 99 B in respect of a document, the High Court is precluded by S. 99 D from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and come within the mischief claimed at by S. 124 A.

[P 196, C 1]

(b) *Criminal P. C. (1923) S. 99 D—Series of books published—Whole series must be looked to.*

Where the applicant is alleged to have published a series of books, the whole series must be looked to, to determine whether the passages contained therein are seditious.

[P 196, C 2]

An extract in a book, stating that the Rowlatt Act was intended "to suppress once and for all all political agitation in the country" is a statement known by the writer to be false, and made by him with the deliberate intention of promoting disloyalty and hatred as also a statement that that Act, a Government measure, gave to the police full power to harass all innocent people. [P 197 C 1]

Peary Lal Benerjee, K. N. Laghate and K. N. Basu—for Petitioner.

L. M. Banerji—for the Crown.

Mears, C. J.—Sometime in the year 1922 the applicant in this case published the second edition of a Hindi Reader for use in schools. The Reader is composed of six separate text books, numbered 1—6, and those volumes are designed for the instruction of boys of 7 to 13 or 14 years of age. On July 15th, 1924, the Local Government issued a Notification by which, under S. 99 A of the Code of Criminal Procedure, 1898, all copies of parts, 3. 4, 5, and 6 were declared to be forfeited, inasmuch as they contained, in the opinion of the Local Government, seditious matter of the character described in S. 124 A of the Indian Penal Code.

Baijnath Kedia, the publisher, was aggrieved by this order, and applied first of all that the Local Government should point out the passages to which they took objection. This application failed, and the matter before us today is one launched by Baijnath Kedia asking this Court to set aside the order of the Local Government, on the ground that the four Readers Nos. 3--6, inclusive, do not in fact contain any seditious matter.

Mr. Peary Lal Banerji, who appears for the applicant, criticised at the outset the form of the Government Notification, and contended that it did not comply with S. 99 A (*b*) of the Code of Criminal Procedure, inasmuch as the grounds were not set out in the Notification. We, however, are precluded by S. 99 D from considering any other point than the question whether in fact the matters contained in the document were seditious or not, and come within the mischief aimed at by S. 124 A.

Counsel for the applicant raised the further point that the onus lay upon the Local Government. This is a question of construction, not free from difficulty. We are inclined to think that having regard to the framework of the section, the onus is cast upon the Local Government. In our opinion that is not a matter of great practical moment, and indeed it gives to the Local Government the advantage of the opening and of the reply. We, therefore, called upon the Government Advocate and he has laid before us a translation prepared by the Government of 126 extracts taken from the impugned publications. Having regard to their character, we are somewhat surprised that any application should have been made. We do not propose to go into them in any great detail; but it is necessary that we should consider each of the Readers separately; and that if we find in any one of the series extracts which though extravagant, do not fairly come within S. 124 A, it is our duty to exempt that particular Reader. The Government Advocate has suggested that when one regards the series as a whole, it will be found that they become increasingly seditious. There appears to be a certain degree of truth in that.

Turning now to the Readers themselves and dealing with Part 3, first of all, at page 2 there is a passage invoking the deity to remove all our "insults"; and at page 25 and 103 there are very strong incitement to race hatred, though as it happens not directed against the Government, but only quoted here to show the prevailing character of the work. At page 25 runs the passage "Even then the blood thirsty Muslims oppressed the Hindus in some ways or the other." The passage at page 103 runs "Of all the nations the Hindus are the best and everything else is bad." In book 4, page 31, there is a poem clearly designed to create hatred in the minds of the children against the British, and very obviously directed against the British, notwithstanding the suggestion which was made in argument that it really referred to events which had happened in Belgium in the month of August 1914. At page 68 and onwards there is a long, foolish and malicious discussion on the respective treatment and exploitation of the "black natives" in India

by Englishmen and of the Philippinoes by Americans. The trend of that story is manifestly one which would promote disloyalty. At page 109 the question is asked "why is not money spent on education"? The reply is given because "you have no power in your hands". In part 5, page 152, the Rowlatt Act was, according to the writer, drawn up "to suppress once and for all, all political agitation in the country. It treated the whole of India as in a state of rebellion and under it the police got full power to harass all innocent citizens." The translation which we have given differs to some extent from that which will be found at page 10 of the print supplied to us by the Local Government, but is an agreed and accepted translation.

We take the view that this statement that the Rowlatt Act was intended "to suppress once and for all all political agitation in the country was a statement known by the writer to be false, and made by him with the deliberate intention of promoting disloyalty and hatred and a similar observation applies to the statement that the Act, a Government measure, gave to the police full power to harass all innocent people. At page 75, Book 6, we are told that the "Western civilization was godless; the Indian civilization is godly," and that "the Indian civilization tends to stabilise morality. The tendency of the Western civilization is towards establishing immorality." We may pause here for a moment to say that a passage such as that, even if objectionable, would not, standing alone justify a Government to take measures of forfeiture. But a passage like that, and many others that can be found in these volumes must be considered as having a cumulative effect, and no one can doubt that the cumulative effect of each of these books was one designed to bring into hatred and contempt His Majesty's Government established by law in British India. At page 78 the children are taught that the establishment of dispensaries and hospitals encourages the people to run the risk of contracting disgraceful diseases, and "promotes greater stability to offences, suffering and downfall and real slavery". "Dispensaries are the root of evil. Owing to their existence people become indifferent to their heath and promote immorality. Hospitals are the means by which the devil exercises his control over his dominion and carries on his work." We are also told that but for the existence of hospitals the diseases indicated above and consumption itself would decrease. The extracts given from page 84 and onwards were no doubt written at a time when non-cooperation was still making its appeal to some sections of the nation. The reader contains a story in which the conscience of a subordinate official is disturbed by a supposed order of the Government directing him to watch the activities of the enthusiasts of movement. His ruminations cover some 8 pages of print and their manifest object is to promote hatred and disloyalty in the unformed minds to which they are addressed. A later extract tells the children that they are "dwelling under the rule of unrighteousness."

We have not by any means exhausted the extracts open to objections but we have indicated some of the more serious ones. It is said that they are extracts from books which have already been published and which have not been proscribed. That may be partly true but not altogether so. But even if it is entirely true, the compiler of those books has most manifestly collected together all the seditious utterances that he could find, and has given us a book which page after page contains sentiments hostile and insulting to the British Government. Books such as these stand on very different footing to publications in which here and there one may find passages to which a more moderate writer would not have given utterance. In our opinion these readers were compiled with the determination to corrupt the minds of the children, and we believe that they come explicitly within the terms of S. 124 A of the Indian Penal Code. Under these circumstances we dismiss the application with costs. We fix the costs at Rs. 300.

Application dismissed.

1925 ALLAHABAD 198

MUKERJI, J.

Musaddi Lal—Plaintiff—Appellant.

v.

Chhotu and others — Defendants—Respondents.

Second Appeal No. 1157 of 1922, Decided on 24th January 1924, against the decree of the Add. Dt. J., Meerut, D/- 22nd April, 1922.

U. P. Land Revenue Act, S. 36—Order under, is binding in absence of fraud or want of jurisdiction.

Where it has not been alleged that the order fixing the rent was obtained by means of fraud or that the Court which fixed the amount was of incompetent jurisdiction, the order which was passed between the parties is binding, even if it be the case that it merely adopted an agreement between the landlord and the ex-proprietary tenant. 18 A. L. J. 684 Foll. [P. 198, C. 2.]

P. L. Banerji—for Appellant.

The respondents were not represented.

Judgment.—The facts of the case are briefly these. One Attar Singh was the proprietor of certain lands, *Sir* and non *Sir*. He made a mortgage in favour of the appellant, who was the plaintiff in the suit out of which this appeal has arisen. The appellant asked for rent being assessed over the *Sir* lands which became, by the fact of mortgage, the ex-proprietary tenancy of Attar Singh. It appears that Attar Singh and the appellant agreed as to the amount of rent to be paid by the former. An order was passed by the Court under S. 36 of the Land Revenue Act. It examined the *patwari* heard the *sulahnama* and ordered that for 10 bighas 6 biswas land, for which the rent is now claimed, a sum of Rs. 101-7 be fixed as the rent. It fixed another sum with respect to certain other lands in which Attar Singh had no interest as an ex proprietary tenant. Attar Singh is dead. The appellant instituted the suit against his two brothers who are the recorded tenants, on the death of Attar Singh and also made Attar Singh's daughter Musammat Gaindi a party. In the Courts below it was recognised that Mussammat Gaindi had no interest and she never contested the suit. In this Court no notice was served on Musammat Gaindi and so far therefore as she is concerned this appeal must fail.

The Court of first instance found that the defendants applied for abatement of rent and the rent was reduced to the sum of Rs. 37 and odd. This order however was to take effect from 1329 F. and did not affect the present suit which was for the years 1325—1327 F. The learned Assistant Collector held that the compromise on which the order of the Assistant Collector fixing the rent was passed was an unfair compromise and had been obtained by exercise of undue influence. He decreed the suit with respect to a very small sum. Indeed, he accepted a certain amount as the rent for the land which had been recorded before the rent was fixed.

On appeal the learned District Judge was practically of the same opinion as the learned Assistant Collector. He held that it was necessary to protect the ex-proprietary tenants against their own folly.

In appeal which is unfortunately not opposed in this Court, it has been argued that the order fixing the rent so long as it stands, is binding on the parties and their successors and it did not lie within the province of the Court below to question the validity of it.

It has not been alleged that the order fixing the rent was obtained by means of fraud or that the Court which fixed the amount was of incompetent jurisdiction. This being so, the order which was passed between the parties is binding, even if it be the case that it merely adopted an agreement between the landlord and the ex-proprietary tenant. We have however the fact that the *patwari* was also examined in the case, though it is not clear on what point. This view was taken by this Court in the case of *Har Prasad* v. *Khazen* (1).

I accordingly hold that the defendants-respondents Nos. 1 and 2 are bound to pay according to the rent fixed by the Assistant Collector on 8th December 1917.

(1) [1920] 18 A. L. J. 684 = 57 I. C. 441.

The result is that the appeal is allowed, decrees of the Courts below are set aside and the suit stands decreed against the respondents Nos. 1 and, 2 alone with costs throughout which however will not include the costs in this Court because the appeal was uncontested. The suit will stand dismissed against respondent Musammat Gaindi,

Appeal allowed.

1925 ALLAHABAD 199

DANIELS, J.

Bhagwana—Defendant— Appellant.

v

Shib Sametri Prasad—Plaintiff—Respondent.

Second Appeal No. 1517 of 1922, Decided on 26th February 1924 against the decree of the Sub. J., Meerut, D/- 18th November 1922.

(a) *T. P. Act S. 106—Notice announcing tenant's liability to pay damages in case of non-compliance—No option of paying enhanced rent is given.*

Where a notice to quit stated that if the tenant failed to comply with it, a suit for his eviction would be filed and rent by way of mesne profits would be claimed.

Held: that the notice merely announced that the tenant would be liable to pay damages if he delayed in quitting and it did not give him an option to pay enhanced rent. 7 All. 899 Dist. [P, 199, C. 2]

(b) *T. P. Act S. 106—Temple property—Notice to quit—Notice not headed as such and signed by Manager's agent—Notice is not bad.*

Where the notice given by the manager of a temple property was given by him in his capacity as manager but the heading of the notice did not show the fact and the notice was not signed by the manager but by his general attorney.

Held; the notice was nevertheless quite valid. [P. 200, C. 1]

Harendra Krishna Mukerji—for Appellant.

Panna Lal and *S. B. Johari*—for Respondent.

Judgment—This is an appeal by the defendant in suit for ejectment from two shops belonging to the temple of Savitriji of which the plaintiff is the manager. Most of the questions in dispute in the Courts below are now concluded by findings of fact. This appeal has been urged before me on three grounds.

1. That the notice to quit given by the plaintiff was invalid on the ground that it did not terminate on the expiry of a month of the tenancy as required by S. 106 of the Transfer of Property Act.

2. That the notice was invalid under the Full Bench ruling in 7 All. 899; because it gave the defendant an option to pay enhanced rent.

3. That the notice was invalid because it was not signed by the plaintiff but by his general attorney and because the heading of the notice does not state that the plaintiff was giving notice in his capacity of manager.

There is no force in any of these pleas. The first point was not raised anywhere in either of the two Courts below, and the appellant is not entitled to raise it now, all the more as there is no evidence on the record to show that the notice did not expire with a month of the tenancy. The appellant's plea in fact is based on the fact that in the notice it is stated that the rent was payable on the 1st of each month. It seems clear on a perusal of the notice that the plaintiff in issuing the notice understood that to be the date on which the tenancy ended. The question on what day of the month the tenancy ended is a question of fact as to which no evidence was led and there was no controversy in the Courts below. I accordingly reject this plea.

As to the second point a perusal of the notice shows that it is by no means on all fours with the notice which was considered in the Full Bench ruling in 7 All. 899. In that case the person giving the notice said that if the premises were not vacated he would sue for ejectment and for recovery of rent at an enhanced rate. In this case the notice definitely informs the defendant that he is required to quit the premises on the 1st of August 1921 and that if not, a suit for his eviction will be filed and rent by way of mesne profits (*vasilat*) will be claimed. This merely means that if there is any delay in the defendant quitting the premises in accordance with the notice he will be liable for damages

for his continued occupation. It in no way invalidates the notice and indeed this point, like the first, was not raised in the Court below.

As to the third point the fact that the shops belonged to the temple of Savitriji is clearly stated in the body of the notice and the notice is not invalid because it is signed by the authorised agent of the plaintiff instead of by the plaintiff himself.

There is no force ir the appeal and I accordingly dismiss it with costs.

Appeal dismissed.

✱ 1925 ALLAHABAD 200

STUART, J.

Lalman and another—Plaintiffs—Appellants.

v.

Fazal Muhammad Khan and another—Defendants—Respondents.

Second Appeal No. 1024 of 1922, Decided on 21st January 1924, against the decree of the Dt. J., Shahjahanpur, D/- 7th April 1922.

(a) *Agra Tenancy Act, (III of 1901), S. 40—Entry must be made on basis of possession—Question can be re-opened on basis of title.*

S. 40 shows that where a certain person is in possession the entry must be made on the basis of possession and the question can be re-opened upon the basis of title in either a Civil or Revenue Court. [P 201 C 1]

✱ (b) *Civil P. C., S. 11—Previous proceeding confined to question of possession—Question of title is not barred.*

In a case where the previous proceeding was confined by statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred by *res judicata*. [P 201 C 2]

(c) *Agra Tenancy Act (III of 1901) S. 57—Settlement Entry of land as sir—Correctness can be questioned.*

Where land has been recorded as *sir* at the last settlement and has been continuously so recorded since, the correctness of the entry of the land as *sir* at the settlement is under S. 57, Act III of 1901, open to disproof. [P 201 C 2]

Harnandan Prasad—for Appellants.

Durga Prasad—for Respondents.

Judgment.—This appeal is concerned with the title to a plot of land 1.38 acres in area bearing a rent of Rs. 25. It raises points of difficulty. This much appears to be clear. Bazmir Khan the father of Fazal Muhammad Khan defendant-respondent sold at some time prior to 1895 a one-third share in the village of Udaipur Bhura, Shahjahanpur district, to Khub Chand the father of Lalman plaintiff-appellant. In this share was a field which was formerly numbered 558/1. The number was changed to 613 at some time prior to 1895. This has been subsequently sub-divided into two numbers 613/1 and 613/2 and is the plot of land in area 1-38 acres which is now in dispute. In 1895 there was a partition in the village and on a finding of the learned District Judge this No. 613 was at the time of the partition allotted to Bazmir Khan. Although Bazmir Khan had sold a portion of his zamindari he had retained the remainder and his son Fazal Muhammad Khan is still a *zamindar* in the village and is also the *lambardar*. The real difficulty in this case is to decide whether this No. 613 passed from Bazmir Khan to Khub Chand. There can be no presumptions in the matter. It may have passed or it may not have passed. The entries in the papers although affording information are never likely to afford absolutely reliable information in matters such as these. There is evidence which the learned District Judge has accepted as correct that in the partition of 1895 No 613 was handed over to Bazmir Khan. This evidence is contained in a certified copy, Ex. B, of a portion of the partition proceedings but it would appear, though I am not quite clear on the point, that the whole partition record was before the Assistant Collector and before the learned District Judge. It is, however, to be noted that this entry, which clearly declares that No. 613 was left with Bazmir Khan with the consent of Lalman, Khub Chand then being dead, states the area of No. 613 as .85 of an acre instead of as it is 1.38. There can however be no doubt as to the fact that this entry affords evidence on which a Judge could arrive at a finding of fact.

It appears that in the settlement of 1897–98 No. 613 was recorded as Lalman's *sir*. Bazmir Khan applied in 1903 to the Assistant Collector to

alter that entry and to enter the number as in his possession as *sir*. That application was made under S. 40 of Local Act III of 1901. The Assistant Collector refused to alter the entry. He based his decision upon a *Kanungo's* report. He heard no evidence on the subject. It must be noted that under S. 40 decision must be made on the point of possession if that point can be decided. The *Kanungo* found that Lalman was in possession. It is true he went into a point which was unnecessary for decision that Lalman was also entitled to the number. Reading S. 40 it will however appear that where the revenue authorities can find as they found here that a certain person is in possession the entry must be made on the basis of possession and the question can be re opened upon a basis of title in either a Civil or a Revenue Court. Bazmir Khan appealed to the Collector who upheld the Assistant Collector's order. The Collector's order was however no more than a decision as to possession.

Although the order was that Lalman was in possession and Bazmir Khan was not in possession the plaintiffs' allegation is that Bazmir Khan and after him his son Fazal Muhammad Khan has remained in possession, for the present suit is a suit under S. 58 of Local Act II of 1901 for the ejectment of Fazal Muhammad Khan from this field on the finding that he is a tenant without occupancy rights. Now it appears that the actual cultivator is a man called Munna. Fazal Muhammad Khan contested on the ground that he was actually the proprietor of the plot. Munna stated that he held the land from Fazal Muhammad Khan. The Assistant Collector decided upon the basis of the entries in the settlement and the orders of 1903 that the plaintiff was the proprietor and that there was a tenancy between him and Fazal Muhammad Khan. So he ordered the ejectment of both defendants. The learned District Judge has found on the merits that Fazal Muhammad Khan is the proprietor of the plot. I have no doubt as to the point that, if the question was open to the learned District Judge for decision, his finding is a finding of fact which cannot be disturbed in second appeal. He further found that no relationship of landlord and tenant existed between the plaintiffs and Fazal Muhammad Khan. The latter finding is also a finding of fact. The point argued before me on behalf of the plaintiffs-appellants is that it was not opon to the District Judge to arrive at any such finding and S. 44, Local Act III of 1901 is relied on in this connection. S. 44 lays down that certain decisions under Ss. 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject matter of the dispute. But there has been no decision under Ss. 40, 41 and 42 in reference to the property in dispute. It is further argued that the decisions of 1903 operate as *res judicata*. Under the provisions of S. 40 they cannot operate as *res judicata* to prevent the Judge arriving at the conclusion at which he did, for they clearly refer only to possession in 1903, a matter with which we are not concerned in the present case. I find that it was open to the learned District Judge to arrive at the finding at which he did, that he was not precluded either by the provisions of the Revenue or the Rent Acts or by the law of *res judicata* from arriving at that finding and the finding is one which cannot be disturbed in second appeal. It is really a question of fact as to who succeeded to the plot. The entry in the settlement to the effect that the plot is Lalman's *sir* is not binding in any way. I agree with the views taken by the Board of Revenue in *Mahesh Prasad* v. *Lala Radhika Prasad*, (1) and *Pem Raj* v. *Ram Kishen*, (2) that where land has been recorded as *sir* at the last settlement and has been continuously so recorded since, the correctness of the entry of the land as *sir* at the settlement is, under S. 57, Act III of 1901, open to disproof.

I accordingly dismiss this appeal with costs on the higher scale.

Appeal dismissed.

(1) Selected Decision No. 17 of 1912.
(2) Selected Decision No. 9 of 1913.

✱ 1925 ALLAHABAD 202

WALSH AND RYVES, JJ.

Gaya Prasad and another — Applicants.

v.

Firm Mathu Lal Budha Lal—Opposite Party.

Civil Rev. No. 124 of 1923, Decided on 26th February 1924, against the order of the Dt. J. Cawnpore, D/- 13th August 1923.

(a) *Civil P. C., S. 115—Lower Court's order not clear—Case was sent back*

Where the lower Court's order had left the matter in a muddle so much so that both the parties believed the matter to be pending, the case was sent back to the lower Court.

[P 201. C. 1, 2]

✱ (b) *Civil P. C., Sch. II Para 8—Leave to revoke order of reference is not to be granted save when substantial injustice will otherwise result—Principles underlying exercise of power to grant leave discussed.*

Obiter :—In giving leave to revoke a submission the Courts all be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who as a consideration for a contract had agreed to submit any disputes whether of law or fact, which might arise, to arbitration when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. The principle underlying the exercise of the power to revoke is that the parties take the arbitrators for better or for worse, and that their decision is final both as to law and fact; unless a substantial miscarriage of justice may take place, leave ought not to be given. It is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by. [P. 202, C. 2]

M. L. Agarwala and *P. N. Sapru* —for Applicants.

Sailanath Mukerji and *N. P. Asthana* —for Opposite Party.

Judgment. — We think that the learned Judge went a little too far in cancelling the order of the 15th of July 1922. We think we understand what his intention was, but it has left the matter in somewhat of a muddle, because if the order of the 15th of July is cancelled, the application ceases to exist, and the notice to the parties and the arbitrators is no longer effective. On the other hand the parties before us are agreed that the application has not been disposed of and is still pending. All we can do therefore is, while suggesting that the arbitrators shall not go on with their arbitration while the application to revoke the submission is pending, to cancel the order of Mr. Holme of the 13th of August 1923, and to send the matter back in order that the application for revocation be heard and determined at a very early date. If the District Court of Cawnpore possesses a copy of the last Edition of Russell on arbitration, namely the 10th Edition 1919, edited by Mr. Hudson, it will find in a very small compass in sub-S. (4) of S. 1 of Part I, all the principles set out which ought to govern the decision of an application for leave to revoke. For the convenience of the Court, in case this book is not available, we may mention that it has always been, under the corresponding section in England, held by English Courts that in giving leave to revoke a submission, the Court shall be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. It would be contrary to justice to give leave to revoke a submission to a party who, as a consideration for a contract, had agreed to submit any disputes, whether of law or fact, which might arise, to arbitration, when he found the case going against him. The exercise of the power of giving leave to revoke is in general limited to cases where the arbitrators are exceeding their jurisdiction, or refusing jurisdiction, or failing to do all that their jurisdiction requires them to do, and the principle underlying the exercise of the power to revoke is, that the parties take the arbitrators for better or for worse, that their decision is final both as to law and fact, that unless a substantial miscarriage of justice may take place, leave ought not to be given, and it is no miscarriage of justice for a party to be injured by bad law which he has agreed to be bound by.

We set aside the order of the 13th August 1923, and direct the record to be returned to the lower Court for disposal without delay. The costs will be costs in the application and will include in this Court fees on the higher scale.

Application allowed.
Order set aside.

✱ 1925 ALLAHABAD 203

KANHAIYA LAL, J.

Amjad Khan and others—Defendants—Appellants.

v.

Shafiuddin Khan and others—Plaintiffs—Respondents.

Second Appeal No. 542 of 1922. Decided on 24th July 1923, from the decree of the Dt. J., Agra, D/-25th January 1922.

✱ (a) *Easements Act, S. 52—License may be implied from circumstances.*

N had built a house on another's land with the permission of his predecessor-in-title After N's death two of his sons executed an agreement to pay ground rent for the land and to vacate in case of default. Afterwards it was found that N's sons including the executants of this agreement and thier descendants had abandoned the house; and that the house was in the occupation of N's daughter and her son.

Held: that the agreement to pay ground rent was not binding on the latter and that they were licensees deriving title directly from N and not tenants. [P. 204, C. 1,2]

✱ (b) *Easements Act, S. 60 (b)—Denial of licensor's title is no ground for forfeiture or revocation where licensee had executed a work of a permanent character—Thatched house may be a work of permanent character.*

A license cannot be revoked, if the licensee acting upon the license has executed a work of a permanent character. A Kuchcha thatched house may be a work of a permanent character and the fact that the thatch is renewed from time to time does not make it a work of a temporary character. Unless the license is shown to have been granted under restrictive conditions of the nature set up, no revocation can be allowed to the prejudice of the licensee by whom a permanent structure has been built. [P. 204, C. 2]

K. Malcomson and *K. N. Katju*—for Appellants.

Iqbal Ahmad—for Respondents.

Judgment.—The dispute in this appeal relates to a house situated in the town of Ferozabad. The plaintiffs claim to be the owners of the site occupied by that house and allege that *Mt.* Khairatan and Hasan Amjad Khan, who were occupying that house have been wrongfully denying the title of the plaintiffs' to the land in question. They seek the ejectment of the said occupants an mplead certain other persons whom they describe as having been once in possession as the heirs of Nur Khan, the original *ryot.*

According to the plaintiffs the land in question belonged to Azimuddin Khan by virtue of a purchase made from Rahim Ali on the 4th of December 1859 and Nur Khan had built a house thereon with the permission of his predecessor in-title. It was also stated that after the death of Nur Khan two of his sons, Kale Khan and Sardar Khan executed an agreement on the 3rd of July 1865, by which they agreed to pay a ground rent of one anna per mensem and to vacate the land in case default was made in payment thereof.

It appears that Nur Khan died, leaving three sons, Kale Khan, Sardar Khan and Munir Khan, and a daughter named Mt. Khairatan. According to the plaintiffs the heirs of Kale Khan and Sardar Khan, namely Mt. Mariam Bibi, Mt. Mamman and Hamid Khan, had left the house long ago and gone to live in another house in the town and Munir Khan had similarly left the house 15 or 16 years ago and gone to live elsewhere. The defendants Mt. Khairatan and Amjad Khan, who are in occupation of the house deny the plaintiffs' title to the land occupied by the house in dispute and plead that they have been in adverse possession of the same. They also deny the genuineness of the lease purporting to have been executed by Kale Khan and Sardar Khan on which the plaintiffs relied in support of their claim. The lease did not specify the boundaries or number of the land to which it related and no attempt was made by any of the Courts below to find out whether it related to the land, occupied by the house of Nur Khan, which was referred to in the sale deed of the 4th December, 1859 executed by Rahim Ali in favour of Azimuddin Khan. The trial Court refers to an admission said to have been made by Amjad Khan that he and his mother or Nur Khan had no other house in the town except the one in question. But while the Court of first instance held that the *Sarkhat* of the 3rd of July 1865 executed by Kale Khan and Sardar Khan was not binding on the other defendants, the lower appellate Court thought that it had been presu-

mably executed by Kale Khan and Sardar Khan on behalf of the entire family and was binding on the other defendants also. Both the Courts below eventually agreed in passing a decree in favour of the plaintiffs for the ejectment of the defendants on the ground that they denied the title of the plaintiffs to the land in question and were liable to be evicted whether they occupied the same as licensees or tenants.

It appears that there were two houses in the occupation of the descendants of Nur Khan at the time of the settlement of 1877. In the sale deed the boundaries of the entire land sold were mentioned and it was also stated that a portion of that land was occupied by a house belonging to Imamuddin and another portion by a house belonging to Nur Khan, both of which had been built with the permission of the former proprietor. In the *sarkhat* no boundaries were given but a house existing on the land leased was described as having been occupied by Kale Khan and Sardar Khan. In the *khasra* abadi of 1877 A. D. *ahata* No. 261 comprising house No. 184 was entered as having been occupied by Gul Khan (alias Munir Khan) son of Nur Khan, and *ahata* No. 382 comprising house No. 261 was described as having been occupied by Kale Khan sen of Nur Khan. The trial Court thought that the latter house was the one received by Kale Khan from his father-in-law, and the former was the one referred to in the sale deed and the *Sarkhat*.

Be that as it may, the *Sarkhat* is not binding on the present occupants. Mt. Khairatan derived her title directly from Nur Khan and Amjad Khan is her son. They are not bound by any *Sarkhat* which Kale Khan and Sardar Khan may have executed in favour of Azimuddin Khan, agreeing to pay ground rent and to vacate the land in case of non-payment. In the plaint it was admitted that Mt. Mariam had been living with her husband in another house for 14 or 15 years, and that Hamid Khan and Mt. Mamman had left the house long ago, and were living in another house belonging to the plaintiffs. In these circumstances the contesting defendants cannot be treated as tenants liable to ejectment for non-payment of rent which as the Court of first instance found was never actually realised even from those who are said to have agreed to pay the same. In the Municipal *Khasra* prepared in 1896 house No. 323 was entered as having been occupied by Munir Khan son of Nur Khan as a tenant of the present plaintiffs, but there is nothing to show which that house was. That entry is of no value.

The contesting defendants can therefore be treated as only licensees, holding the land in dispute in succession to Nur Khan by virtue of a license which was granted by one of the former proprietors when the house was built. The existence of the license is indicated by the sale deed of 1859 which was executed when there was no dispute between the parties, and the recital there contained is admissible in evidence both as on admission made by a party before the controversy arose and otherwise. It is not shown that the license was granted subject to any restrictive covenant entitling the licensor to revoke it at his will. The house in dispute has been in the continued occupation of Nur Khan and after him by that branch of his line which is now represented by the contesting defendants without the payment of any rent, and the mere fact that being ignorant of the origin of their title they have denied the title of the plaintiffs, would not render them liable to ejectment. As pointed out in *Malik Akhar Ali Khan* v. *Shah Muhammad* (1) a licensee, unlike a lessee, does not forfeit his license by merely denying the title of his licensor. In *Nasirul Zaman Khan* v. *Azimullah* (2) it was held that a license could not be revoked, if the licensee acting upon the license had executed a work of a permanent character. It was further pointed out that a *Kuchcha* thatched house might be a work of a permanent character and the fact that the thatch was renewed from time to time did not make it a

(1) [1917] 39 All. 681=40 I. C. 443=15 A.L.J 592.
(2) [1906] 28 All. 741=3 A.L.J. 765=1906 A. W. N. 216.

work of a temporary character. On behalf of the plaintiffs respondents reliance has been placed on the decision in *Jai Chand Bahadur* v. *Girwar Singh* (3). There the question was one of burden of proof of adverse possession and a licensee who had set up an adverse right was held to have no title to claim the same unless he succeeded in establishing his title by adverse possession. There is no question of burden of proof here. The title of the plaintiff's as owners of the land and of the defendants as licensees from the former proprietor is beyond dispute. The only question is whether that license has been forfeited by reason of the denial set up in this case. There was no denial prior to the suit. Unless the license is shown to have been granted under restrictive condition of the nature set up, no revocation can be allowed to the prejudice of the heirs of the licensee, by whom a permanent structure has been built.

The appeal must therefore be allowed and the claim of the plaintiffs dismissed, but in view of the fact that the defendants have improperly denied the title of the plaintiffs to the ownership of the land occupied by the house in dispute I direct the parties to bear their own costs throughout.

Appeal allowed.

(3) [1919] 41 All. 669=52 I. C. 636=17 A.L.J. 814.

1925 ALLAHABAD 205

DANIELS, J.

Lakhan Singh — Plaintiff — Appellant.

v.

Lal Singh and another—Defendants—Respondents.

Second Appeal No. 1433 of 1922, Decided on 25th February 1924, against the decree of the Dt. J., Budaun, D/-21st June 1922.

Provincial Small Cause Courts, Sch. II Arts. 6 and 11—Hypothecation bond — Suit framed as money suit is not Small Cause.

Where the amount in dispute was Rs. 252-10-0 and the claim was based on hypothecation bond but all claim against the mortgaged property had been abandoned and the suit was framed purely as a money suit and the question was whether second appeal lay.

Held; that neither Art. 6 nor Art. 11 of the Sch. II of the Provincial Small Cause Courts Act applied. S. 102 C. P. C. applied to such a case and that no second appeal lay. [P 205, C 2]

S. A. Haider—for Appellant.

G. Agarwala—for Respondents.

Judgment.—In this case a preliminary objection is taken that no second appeal lies. The amount in dispute in the case was Rs. 252/10-only and the plaintiff asked for nothing more than a simple money decree. It is true that the bond on which his claim was based was a hypothecation bond but he expressly abandoned all claim against the mortgaged property and framed his suit purely as a money suit. Under these circumstances S. 102 C. P. C applies and no second appeal lies The appellant pleads that the suit should be treated as falling under Articles 6 or 11 of the second Schedule to the Provincial Small Cause Courts Act. Neither of these articles is applicable. Article 6 applies to suits for sale or foreclosure and to suits for redemption but to no other kinds of suit. Article 11 applies only to suits for the enforcement of a right to or interest in immovable property. No such right is sought to be enforced in this case. The ruling in *Sukhdeo Prasad* v. *Lachman Singh* (1) cited by the appellant is inapplicable. There the suit was framed as an ordinary mortgage suit in which sale of the property was asked for. It was only at a later stage of the case that the plaintiff withdrew his relief for sale of the property and expressed his willingness to be content with a simple money decree. I give effect to the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

(1) [1902] 24 All. 456=(1902) A. W. N. 114.

1925 ALLAHABAD 206 (1)

DANIELS, J.

Daya Ram—Plaintiff—Appellant.

v.

Sita Ram and others—Defendants—Respondents.

Second Appeal No. 1534 of 1922, Decided on 18th February 1924, against the decree of the Add. Dt. J., Meerut, D/- 15th July 1922.

T. P. Act S. 54—Sale of property worth less than Rs. 100/- Possession delivered—Sale is complete—Unregistered sale deed executed at the same time does not destroy sale but is admissible to prove nature of possession—Registration Act S. 49.

Where there has been a sale or mortgage of property, worth less than Rs. 100/-, with delivery of possession the effect of the transaction is not destroyed because an unregistered sale deed was executed at the same time. In such a case the unregistered sale deed can be refered to in order to ascertain the nature of possession of the vendee.

N. C. Vaish—for Appellant.

S. N. Gupta—for Respondents.

Judgment.—In this case the father of the appellant sold the house in suit to the defendant Shankar Das in 1912 by an unregistered sale deed for a sum of Rs. 90/-. Shankar Das mortgaged the house and the mortgagees who are the respondents in this case obtained a decree against Shankar Das on their mortgage. The plaintiff brought the present suit for a declaration that the house still belongs to him and is not liable to sale under the decree against Shankar Das. His contention was that Shankar Das's possession was purely permissive. On the evidence both Courts have rejected the plaintiff's case. The sole question urged in support of the appeal to this Court is that the sale deed in favour of Shankar Das being unregistered was inadmissible in evidence even for the purpose of showing the Nature of Shankar Das's possession. It may be noted that the Court below has merely used it to corroborate other evidence given by the defendants which the Court has believed. The property having been of the value of under Rs. 100/- at the time when the sale took place could under the provisions of S. 54 of the Transfer of Property Act be sold either by a registered sale deed or by delivery of possession. In this case there unquestionably was delivery of possession, and it has been held by Tudbale, J in *Habib-ur-Rahman* v. *Rasul Bandi* (1), that where there has been a sale or mortgage with delivery of possession the effect of the transaction is not destroyed because an unregistered sale deed was executed at the same time. There is authority of the Calcutta High Court to the same effect in *Ganga Narain* v. *Kali Charan* (2) There is also authority for the view that in such cases an unregistered sale deed can be referred to in order to ascertain the nature of the possession sought to be disturbed. The case of *Qadar Bakhsh* v. *Mangha Mal* (3) is a recent authority to this effect and *Jhamphu* v. *Kutramani* (4) is a case of this High Court to the same effect. On the authorities the case was rightly decided by the Court below and I dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) [1921] 19 A.L.J. 376=62 I.C. 859.
(2) [1895] 22 Cal. 179.
(3) 1923 Lah 495=5 L L J. 555.
(4) [1917] 39 All. 696=42 I.C. 713=15 A.L.J. 761.

1925 ALLAHABAD 206 (2)

KANHAIYA LAL, J.

Ram Baran Singh—Appellant.

v.

Mufassil Bank, Ltd.—Respondent.

Second Appeal No. 1783 of 1923, Decided on 23rd July 1924, from the decree of the Second Add. Dt. J., Gorakhpur, D/- 10th May 1923.

Company—Unless articles specifically limit powers of directors in carrying on ordinary business of the company stranger dealing with them in good faith is protected.

Where the authority of the Directors is defined by the Memorandum of the Articles of Association, they have no power to go beyond the authority given them, or to undertake any transaction outside the scope of the business of the company. They have power to carry on the business of the company in accordance with the provisions therein contained, and if they do anything beyond the scope of the company, their act is *ultra vires* and void, as the company would not be bound by any act done by the Directors for objects which the company has no power to entertain. But not only do the acts of the Directors bind the company when done within the scope of their authority, but also where the acts of the Directors, however irregular, belong to a class of acts which is authorised by the constitution of the company. A company is bound by its dealings with strangers, who act *bona fide*

with the company; a company is liable for all acts done by its directors, even though unauthorised by it provided such acts are within the apparent authority of the directors and not *ultra vires*. Persons dealing *bona fide* with a Managing Director are entitled to assume that he has all such powers as he purports to exercise if they are powers which, according to the constitution of the company, a Managing Director can have. All persons dealing with a company must ascertain the limitation imposed by the Articles of Association, but they are not bound to draw any direct or obvious inferences from the provisions they find there, nor is there any obligation cast upon them to see that such Directors are properly appointed or that they have acted exactly in accordance with the manner prescribed therein. The articles of Association of the company define the power of Directors as between themselves and the company, and unless there is anything in those Articles limiting the powers of the Board of Directors in carrying on the ordinary business of the corporation a third party who deals with the Directors or with the Managers acting under those powers however, irregularly, is protected if he acts in good faith in his dealing with them. [P. 208 C. 1]

M. L. Agarwala and *Lakshmi Narain Tewari* – for Appellant.

N. Upadhia—for Respondent.

Judgment.—These appeals arise out of proceedings in execution taken by the assignee of certain decrees and the question for consideration is whether the assignment was valid and binding on the original decree holder. The decrees in question had been obtained by the Kayasth Trading and Banking Corporation Ltd., against the present judgment-debtors. They were sold by B. Ram Gharib Lal, who was the manager of the company and one of its Directors, on behalf of the company, and the consideration paid by the assignee was credited in the accounts of the corporation.

The Articles of Association provided that there shall be a manager of the company whose duty shall be to conduct the whole business of the company and to perform all such works and services as may be necessary to carry on the said company or its branches, and such as are usually performed by the manager of a Banking Company. They further provided that the said manager shall be authorised to advance loans to the best advantage of the company of such amounts and to expend such sums to keep the bank, its branches and establishment, going, as may be prescribed by the Directors from time to time. B. Ram Gharib Lal was appointed the manager of the company by the Articles of Association, and by a subsequent resolution of the Board of Directors dated the 4th April 1917, he was also appointed one of its Directors. On the 9th August 1916 a power of attorney was executed in his favour by the corporation, authorising him to sign and endorse on behalf of the company deeds, bonds and conveyances, and to transfer decrees, negotiable instruments and other documents, the transfer, assignment or endorsement whereof was sanctioned in writing by the Bd. of Directors or by any of the Directors authorised in that behalf by the said Board.

There is no evidence to show that any sanction had been granted for the sale of these decrees by the Board of Directors or by any Director authorised in that behalf by the said Board. The sales, however, purported to have been effected on behalf of the corporation; and the real question is whether a third party, who deals with the manager in the above circumstances, is bound to go behind his apparent authority to enquire whether the manager had obtained the sanction of the Board of Directors to affect the sales.

The authority of the Directors is defined by the Memorandum of the Articles of Association; and they have no power to go beyond the authority given to them, or to undertake any transaction outside the scope of the business of the company. They have power to carry on the business of the company in accordance with the provisions therein contained, and if they do anything beyond the scope of the business of the company, their act is *ultra vires* and void, as the company would not be bound by any act done by the Directors for objects which the company has no power to entertain. But not only do the acts of the Directors bind the company when done within the scope of their authority, but also where the acts of the Directors, however irregular belong to a class of acts, which is authorised by the constitution of the company. A company is bound by its dealings with strangers, who act *bona fide* with the company; for says

Grant, a company is liable for all acts done by its Directors. even though unauthorised by it, provided such acts are within the apparent authority of the Directors and not *ultra vires* [*The Ashbury Railway Carriage & Iron Co.* v. *Hector Riche*, (1)] and persons dealing *bona fide* with a Managing Director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the company, a Managing Director can have: *Biggerstaff* v. *Rowatt's Wharf Ltd.* (2). All persons dealing with a company must ascertain the limitations imposed by the Articles of Association, but they are not bound to draw any direct or obvious inferences from the provisions they find there, nor is there any obligation cast upon them to see that such Directors are properly appointed or that they have acted exactly in accordance with the manner prescribed therein. (Grant's Law of Banking 6th Edn. page 607). The Articles of Association of the company define the power of Director as between themselves and the company, and unless there is anything in those Articles limiting the powers of the Board of Directors in carrying on the ordinary business of the corporation, a third party who deals with the Directors or with the Managers acting under those powers. however irregularly, is protected if he acts in good faith in his dealing with them.

It is urged on behalf of the judgment-debtors that the corporation had no power to mortgage much less to sell its properties except in the manner allowed by S 109 of the Indian Companies Act (VII of 1913). But that section only limits the borrowing powers of the company or prescribes the manner in which that power is to be exercised, and it does not prescribe a sale of property; where such a sale falls within the ordinary business of the company. A company, which deals in Banking business, has, for instance, the power not only to lend money but to sell any decree, which it may obtain in lieu of the debts advanced, as a means of realising those debts. The sales in the present case were irregular, because they do not appear to have been made with the sanction of the Directors, as required by the power of attorney which conferred the power of sale. But if any damage has accrued to the company by reason of the Manager having acted beyond his authority in the ordinary discharge of his duties, the remedy of the company is against such Manager, and the sales cannot be set aside to the prejudice of a third party, who has already paid in good faith the consideration thereof, which the company has appropriated.

The lower appellate Court has held that the effect of that appropriation was to ratify the sales, but it is not clear whether the appropriation was effected within the knowledge of the Director or with their acquiescence. With the exception of Babu Ram Gharib Lal, the other Directors appear to have ceased to take any interest in the affairs of the company or with the manner in which the Manager was dealing with the business. But a notice appears to have been issued to the corporation, when the assignee applied for the substitution of his name under O. 21, R. 16 of the Code of Civil Procedure; and no objection appears to have been taken by the company or its Directors at the time to the said sales. Their conduct on that occasion at any rate amounted to a ratification of the sales, and the decrees can now be executed in the same manner and subject to the same considerations as if the application for the execution had been made by the original decree-holder himself. The judgment-debtors have to pay the money due by them and the substitution of the name of the assignee in the place of the original decree-holder after the issue of the notice to him, sufficiently protects them against the possibility of their being required to make the payment over again.

The appeals therefore fail and are dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) [1875] 7 H. L. 653—44 L.J. Ex. 185—33 L.T. 451—24 W.R 794.

(2) [1896] 2 Ch. 93—65 L. J. Ch. 536—74 L.T. 473—44 W. R. 536.

1925 ALLAHABAD 209

DANIELS AND NEAVE, JJ.

Ram Adhar—Plaintiff—Appellant.

v.

Bhagwan Singh and others—Defendants—Respondents.

S. A. No. 1138 of 1922, Decided on 4th June 1924, from a decree of the Addl. Sub. J., Cawnpore.

Evidence Act, S. 115 — Attestation coupled with other circumstances can be "consent"— Hindu reversionees attesting mortgage by widow for paying their debt were held estopped from questioning mortgage—Hindu Law — Widow— T. P. Act, S. 3.

Though mere attestation is not sufficient to fix a party with knowledge of the deed attested yet attestation combined with other circumstances may amount to evidence of consent. Where not only did the reversioners attend before the Registrar, identify the executant, and attest the deed, but the debt in respect of which the deed was executed was a debt from the reversioners themselves as principal debtors

Held; that it was impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it. 42 Cal. 876. 1922 P. C. 20 Ref.. [P. 209, C. 2]

P. L. Banerjee—for Appellant.

N. C Vaish—for Respondents.

Judgment.—This appeal arises out of a suit for the enforcement of a mortgage by sale of the mortgaged property. The mortgage was executed by Mt. Gulbari, a Hindu widow in possession of the estate of her deceased husband. The defendants to the present suit are the reversioners, her husband's brother and nephew, who have succeeded to the estate after her death. The point on which the Courts below have differed is whether the defendants are estopped from questioning the mortgage by reason of the fact that they or rather the first defendant and the father of the second defendant through whom the second defendant claims, were assenting parties to the mortgage. The learned Munsif held that they were estopped. The learned Subordinate Judge considered that there was no evidence on the record from which the Court could legally infer their consent. It is this finding which is challenged in appeal. The facts are practically undisputed. The debt in respect of which the mortgage was executed was a debt due from the defendant Bhagwan Singh and from Buddhi Singh the father of the second defendant. They were at the time presumptive reversioners to the estate. They attested the mortgage-deed. They also identified Mt. Gulbari before the execution officer. The learned Subordinate Judge relies on the numerous rulings in which it has been held that mere attestation is not sufficient to fix a party with knowledge of the deed attested. This principle is not open to dispute but in all the rulings in which it has been laid down their Lordships of the Privy Council have been careful to safeguard it by stating that attestation combined with other circumstances may amount to evidence of consent. Thus in *Hari Kishen Bhagat* v. *Kashi Prasad Singh* (1), their Lordships are careful to point out that there was no evidence that the reversioners benefited by the transaction or that so far as they were concerned there was any need for the mortgages. Similarly in *Pandurang Krishnaji* v. *Markandeya Tukaram* (2), a case specially relied on by the learned Subordinate Judge, it is pointed out that attestation may take place in circumstances that would indicate that the witness did in fact know of the nature of the transaction. Here the facts speak for themselves. Not only did the reversioners attend before the Registrar, identify the executant, and attest the deed, but the debt in respect of which the deed was executed was a debt from the reversioners themselves as principal debtors. It is impossible to believe under these circumstances that they were not aware of the nature of the transaction or that their attestation was not meant to indicate their assent to it. We cannot therefore agree with the

(1) [1914] 42 Cal. 876—42 I.A. 64—17 M.L.T 115—19 C.W.N. 370—13 A.L.J. 223—2 L.W. 219—21 C.L.J. 225—28 M.L.J. 565—17 Bom. L.R. 426—27 I.C. 674—(1915) M.W.N. 11 (P.C.)

(2) 1922 P.C. 20—49 Cal. 334—49 I.A. 16—18 N.L.R. 1—42 M.L.J 436—24 Bom. L.R. 557—35 C.L.J. 409—15 M.L.W. 486—20 A.L.J. 305—26 C.W.N. 201—5 N.L.J 6—30 M.L.T. 249 (P.C.)

learned Subordinate Judge that there was no evidence on the record from which the consent of the reversioners could be inferred. It is pointed out on behalf of the respondents that the widow was surety for the debt and that this fact is recited in the deed. We do not think that this fact affects the merits of the case. The mortgage did not purport to be a mortgage of the widow's limited interest only but of the entire estate and when we find that that mortgage was executed with the assent of the reversioners in respect of the debt due from themselves, we agree with the trial Court that they and their successors are estopped from questioning it now that the estate has fallen into possession.

We therefore set aside the decree of the Court below and restore that of the trial Court with costs both in this Court and in the lower appellate Court. Costs in this Court will include fees on the higher scale. We extend the time for payment to six months from this date.

Appeal accepted.

1925 ALLAHABAD 210

DANIELS, J.

Iqbal Ahmad and another—Plaintiffs—Appellants.

v.

Suraj Bali and others—Defendants—Respondents.

S. A. No. 152 of 1923, Decided on 25th June 1924, from a decree of the D. J., Azamgarh, D/- 6th November 1922.

(a) *Criminal P. C., S. 145 — Agra Tenancy Act, Chapter 5—Ejectment proceedings—S. 145 Criminal P. C. applies.*

An order under S. 145 Criminal P. C. does not bar a suit for ejectment under the Agra Tenancy Act. The expression "eviction in due course of law" in S. 145 Criminal P. C. is equally applicable to ejectment proceedings under chapter 5 Agra Tenancy Act and to ejectment under a Civil Court decree. [P. 211, C. 1]

(b) *Agra Tenancy Act, Ss. 34 and 199—Defendant can have question of proprietary right referred to Civil Court.*

In a suit for ejectment under S. 34 the defendant can ask to have the question of proprietary right referred to a Civil Court under S. 199. [P. 211, C 2]

(c) *Agra Tenancy Act, S. 34 — Ejectment suit not—Failure to plead S. 34 is fatal—Person in occupation without landholder's consent can be ejected.*

Omission to plead specifically S. 34 of Agra Tenancy Act in a suit for ejectment is not necessarily fatal to suit. A person occupying land without the land-holder's consent can be ejected as a non-occupancy tenant. [P. 211, C. 1]

U. S. Bajpai—for Appellants.

Harendra Krishna Mukerji — for Respondents.

Judgment.—This is a second appeal in a suit for ejectment of a non-occupancy tenant under S. 58 of the Agra Tenancy Act. The appeal has apparently been preferred to the Civil Court because a question of proprietary right is involved. The real question in dispute is whether the land in suit is situated in Dewara Jadid in the Azamgarh District of which the plaintiffs-appellants are *zemindars* or in the village of Dewara Sabitpur in the Fyzabad District of which the defendant Babu Narendra Bahadur Singh is in charge. The other defendants are the persons actually cultivating the land and claiming to cultivate under Babu Narendra Bahadur. The dispute between the principal parties, the plaintiffs and Babu Narendra Bahadur Singh, was the subject of proceedings in the Criminal Court under S. 145, Criminal Procedure Code. In these proceedings Babu Narendra Bahadur Singh was found to be in possession and an order was passed in his favour under S. 145 (6). The plaintiffs thereupon filed the present suit for his ejectment and that of the persons cultivating under him. No reference was made in the plaint to S. 34 of the Tenancy Act, but there was also no reference to any agreement of tenancy between the parties and it was admitted that no rent had been fixed. Under the circumstances it must have been clear to all parties that the suit was filed with reference to S. 34.

The Assistant Collector dismissed the suit on the ground that it was barred by S. 145, Criminal Procedure Code. The learned District Judge appears to agree with this conclusion and he also finds that there is nothing to show that the defendants are tenants of the appellants. On both

these grounds he has dismissed the appeal.

It is clear at the outset that S. 145, Criminal Procedure Code, is no bar to the present suit and no attempt has been made to support the judgment of the Court below on this point. S. 145 (5) lays down that the party in whose favour an order is passed shall be entitled to possession of the land "until evicted therefrom in due course of law." The expression "eviction in due course of law" is just as much applicable to ejectment in proceedings under Chapter V of the Tenancy Act as it is to ejectment under the decree of a Civil Court.

The learned Pleader for the respondents supports the judgment of the Court below on the ground, first that there was no relationship of landlord and tenant between parties, and secondly that S. 34 of the Tenancy Act not having been pleaded in the plaint it is not open to the appellant to fall back on the provisions of that section. The two points are closely connected. If the plaintiffs-appellants are entitled to rely on S. 34 it is not necessary for the success of their suit that any contract of tenancy should have been entered into between the parties. S. 34 applies wherever agricultural land is occupied by the defendant without the consent of the land-holder. If the plaintiffs' assertion that the land is within their *zemindari* is correct, a point which has not yet been determined, the case falls precisely within the terms of S. 34. It is true that S. 34 was not specifically pleaded, but I am not aware that it has ever been laid down that this omission is necessarily fatal and, as I have said above, in view of the pleadings and of the circumstances of the case it must have been perfectly clear to all the parties concerned that this was the provision on which the plaintiffs were relying for the success of the suit. If the matters were *res integra* there is, in my opinion, much to be said for the view that S. 34 was not intended to be made use of for the purpose of ejectment. The land-holder has the option either of treating the squatter as a tenant and claiming rent from him under S. 34, or of treating him as a trespasser and ejecting him through the Civil Court. The contrary view was, however laid down by Sir George Knox in *Balli* v. *Naubat Singh* (1) as far back as the year 1912, and was re-affirmed by a Bench of this Court in *Jagadardeo Singh* v. *Ali Hammad* (2) in 1918. It has also been adopted by the Board of Revenue in a large number of cases. The matter must, therefore, be regarded as settled and it is not open to me to dissent from these rulings. It is certainly an anomalous position that a dispute between two rival *zemindars* should be fought out by proceedings under the Tenancy Act, but this is what S. 34, as interpreted by this Court, allows, and it is open to the defendant to ask to have the question of proprietary right referred to Civil Court under S. 199 of the Act. The suit has been disposed of on a preliminary point and the real question at issue between the parties has not been determined by either of the Courts below. I, therefore, set aside the decrees of both the Courts below and remand the case through the lower appellate Court to the Court of first instance for determination on the merits. Costs here and heretofore will abide the result. The same order will govern Appeal No. 153.

Case remanded.

(1) [1912] 9 A.L.J. 771=16 I.C. 120.
(2) [1918] 40 All. 300=44 I.C. 919=16 A.L. J. 249.

1925 ALLAHABAD 211

WALSH, AG. C. J. AND SULAIMAN, J

Ram Sarup—Defendant—Appellant.

v.

Mt. Kataula and others—Plaintiffs—Respondents.

L. P. A. No. 10 of 1923, Decided on 2nd July 1924, from the decree of Stuart, J.

Hindu Law—Joint family—Suit by member for declaration of title to specific share does not lie in absence of partition being claimed.

The exact extent of the share owned by a member of a joint Hindu family in the joint family properties can only be determined at the time when separation between the members actually takes place. Therefore, so long as the family remains joint and in the absence of

any suggestion that a separation is desired, no member of a joint Hindu family can sue for a declaration that he necessarily has a certain specified share in the joint family property.

[P. 212, C. 2]

Benoy Kumar Mukerji—for Appellant.

Saila Nath Mukerji—for Respondents.

Judgment.—This is a defendant's appeal under S. 10 of the Letters Patent. The suit was for a declaration that the plaintiffs as members of a joint Hindu family have a right to two thirds of the property in dispute detailed in the plaint and are entitled to get mutation of names effected in the Revenue Court in their favour. There was also an alternative relief for possession in case they were found to be out of possession. The claim was contested by the defendants on the ground that the family had been separate at the time when Daulat Singh died. The Court of first instance came to the conclusion that the family was joint at the time of his death and did not think it necessary to consider whether it was separate or joint at the time when the suit was instituted. The learned District Judge however came to the conclusion that the ordinary presumption of jointness had not been rebutted by any evidence at all and that really there was no evidence of separation at all.

Reading his judgment there can be no doubt that he came to the conclusion that the family continued to be joint till the date of the institution of the suit. Nevertheless he affirmed the decree of the first Court granting the plaintiffs a declaration that they were entitled to a two-thirds share in the property in dispute.

On appeal that decree has been affirmed by a learned Judge of this Court. In the judgment of the learned Judge it has been assumed that there had been no separation amongst the descendants of the three brothers and that the plaintiffs as members of a joint Hindu family are asking for a declaration that they had a right to the property standing in the name of Mt. Sobha to the extent of a two-thirds share. The learned Judge also thought that the Courts below had found that the plaintiffs and defendants were members of a joint Hindu family.

One of the points raised before him was that under these circumstances the suit as framed was not maintainable. He, however, overruled this plea on the ground that it was not incumbent on the plaintiffs to claim partition of the property by metes and bounds.

It is quite clear to us that if the family continued joint till the date of the suit, and there is no suggestion in the plaint that the plaintiffs want to separate, the plaintiffs, though they are entitled to joint possession over the joint property, are not entitled to a declaration that they necessarily have a two-thirds share in the property. The exact extent of their share can only be determined at the time when the separation actually takes place. Mr. Saila Nath Mukerji is unable to show to us from the pleadings or any other statement of the plaintiffs that they claimed to be separate at the time when the suit was irstituted or that they expressed in clear and unambiguous terms their intention to separate.

Under these circumstances the decree of the Court below must be modified. The appeal is accordingly allowed in part and the decree of the Court below is modified to this extent that the plaintiff's suit for a declaration that they have a joint interest in the property in dispute and are entitled to joint possession is decreed but that that portion of the decree which specifies the plaintiff's share as being two-thirds is to be struck off from it. In other respects the appeal is dismissed.

As on the question of fact raised in the Court below the defendants have failed and as all this trouble has been caused owing to the bad drafting of the plaint and the incorrect way in which the reliefs have been claimed we direct that the parties should bear their own costs throughout.

Appeal rejected.

1925 ALLAHABAD 213

MUKERJI AND DALAL, JJ.

Lalman and others — Defendants — Appellants.

v.

Kalka Prasad and others—Plaintiffs —Respondents.

S. A. No. 1713 of 1922, Decided on 9th July 1924, from the decree of Dist. J., Farukhabad, D/- 18th Sept. 1922.

Contract Act, S. 68—Discharge of decretal debt by stranger as owner of property of the deceased, where deceased's minor sons were living, does not avail the stranger.

Where the share of T was attached, while he was separate from his mother and where T had minor sons but T's brother and mother representing themselves to be owners and to be persons in possession of T's share, mortgaged that share and with the mortgage money satisfied the decree against T's estate.

Held: that the mortgagors having never purported to act on behalf of minor sons of T and having totally ignored their existence, the mortgage could not be enforced against either T's descendants or T's property and that S. 68 of the Contract Act did not apply to the case.

[P. 213 C.2 ; P. 214 C. 1]

Gulzari Lal—for Appellants.

U. S. Bajpai—for Respondents.

Judgment.—This appeal must succeed.

The respondent, Kalka Prasad, brought the suit, out of which this appeal has arisen on foot of a mortgage-bond, dated the 20th June, 1904, for sale of a certain property which admittedly belonged to one Tika. The parties to this suit were a large number of people and the relationship among them is described in the pedigree to be found at page 7 of the printed record. The plaintiff's case was that the entire family of the defendants was a joint one and three persons, namely, Misra, Jaijai Ram and their mother Mt. Ganeshi executed a mortgage on behalf of the entire family. The pedigree will show that Mt. Ganeshi had five sons one of whom was Tika. The appellants before this Court are two sons of Tika and a son of one of these.

The suit was defended by the appellants alone and it was contended that they were not liable. It appears that, in the Court of the first instance the plaintiff said that although he had bought a suit against so many defendants he would be content to have a decree for the sale of Tika's share alone and the decree should be against the sons and grandsons of Tika.

The learned Judge of the lower Appellate Court has found that Tika was separate from his brothers and mother. He was living away from the family house and at the house of his father-in-law. It has also been found that at the date of the mortgage there was a money-decree against the estate of Tika and his share of the property had been attached. By the mortgage in suit, the three executants recited that, they were owners and persons in possession of the fifth share of Tika in the family property, and as that share had been attached in execution of a decree, the sale of the property would injure them (the executants). With these recitals they executed the mortgage-bond.

It has been found that a sum exceeding the consideration money, namely, a sum of Rs. 527 was paid by the mortgagee towards the satisfaction of the decree. The Court of first instance said in its judgment that the mortgage had been executed by the *de facto* guardians of the sons of Tika and, therefore, it was binding on the appellants. The learned District Judge did not hold that the mortgagors were the *de facto* guardians of the sons of Tika but he thought that S. 68 of the Contract Act might be brought into play and that would be sufficient to affirm the decree of the Court of the first instance which was in favour of the plaintiff.

In this Court it has been urged that the executants of the mortgage were no body and the mortgage could not operate to bind Tika's share or his descendants. It has further been urged that S. 68 of the Contract Act has no bearing on the case and if it was a question of supplying necessities to the minors, a suit on that footing would be barred by three years of limitation.

We are of opinion that S. 68 of the Contract Act has no application to the facts of this case. As for the mortgage, we find that the mortgagors never purported to act on behalf of the minor sons of Tika. Indeed they totally ignored the existence of these children and executed the mort-

gage as if they were the sole owners of the said property. The principle of the ruling in *Balwant Singh* v. *Rockwell Clancy* (1) decided by the Privy Council and of the case of *Nandan Prasad* v. *Abdul Aziz* (2) applies to the facts of the case. The mortgage could not be enforced against either Tika's share of the property or against his descendants.

We allow the appeal, set aside the decrees of the Courts below and dismiss the suit of the respondent, Kalka Prasad, with costs to the appellants throughout. Costs in this Court will include Counsels' fees on the higher scale.

Appeal aecepted.

(1) [1912] 34 All. 296=39 I.A. 109=(1912) M. W.N. 462=11 M.L.T. 344=9 A.L.J. 509 =15 C.L.J. 475=16 C.W.N. 577=23 M.L. J. 18=14 I.C. 629=14 Bom. L.R. 422 (P.C.)

(2) 1923 All. 581=45 All. 497=21 A.L.J. 373=L.R. 4 A Civ. 227,

---

1925 ALLAHABAD 214

DANIELS AND NEAVE, JJ.

Raja Babu—Appellant.

v.

Balmukund and others–Respondents.

S. A. No. 1182 of 1922, Decided on 26th May 1924, from the decree of D. J., Cawnpore.

(a) *Civil P. C., O. 32, R. 4—Where a Hindu father is appointed guardian, in a suit on the basis of* hundis *executed by him, in absence of proof of immorality or illegality the decree is binding on the sons,*

In a suit brought on the basis of *hundis* executed by a Hindu father, the father was appointed guardian of the minor son and a decree was passed against them, when subsequently the sons filed a suit to annual the decree on the ground of improper appointment of guardian and alleged but failed to substantiate that the debt was illegal or immoral.

Held: as there was no defence open to the minors which the father would not have taken in the former suit, the minors were properly represented by their father and the decree passed against them could not be set aside.

[P. 214, C. 1]

(b) *Civil P. C., O. 32, R. 4—Consent of person appointed is necessary but can be presumed where despite opportunity to object, he has not objected to the appointment.*

O. 32, R. 4 of the Civil P. C. necessitates that the person appointed as guardian must give his consent to such appointment. Where however, the guardian has had an opportunity to object to his appointment and does not do so, the consent can be presumed.

[P. 215 C. 1]

(c) *Civil P. C., O. 32, R. 4—Irregularity and prejudice to minor are factors to be considered in cases of setting aside decree against minors for improper appointment of guardian.*

The two questions which arise in suits to set aside decrees passed against minors on the ground of improper appointment of guardian are (1) Whether the guardian was irregularly appointed and (2) whether the minors have been prejudiced. 43 All. 104 Foll. [P. 214, C. 2]

Girdhari Lal Agarwala—for Appellant.

Sailanath Mukerji—for Respondents.

Daniels, J.—This appeal arises out of a suit by the plaintiffs respondents to set aside an *ex parte* decree passed against them as minors under the guardianship of their father Beni Madho, on the ground that their father was improperly appointed as their guardian in the previous suit, that they were not liable for the debt, and that the decree is not binding on them. The father was himself a defendant in the previous suit, and was also impleaded as guardian of his sons. The two questions which arise in a case of this kind were laid down in *Chhatter Singh* v. *Tej Singh* (1). They are—

1. Whether the guardian was irregularly appointed?
2. Whether the minors have been prejudiced?

Both these questions have been answered by the Courts below in favour of the plaintiffs. There may be some doubt as to the proper answer to the first question but the defendant-appellant is undoubtedly entitled to succeed on the second.

The suit was brought on two *hundis*. Notice was issued to Beni Madho, father of the plaintiffs to state whether he had any objection to being appointed guardian. This is the ordinary form in which notices for the appointment of a guardian are issued by this Court. (See Form No. H. C. J. Part I, 18. O. 442, H. C. 1921). The notice was served by affixation on his house under Order 5, rule 17, but was held by the Court trying the case to have been duly served. He did not appear or make any objection and he was appointed guardian *ad litem* under Order 32, rule 3, on 3rd April, 1917. A week later Bani Madho appeared, stated that he had not received the notice in time and objected to

(1) [1921] 43 All. 104=59 I.C. 671=18 A.L.J. 956.

being appointed guardian. The Court held that as he had already been appointed he could not retire without leave of the Court under rule 11 or without procuring some one to take his place under rule 8. As he had not offered to pay the cost of appointing a successor. and as in the opinion of the Court no sufficient reason for allowing him to withdraw was made out, the Court refused to allow him to retire.

Now it is quite true that under Order 31, rule 4 (3), no person can be appointed guardian for a suit without his consent. Consent can, however, be presumed where the guardian is given an opportunity to object to his appointment and does not do so. This was laid down in the case of *Chhatter Singh* v. *Tej Singh* (1), already cited and by the Patna High Court in *Thakur Tejeswar Dutt* v. *Lakhan Prasad Singh* (2). It is doubtful how far the Court in the present case was justified in going behind the decision of its predecessor that the service on Beni Madho was sufficient. When once a guardian has been duly appointed he cannot retire except with the leave of the Court and under the conditions laid down in Order 32, rules 8 and 11. The Court would undoubtedly have exercised a wise discretion in allowing him to retire under the circumstances and in appointing the mother of the minors who was willing to be appointed to act for them. It is, however, difficult to say that the Court acted illegally in the matter.

The only ground on which the Courts below have held that the father was not a proper person to be appointed guardian and that the minors were prejudiced by his appointment is that no pious obligation to pay the father's debt arose during his lifetime. That idea is now finally exploded by the judgment of the Privy Council in *Brij Narayan* v. *Mangal Prasad* (3). The debt was a simple money debt which the sons were under a legal liability to pay unless it were proved to be illegal or immoral. The sons in the present case set up a plea that the debt was illegal or immoral but the trial Court found against them. No evidence was offered to show that the debt taken was for illegal and immoral purposes and it has not been suggested either in the Court below or in this Court that this plea could be substantiated. Under these circumstances the plaintiffs were properly represented by their father and there was no defence open to them which he could not have taken. The plaintiffs' suit should have been dismissed and we allow the appeal, set aside the decrees of the Courts below and dismiss the suit with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

(2) 1923 Patna 231=2 Pat. 296=4 P.L.T. 127=1 Pat. L. R. 59=1923 P.H C.C. 88.

(3) 1924 P. C. 50=46 All. 95—51 I.A. 129=21 A.L.J. 934=5 L.R. P.C. 1=28 C.W.N. 253=46 M.L.J. 23=5 P.L.T 1=2 Pat. L. R. 41=(1924) M.W.N. 68=19 M.L.W. 72=33 M.L.T. 457=26 Bom. L.R, 500=11 O.L.J. 107 (P.C.)

✱ 1925 ALLAHABAD 215

MEARS, C. J., AND PIGGOTT, J.

Rafat-un-nissa Begam — Defendant —Appellant.

v.

Husaini Begam—Plaintiff— Respondent.

F. A. No. 414 of 1921, Decided on 12th November 1924, from a decree of the Sub. J., Moradabad.

✱ (*a*) *Registration Act, S. 35 (1) (c)—Admission of husband on wife's behalf is an irregularity curable by S. 87.*

Admission of execution of a document by the husband of a lady on behalf of the lady, who had given general power of attorney to the husband would amount to no more than an irregularity of procedure curable by the provisions of S. 87 of the Registration Act, and would not affect the validity of the registration.

[P. 217, C. 1]

✱ (*b*) *Registration Act, S. 32 (b)—Presentation by one representative is sufficient.*

In so far as the provisions of S. 32 (b) can be applied at all to the case of a deceased executant, it is sufficient if the document is presented for registration by a person who is a representative of the estate of the deceased, and it is not necessary for the entire body of persons, who between them represent the whole estate, to join in making the representation.

[P. 218 C. 1]

Peary Lal Banerji and *Durga Prasad*—for Appellant.

B. E. O'Conor—for Respondent.

Piggott, J. — This is an appeal by one of the defendants to a suit in which a certain lady, Nawab Husaini Begam, as plaintiff, sought to enforce

certain rights alleged to exist in her favour under a mortgage-deed purporting to have been executed on the 6th of December 1918, by one Mt. Hashmat-un nissa. The said executant died on the 13th of December, 1918. Under Muhammadan law her heirs were her two brothers, Aziz-ud-din and Sami-ud-din, and her sister Mt. Rafat-un-nissa. It is this sister who is the appellant before us. It so happens, however, that Mt. Hashmat-un-nissa had also left a will, under which she bequeathed the one-third share in her estate, over which she had power of disposition under the Muhammadan law, to two persons named Mushtaq Ali and Murshid Ali. All these persons were impleaded as defendants to the suit. Various defences were raised in the trial Court, all of which have been overruled, and the suit has been decreed against all the defendants. As already noted, the appeal is by Mt. Rafat-un-nissa, Begam alone. The memorandum of appeal before us raises really two points. Six out of the seven paragraphs of which the memorandum of appeal consists amount in substance to a plea that the plaintiff, having been put to proof of the fact, has failed to prove actual and intelligent execution of the deed in suit by Mt. Hashmat-un-nissa. We have been taken through the evidence, which is also discussed in detail in the careful judgment of the learned Subordinate Judge. We agree with the trial Court that importance attaches to the evidence given by the scribe Mohan Lal, who was also an attesting witness, and that no adequate cause has been shown for distrusting the evidence of this witness. Of the marginal witnesses to the deed two were brothers of the executant, one was an agent of the mortgagee, and one was a karinda of the executant of long standing. The witnesses examined at the hearing were one of the brothers by name Azid-ud-din, the agent by name Shams-ud-din, the scribe Mohan Lal, and a witness named Ali Husain Khan, who benefited under the mortgage-deed to this extent that a small promissory note in his favour was to be paid off out of the consideration. On this part of the case we are content to say that, having weighed all the arguments addressed to us in support of the appeal, we see no good reason to dissent from the finding of the trial Court. We agree that execution of this document by Mt. Hashmat-un-nissa is proved according to law.

The remaining plea taken in appeal is one of law. It is contended that this document, even though executed by the lady in her life-time, is now of no effect and not receivable in evidence, because it has not been duly registered. In this connection our attention was drawn to the fact that it was presented for registration at the office of the Sub-Registrar at Moradabad, whereas the property principally affected by the mortgage is a share in a village situated within the jurisdiction of the Sub-Registrar of Thakurdwara. The document, however, purports to include a small parcel of land in the town of Moradabad. It does not appear to us that the defendants laid any stress on this point in the trial Court. Consequently there are no materials before us on which we can hold that the executant did not in good faith intend to convey by way of mortgage this small parcel of land as well as the share in the village of Sarkara. We find no flaw in the registration proceedings on this account.

The other point taken is that there was neither a valid presentation of the document before the Sub-Registrar of Moradabad, nor a satisfactory admission of execution, so as to justify the registration of the document. We shall have to refer in this connection to two distinct sections of the Registration Act (No. XVI of 1908). One is S. 35 (1) (c), which deals with the admission of execution in the case of a document the executant of which is dead; the other is S 32 (b) which relates only to the presentation of the document. The facts with which we have to deal are the following:—As already mentioned by us, Mt. Hashmat-un-nissa died seven days after the execution of the deed. Ten days after her death her brother Sami-ud-din, who was one of her heirs under the Muhammadan law, and therefore a legal representative of her estate

within the meaning of those words as used in the Code of Civil Procedure, presented the document in suit to the Sub-Registrar of Moradabad, with a prayer that it might be registered. In his petition he gave the names of the remaining heirs-at-law of the deceased lady, namely, his own brother, Aziz-ud-din, and Mt. Rafat-un-nissa Begam, the appellant now before us. He said nothing about any will left by the deceased, or the rights of legatees under such will, and this in spite of the fact that the heirs-at-law had only a few days before come to terms with the legatees and executed a document under which they agreed that the will should stand. Sami-ud-din's prayer was that the Sub-Registrar should issue notice to the remaining heirs-at-law and call upon them also to admit execution of the deed. He himself admitted execution there and then took out a portion of the sale consideration, being his rateable share as an heir-at-law out of that portion of the consideration which had been left over to be paid at registration The other brother, Aziz ud-din, appeared before the Sub-Registrar in obedience to a summons. He too admitted execution and took out a similar share of the sale consideration. The appellant, Rafat-un-nissa Begam, never appeared in person before the Sub-Registrar of Moradabad, but sent her own husband who held a general power of attorney on her behalf. This gentleman also admitted execution and took out the balance of the Rs. 1,300 which had been left to be paid at registration. The first contention for the appellant is that Jamil-ud-din was not entitled to admit execution as agent of his wife, because he did not hold a special power of attorney to that effect. The learned Subordinate Judge has remarked, and, in our opinion, rightly, that, even assuming that the Sub-Registrar committed an irregularity of procedure in accepting Jamil-ud-din's admission of execution, this would so far as S. 35 (1) (c) of the Registration Act goes, amount to no more than an irregularity of procedure curable by the provisions of S. 87 of the same Act, and would not affect the validity of the registration. On this point the Court below has referred to a decision of the Madras High Court, in *Pakran* v. *Kunhammed* (1), which is directly in point and which in substance follows an older decision of this Court, in *Hardei* v. *Ram Lal* (2). The real difficulty raised by the appellant's contention turns, however, on the wording of S. 32 (b) of the Registration Act. If there has been no valid presentation, it is contended that the Sub Registrar of Moradabad never had any jurisdiction to deal with this document, that the provisions of S. 87 of the Act are inoperative, and, in short, that the document has not been registered according to law. The words of the clause are to the effect that the document is required to be presented at the proper registration office "by the representative or assign" of some person "executing or claiming under the same". Now, as we have pointed out, the actual presentation of the document was by one of the legal representatives of the deceased lady. The contention before us is that the word "representative" in the clause above quoted must be read as including the plural "representatives", and that in the case of a deceased person there is no valid presentation on behalf of the executant unless the whole body of persons representing the estate of the deceased join in making the presentation. In our opinion this is one of those cases in which the context is repugnant to the idea of making the singular word include the plural in the manner in which the appellant contends. When we look at S. 35, which we have already considered, it is obvious that if any person who is a representative of a deceased executant appears and admits execution of the document before the Sub-Registrar, that document must be registered, at any rate, as against the person making such admission, We are inclined to doubt whether in S. 32 (b) the legislature was specifically considering the case of a deceased executant at all. The definition given of the word "representative" in S. 2 of the Registration Act shows that the legislature was thinking of executants still alive who could only enter an appearance before the Regis-

(1) [1900] 23 Mad. 580.
(2) [1889] 11 All. 319—(1889) A.W.N. 101.

trar through their representatives. The case of a deceased executant is specifically dealt with by S. 35 (1) (c), and we have already held that the provisions of that section would not invalidate the registration of this document. We are content to say that, in so far as the provisions of S. 32 (b) can be applied at all to the case of a deceased executant, it is sufficient if the document is presented for registration by a person who is a representative of the estate of the deceased, and that it is not necessary for the entire body of persons, who between them represent the whole estate, to join in making the presentation.

The appeal, therefore, fails, and we dismiss it accordingly with costs including fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 218 (1)

KANHAIYA LAL, J.

Jokhu Singh—Petitioner.

v.

Chunnoo Lal—Opposite Party.

Civil Rev. Suit of 1924, Decided on 23rd July 1924, against an order of the Judge, Small Cause Court, Allahabad D/ 17th March 1924.

Civil P. C., S. 115 -Refusal to exercise discretion in one case is not relevant in another case.

Omission to give reasons by a Court for granting instalments is after all an irregularity and the discretion exercised by the Court below in that respect ought not lightly to be interfered with. [22 C. W. N. 601 Foll]. Where the question is one of discretion the ground why it was refused in one case is not relevant in other cases. [P 218 C 1,2]

M. Wali-ullah—for Petitioner.

Judgment.—In a suit decided by the Small Cause Court the defendant has been allowed to pay the decretal money by instalments of Rs. 50/- half yearly. The Court below ought to have given reasons why it allowed the payment of the decretal money by instalments. But the omission to give reasons is after all an irregularity, and as held by their Lordships of the Privy Council in *Mt. Rahmat-un-nissa* v. *Price* (1) the discretion exercised by the Court below ought not lightly to be interfered with.

The learned counsel for the applicant refers to the decision in *Binda Prasad* v. *Madho Prasad* (2) but that was an appeal in which the propriety of the decree could have been challenged on every possible ground. A reference has also been made to the decision in *Balgobind Ram* v. *Chhedi Lal* (3). But where the question is one of discretion the ground why it was refused in one case is not relevant in other cases. The application is therefore dismissed.

Application dismissed.

(1) [1918] 42 Bom. 380=45 I.A. 61=22 C.W N. 601=16 A.L.J. 513=17 C.L.J. 623—5 Pat. L,W. 25=23 M.L.T. 400=8 L.W. 53=20 Bom.L.R 714=35 M.L.J. 268= 45 I.C. 568=12 Bur. L.T. 91 (P.C.)
(2) [1878-80] 2 All. 129.
(3) [1910] 11 C.L.J. 431=6 I.C. 552.

1925 ALLAHABAD 218 (2)

MUKHERJI, J.

Bhagwan Das—Accused—Appellant.

v.

King Emperor—Opposite Party.

Criminal Mis. Nos. 156 and 157 of 1924, Decided on 19th August 1924, reference made by the S J. Meerut.

(a) *Practice—Crown is Party in Cr. Cases and should be represented by the Government Pleader.*

In Criminal Cases the Crown is as much a Party before the Court as the accused person. Any motion therefore that has to be made before the Court should be through the Government Pleader and not by an Official, or 'demi-official' Letter by one officer to another. [P 219 C 1]

(b) *Practice—Admitting to bail—Mention in the order that sentence is suspended is not illegal.*

When an appellate Court or a Court hearing a revision admits the appellant or the applicant to bail or orders that a fine should not be paid till the disposal of the case, he thereby ordrs the supension of the sentence, and therefore mention in the order that the sentence is suspended does not render the order bad. [P 219 C 2]

The parties were not represented.

Judgment.—These two Criminal Miscellaneous cases No. 156 and No. 157 of 1924 have arisen out of a single

reference made by the learned Sessions Judge of Meerut.

It appears that one Bhagwan Das was tried at the instance of one Siddiq Ali and was convicted under S. 504 of the Indian Penal Code by a summary trial, and was sentenced to pay a fine of Rs. 200. A revision against this conviction and sentence was filed before the Court of the learned Sessions Judge and was transferred to the Court of the learned Additional Sessions Judge hearing cases from Muzaffarnagar District. There was another criminal case against the same person, Bhagwan Das, and as the result of that case he was convicted of an offence under S. 298 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 300. Against this conviction and sentence Bhagwan Das appealed to the Sessions Judge of Meerut and the appeal in the ordinary course was transferred to the Court of the Additional Sessions Judge hearing cases from Muzaffarnagar. At the instance of the learned District Magistrate of Muzaffarnagar the learned Sessions Judge got the records of the two cases and wanted to hear them himself. Objection was taken before him that it was not probably right for him to do so, as he had no jurisdiction to withdraw cases which had been transferred to the learned Additional Sessions Judge. The learned Sessions Judge has accordingly sent up this reference to this Court asking for a ruling whether he has got jurisdiction to hear the appeal and the application for revision; and, if not, requesting the Court to transfer the cases to his Court.

As a matter of procedure it may be pointed out for the guidance of Courts below that the Crown is as much a party before the Sessions Judge as the accused person. Any motion that has to be made before the Sessions Judge should, therefore, be through the Government Pleader and not by an "official" or "demi-official" letter from the District Magistrate as representing the Crown. The proper course, therefore, should have been for the Government Pleader to make an application to the learned Sessions Judge to re-transfer the cases to his file.

Coming to the reason for transfer, it appears to me there is none at all. The learned Sessions Judge does not give any. The learned District Magistrate has taken exception to the order of the Additional Sessions Judge of Muzaffarnagar because he stated in his order, admitting the appellant in one case and applicant in the other to bail, that he had ordered the suspension of the sentence. When an appellate Court or a Court hearing a revision admits the appellant or the applicant to bail or orders that a fine should not be paid up till the disposal of the case, he thereby orders the suspension of the sentence. The learned District Magistrate does not take exception to the order as to bail but he finds that there was no justification of the order suspending the sentence. As I have pointed out, the two are one and the same thing. It is clear, therefore, that there was nothing in the conduct of the Additional Sessions Judge of Muzaffarnagar which should have induced the Crown to desire that the case should be heard by any other Judge. The learned District Magistrate also pointed out to the learned Sessions Judge of Meerut that the cases had excited the two Hindu and Muhammedan communities of Muzaffarnagar and that it was therefore desirable that the cases should be heard by a Judge who was neither a Hindu nor a Muhammedan. On principle, I deprecate this sort of proceeding. The officers of the Crown in the majority of cases are bound to be either Hindu or Muhammedan and if parties are allowed to choose their Courts, it would not be easy to please them all. In those unfortunate cases in which an Indian and a European are arraigned on either side, if either party wants a Court the presiding officer of which is neither an Indian nor a European, it would be difficult to please him. On principle, therefore, it is to be regretted that the learned Sessions Judge of Meerut should have been asked to take up the cases.

In this particular case there is however one point, which is this, that Bhagwan Das, the appellant in one case, and applicant in the other, does not take exception to the learned Sessions Judge of Meerut hearing the appeal and revision. No doubt he says that as the learned District Magistrate so wishes, he would not mind if the cases be heard by the learned Sessions Judge of Meerut. Thus we have the fact that one party wants that the case should be heard by the learned Sessions Judge of Meerut and the other party agrees. In the circumstances I order that the two cases, namely the appeal and the revision, be retransferred from the Court of the Additional Sessions Judge of Muzaffarnagar to the Court of the Sessions Judge of Meerut.

Cases transferred.

✱ 1925 ALLAHABAD 220

MUKHERJI, J.

Chhotey Lal—Applicant.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 339 of 1924, Decided on 28th August 1924, from an order of the S. J., Kumaun, D/-29th April, 1924.

✱ (*a*) *Evidence Act, S. 114 ill. (a)—Articles of ordinary type found 2½ years after theft—No presumption can be raised under the section against the accused—Penal Code, S. 411.*

2½ years before the discovery, at the house of accused, of the articles (four silver ornaments of ordinary type worth Rs. 100) these had been removed from the houses of the two complainants by means of a dacoity. The accused was a goldsmith by caste and profession and when asked, he explained that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the accused.

Held: that the accused cannot be presumed to be in possession of the articles with guilty knowledge. 29 All. 138 Foll. [P 221, C 1]

✱ (*b*) *Interpretation of Statutes—Illustrations explain and do not restrict the meaning of section.*

An illustration only simdlifies the law as enacted in the Code and cannot certainly be taken to restrict the sense of the section.

G. N. Kunzru—for Applicant.

R. Malcomson—for the Crown.

Judgment.—The applicant was charged with having committed an offence under S. 411 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for one year. He appealed to the learned Sessions Judge, but his appeal was dismissed.

In this Court, it has been contended that on the facts found and in the circumstances of the case the prosecution has failed to prove a case under S. 411 of the Indian Penal Code.

The following facts appear to have been established. 2½ years before the discovery of the articles at the applicant's house, these had been removed from the houses of the two complainants by means of a dacoity. The articles are four silver ornaments of the total value of Rs. 100. The applicant is a goldsmith by caste and profession. He was asked whence he got those articles and he replied that he himself had made them for his wife. The articles were found, except in one case, on the person of the wife of the applicant. There is no evidence that any attempt had been made to conceal the property. On the other hand they were found at places where the goods belonging to the applicant or his wife would be naturally found. It was further found that, the explanation of the applicant that he had made those goods himself was false and that the goods had been really the property of the two complainants Gannu Singh and Govind Singh. The question is whether in the circumstances of the case the prosecution was entitled to raise the presumption that the applicant was in possession of the articles having reason to believe that they were stolen property.

It appears to me that it is certainly on the prosecution to prove the guilty knowledge of the person prosecuted. There may however be circumstances in which this guilty knowledge may be inferred and may be accepted as conclusive if no explanation is forthcoming on the part of the accused person. Such a case is mentioned by way of illustration in clause (*a*) to S. 114 of the Evidence Act. There it is stated that, if a man be found in possession of stolen goods soon after a theft, the presumption would be that

the man was either himself the thief or that he knew that the goods were stolen, unless he could satisfactorily account for his possession. It is to be noted that the word 'soon' has been used in this illustration. An illustration only exemplifies the law as enacted in the Code and cannot certainly be taken to restrict the sense of the section. But the section itself simply says that, the existence of any fact may be presumed which the Court thinks likely to have happened, having regard to the common course of natural events, human conduct &c. The question therefore is, can it be said that the person who was found in possession of stolen property 2½ years after the actual offence, by which the owner lost it, must be presumed to be in possession with guilty knowledge, unless he can account for his possession? In judging a case, regard must be had to the nature of the property. The property, as I have already mentioned in this case, is silver ornaments—articles which would easily change hands from time to time—and is articles which may, in the common course of events, find their way to a silversmith's shop. Speaking therefore of the presumption, it is difficult to say that there is any presumption of the guilty knowledge in this particular case.

Several cases have been referred to, and in my opinion, although every case has been decided on the peculiar facts of it, there seems to be a strong opinion against the raising of any presumption in favour of the prosecution where there has been a delay between the loss of the goods and the recovery of them. I do not propose to discuss any of the cases except one, *viz*: *Emperor* v. *Sughar Singh* (1). In that case the appellant was found in possession of certain ornaments of the ordinary type and these were found six months after the dacoity by which they were lost, and it was held that no presumption under S. 114 of the Evidence Act could be raised to imply guilty knowledge. Their Lordships laid special stress on the word 'soon' to be found in illustration (*a*) to S. 114 of the Evidence Act. The other cases are *Ram Chandra* v. *Haji Meah* (2) *King Emperor* v. *Rajendra Roy* (3) and *Queen Empress* v. *T. Burke* (4).

I hold that the prosecution has failed to prove the guilty knowledge on the part of the applicant. I set aside the coviction and the sentence.

The applicant is on bail and he need not surrender.

Revision allowed.

(1) [1906] 29 All. 138=(1906) A. W. N. 314=3 A. L. J. 808=4 Cr. L. J. 436=1 M. L. T. 449.

(2) [1913] 17 C. W. N. 1129=21 I. C. 171=14 Cr. L. J. 571.

(3) [1918] 23 C. W. N. 593=27 C. L. J. 311=47 I. C. 64=19 Cr. L. J. 858.

(4) [1884] 6 All. 234=(1884) A. W. N. 55.

1925 ALLAHABAD 221

WALSH, AG. C. J, AND DALAL, J.

Sita Ram and another—Appellants.

v.

Beni Prasad and others—Respondents.

S A. No. 3 of 1924, Decided on 6th August 1924, from an order of the Dt. J.. Agra, D/-18th February, 1924.

(*a*) *Provincial Insolvency Act. (1920) S. 4 (2)—No fresh jurisdiction has been conferred by the section.*

S. 4 (3) of the Act of 1920 did not invest insolvency Courts with a jurisdiction which did not exist formerly. Prior to the Act V of 1920 also, decrees of an insolvency Court had the same effect of binding the debtor and the debtor's estate and his sons. 15 A.L.J. 661 Affirmed. [P 222, C 2]

✱ (*b*) *Provincial Insolvency Act. (1920) S. 28 (4)—Receiver of insolvent Hindu debtor's estate is entitled to take possession of property obtained by his sons at partition—Hindu law—Debts.*

Sons being liable to pay father's debts, property acquired by them at partition of ancestral property can be taken possession of by receiver of their father's estate to satisfy the father's debts unless the sons can show that the debts were tainted with immorality. 1922 A. 79 Foll. [P 223, C 1]

Surendra Nath Sen, Mohan Lal Sandal and *Peary Lal Banerjee*—for Appellant.

Shiam Krishna Dar, Satish Chandar Das and *M. A. Aziz*—for Respondents.

Judgment.—This is a second appeal in insolvency proceedings. One Ram Prasad was declared an insolvent on

18th May 1914 and a receiver was appointed on 3rd June 1914. At that time the insolvent's father Basanti Lal was dead, while his grand-father Girdhari Lal and three brothers, Shambhu Nath and others of his father Basanti Lal were alive. The receiver desired to take possession of a portion of the property in the possession of Girdhari Lal on the ground that it was joint ancestral property and that Ram Prasad had a share therein. Girdhari Lal objected and the insolvent Court held on 10th September 1915 that the property was the self-acquired property of Girdhari Lal in which Ram Prasad had no share. After the death of Girdhari Lal, the receiver claimed ownership by right of succession of the insolvent to a one-fourth of the property left by Girdhari Lal, whereupon he was stopped by Shambhu Nath and others who claimed the entire property as benficiaries under a will of Girdhari Lal. The matter was inquired into by the insolvency Court which decided on 12th November 1917 in favour of the genuineness of the will.

In 1921 two minor sons of Ram Prasad sued Shambhu Nath and others and also their father Ram Prasad for partition of their one-sixth share, that is, two-thirds of one-fourth, which according to them devolved on Ram Prasad by right of survivorship, A preliminary decree for partition was passed in their favour on 29th June 1923. Before a final decree could be prepared, the parties compromised and the sons received a house and Rs. 8,000 in cash as their one-sixth of ancestral property.

One of the creditors Beni Prasad thereupon moved the insolvency Court to direct the receiver to take possession of this property of sons for payment of their father's debt. This application was dismissed by the trial Court of the Judge of Small Causes on 24th September 1923 on the ground that it was barred by previous orders of the Court under S. 11 of the Code of Civil Procedure. The provisions of the Civil Procedure Code are made applicable to insolvency proceedings under S. 5 of the Act No. V of 1920. On appeal to the District Judge by he creditor the order of the trial Court was set aside and the receiver was directed to take possession of the house and cash allotted to the sons on partition and to distribute the proceeds among the creditors.

It was argued here on behalf of the minor sons of Ram Prasad that the provisions of S. 4 (2) of the Act of 1920 did not apply, as they invested insolvency Courts with a jurisdiction which did not exist formerly. We are however of opinion that prior to this Act also decrees of an insolvency Court had the same effect of binding the debtor and the debtor's estate and the claimants. This was held by a Bench of this Court in *Pitaram* v. *Jhujar Singh* (1). In a subsequent Bench decision of this Court *Irshad Husain* v. *Gopinath* (2) this decision was followed and not dissented from though the learned Judges composing that Bench had a certain amount of hesitation in doing so. We are of opinion that the case in 15 A. L. J. 661 was rightly decided.

The present dispute however is not concluded by the previous orders of 1915 and 1917. In the previous disputes the sons were not parties. The question at issue here is not whether Girdhari Lal was in possession of joint family property or self-acquired property. The point at issue is whether a Hindu father is entitled or not to property obtained by his sons, on a division of joint ancestral property, when he desires to satisfy his debts out of the proceeds of such property. In our opinion the previous orders are not a bar to the present inquiry.

In this view it is not necessary to consider whether the previous orders were obtained by fraud and collusion or not.

The claim of the receiver, in whom the father's rights and interests vested under S. 28 of the Provincial Insolvency Act, is based on the principle of Hindu law enunciated by a Bench of this Court in *Bawan Das* v. *Chiene* (3). That case also arose out of insolvency proceedings as here and the same question was in dispute as to the vesting of a Hindu father's

---

(1) [1917] 15 A.L.J. 661=33 I. C. 798.
(2) [1919] 41 All. 378=49 I. C. 590=17 A.L.J. 374
(3) 1922 All. 79=44 All. 316=20 A.L.J. 155.

property in the receiver. At page 157 of the report. it was observed.

"If we may refer to another principle of Hindu law we may note that in the event of a suit for partition by these minor sons against their father provision would first be required to be made for all debts due by the joint family as such including debts due by their father (vide Trevelyan's Hindu law, Second Edition at page 355 and the authorities there cited)".

The appellants' learned counsel desired to distinguish this ruling on the ground that the receiver was in this case attempting to take possession of the separate property of the sons. That of course he could not do (vide *Devaguptapu* v. *Vaddadi* (4). Here however the receiver has stepped in at the partition and not after. He was vested with all the property which devolved on the insolvent after the date of the order of adjudication and before his discharge-S. 28 (4).

As soon as the sons received joint family property at partition the right became vested in the receiver of taking that property to pay Hindu father's debts. The receiver did not become entitled to this right subsequent to the partition.

The sons are liable to contribute towards the payment of any such debts of the father as are not tainted with immorality. The appellants' learned counsel pointed out that the receiver will therefore have a fund out of which certain debts may be paid rateably and not others. This position was said to be contrary to the scheme of the insolvency Act. We do not think that there is anything in the Act to prohibit the receiver from holding such a fund.

The sons have not had an opportunity given to them to prove the immorality of the debts. This shall be done now. We modify the lower appellate Court's decree and remand the case to the trial Court for a determination of the scheduled debts which may be proved by the sons to be tainted with immorality. The sons shall be bound to contribute to the the rest of the debts and shall be paid the balance, if any, of the proceeds of the property. This order is passed under Order 41 rule 23. Costs here and heretofore shall abide the result.

Case remanded.

(4) [1915] 38 Mad. 1120=27 M.L.J. 113=24 I. C. 474=(1914) M.W.N. 742.

✱ 1925 ALLAHABAD 223

DANIELS AND NEAVE, JJ.

Abdul Wahab and others—Appellants.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 435 of 1924, Decided on 21st July 1924, from an order of the Addl. S. J., Moradabad, D/- 19th May 1924.

(a) *Evidence — Identification Parade — Bringing outsiders to stand with accused is unusual but not illegal.*

Where owing to the scarcity of other under-trial prisoners in jail outsiders were brought in and placed in the line with the accused,

[P. 225, C. 1]

Held: that the procedure was no doubt unusual, but in the peculiar circumstances of the case it was justified.

(b) *Evidence Act, S. 9—Evidence of Magistrate conducting identification parade may be used to corroborate identifying witnesses, evidence.*

For a Magistrate or other officer to come into Court and depose that a particular witness in his presence identified one of the accused as having taken part in the dacoity is nothing more than hearsay evidence but the Magistrate's evidence will be strictly relevant under the provisions of the Evidence Act to corroborate the evidence of a witness saying that he identified certain persons at the jail and that the persons whom he there identified were persons whom he had seen taking part in the dacoity. 19 A.L.J. 947 Ref.

[P. 225, C. 1; P. 226 C. 1]

✱ (c) *Evidence Act, S. 132—Conviction can be based on approver's uncorroborated evidence.*

A conviction can be based on the uncorroborated testimony of an accomplice. 1922 Lah. 1 Ref.

[P. 226, C. 1]

C. Thomas, Waliullah and *M. N. Raina*—for Appellant.

Lalit Mohan Banerji—for Opposite Party.

Judgment. — Eighteen men have been convicted by the Additional Sessions Judge of Moradabad under S. 396 of the Indian Penal Code. Three of them Abdul Wahab *alias* Habbu Khan, Muhammad Sayed Khan and

Jamna Das have been sentenced to death. The rest have been sentenced to transportation for life. They all appeal.

On the night of the 9th of May 1923 between 10 and 11 p.m. the house belonging to Ram Sarup and Murli *alias* Murlidhar Bishnois in the village of Fakhanpur was plundered by dacoits. The gang found Murli and Ram Sarup sleeping just outside their house and capturing them, made them lead them into the house and show where the money and valuables were kept. The gang first rifled an iron-safe containing cash and ornaments of considerable value and then went on to plunder the house. They set fire to a quantity of straw in order to see what they were doing and also used two lanterns, one of which they had brought with them while the other they found hanging up in front of the house.

The noise and flames aroused the village and three parties of villagers attempted a rescue approaching the house from the east, the west and the south sides. Ram Sarup and Murli succeeded in making their escape in the confusion caused among the dacoits by the necessity to repel these attacks, though not till after Murli had been roughly handled on account of his refusal to disclose the hiding place of the rest of his money.

The dacoits were well armed with guns and pistols which they used freely. Three villagers were killed outright and a fourth succumbed later to his wounds. Two others have been crippled for life. The medical evidence proves that all the injuries were caused by gunshots.

The dacoits also visited and plundered the house of Nirmal ten paces away and finally left the village at 1 or 2 a.m.

The dacoits pretended to be Bhantus and Mr. Young the Superintendent in charge of the special police employed in hunting the Bhantu gang which at the time was terrorising the Terai and neighbouring districts took up the case. He deputed Rai Bahadur Tirath Singh D. S. P. to make enquiries. That Officer learning that the reason for the selection of Ram Sarup as the victim of the dacoity was possibly the extravagance with which he had recently celebrated the marriage of his daughter and the consequent reputation for wealth which he had acquired among his caste-fellows, asked Sheoraj Singh, a Girdawar Kanungo, who is a Bishnoi by caste, to see what he could learn from Bishnois in the neighbourhood. At Surajnagar this officer heard that a quarrel had taken place between two men named Jamna Das and Jiraj over the division of the spoils taken in the Fakhanpur dacoity. Jamna Das is his connection by marriage, and by pretending to sympathise with him Sheoraj Singh extracted from him in the course of conversation an admission that he had taken part in the crime and also the names of a number of his accomplices.

The Kanungo reported what he had learnt on the 17th of May, and on the 7th of June Jamna Das was arrested. Three days later Abdul Wahab and the appellants who had been named by Jamna Das were arrested. Meanwhile Sadua had been talking about the dacoity in a way which showed that he had personal knowledge of it. Apparently he too had a grievance over the division of the spoils. He spoke to Harnam Singh who is the *samdhi* of Ram Sarup and in this way the information came to the ears of a constable named Lal Singh and on the 16th of July Sadua was arrested. On the 2nd of October he made a confession which was recorded by a Magistrate under S. 164 of the Criminal Procedure Code. It is argued that the value of this confession must be discounted owing to the time which elapsed before it was made, but we find that no questions on this point were put to Sadua in cross-examination or to the police and there does not appear to be any reason to suppose that the confession was inspired by the police or its materials supplied by them to Sadua. He has adhered to his confession throughout and has been made an approver. Cross-examination has failed to betray him into any contradictions or inconsistencies. His statement has been abundantly corroborated by the testimony of other witnesses. In addition to this the approver took a Magistrate over

the scene of the dacoity and the route taken by the dacoits and produced a *kathla* which he said he had received as part of his share of the plunder. This *kathla* has been satisfactorily identified and the Magistrate's evidence proves that Sadua was able to point out accurately where the various occurrences of the dacoity had taken place and in a manner that tallied exactly both with his own statement and with the evidence of the eye-witnesses. We agree with the learned Judge that the approver's statement may be relied on and is a valuable piece of evidence.

The accused were paraded for identification in the Haldwani jail. Owing to the scarcity of other under-trial prisoners in that jail outsiders were brought in and placed in the line with them. This procedure has been criticised, and it was no doubt unusual, but in the peculiar circumstances of the case no other course could have been adopted and the evidence of the Magistrate who conducted the parade shows that every possible precaution was taken to prevent unfairness. The witnesses were strangers to Haldwani and while outsiders were being collected and taken into the jail they were all kept under the Magistrate's eye near the police station. They thus had no opportunity of seeing them before the parade.

The evidence against the accused consists in the main of the identifications made at the jail by the eye-witnesses, of the statement of the approver and of the confession of Jamna Das. As is always the case the most important evidence is that of the identifications. The learned Sessions Judge has considered this evidence carefully, and where in his opinion it was insufficient he has given the accused the benefit of the doubt and acquitted them. In no instance has he accepted less than two identifications in the jail as adequate corroboration of the approver's evidence. There is however one error in his proceedings which might have seriously affected the legality of several of the convictions, though, as it happens, there is in this case sufficient evidence against all the accused who are affected by it. Certain witnesses were unable to identify in the Sessions Court one or more accused whom they had identified at the jail This is not unnatural, as an interval of eight months elapsed between the identification and the trial, and the appearance of several of the accused had considerably altered in the meantime. In these cases the learned Judge has treated the jail identification as direct evidence against the accused without anything to link it up with the evidence given in Court. As was pointed out in *Nagina* v. *Emperor* (1), for a Magistrate or other officer to come into Court and depose that a particular witness in his presence identified one of the accused as having taken part in the dacoity is nothing more than hearsay evidence. The Magistrate's evidence amounts in substance to this :—

" The witness said in my presence that a particular accused whom he pointed out took part in the dacoity".

The statement of the witness is not made on oath and it is not made in Court. The statement can only be proved either to corroborate the evidence which the witness afterwards gives in Court in accordance with S. 157 of the Evidence Act, or under some other provision of the Evidence Act. If the witness at the trial is no longer able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the committing Magistrate may be brought on the record under S. 288, Criminal Procedure Code. This was the course adopted in *Nagina* v. *Emperor* (1). It is only available where the witness was able to pick out the accused before the committing Magistrate though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he there identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear this, then it is open to the Court under S. 9 of the Evidence Act to establish

(1) [1921] 19 A.L.J. 947.

by other evidence the identity of the accused whom the witness identified at the jail. For this purpose the best evidence will be that of the Magistrate who conducted the identification, and his evidence will be strictly relevant under the provisions of the Evidence Act Of the witnesses who failed to pick out in the Sessions Court persons whom they had previously identified the only one who fulfils these conditions is Tulshi Gir who deposes that he saw some of the dacoits and that he recognised those same persons again at the identification before the Tahsildar at the Haldwani jail. If the case of any of the accused had depended entirely on the evidence of witnesses who were unable to pick him out at the sessions, it would have been necessary to send back the case to supply the omission in the learned Judge's record. As it happened, however, there is no accused against whom there is not at least one reliable identification in addition to the evidence of the approver.

We note here that the learned Judge says towards the close of his judgment that "the rulings are unanimous that a man cannot be legally convicted on the uncorroborated testimony of an accomplice". If this be correct all we can say is that the rulings in question have repealed S. 133 of the Evidence Act, which no Court is competent to do. The learned Judge will find the law correctly laid down in *Narain Das* v. *The Crown* (2) and various other rulings which have hitherto escaped his notice.

[Their Lordships then discussed the case of each individual on facts and confirmed the various sentences passed on each. The judgment then continued :—

The further sentence of forfeiture passed under S. 92 of the Indian Penal Code must be set aside as that section has been repealed by Act No. XVI of 1921.

Appeals dismissed.

---

(2) 1922 Lah. 1=3 Lah. 144=4 L.L.J. 91=23 Cr.L.J. 513=9 P.W.R.Cr. 1922.

1925 ALLAHABAD 226

MUKERJI, J.

Malkhan Singh—Applicant.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 388 of 1924, Decided on 18th August 1924, from an order of the S. J. Jhansi, D/- 25th June 1924.

Penal Code, S. 511—Fraudulently obtaining signature slip is no offence under S 171 (f) read with S. 511—Penal Code S. 171 (f).

The accused went to the officer who had the custody of signature slips. He did not give out his name but produced a certain piece of paper which bore a certain number. The officer looked at that number then looked at the electoral roll and discovered that against that number the name of one L. appeared. On being asked by that officer if he was L. the applicant said he was. A patwari of the village was there and he said that the applicant was not L. but was one M. There was a dispute and ultimately the applicant admitted that he was M and not L.

Held: that the obtaining of the "signature slip" was an act which by itself would not have amounted to an application for a voting paper. [P 227 C 1]

K. N. Laghate—for Applicant.

Asstt. Govt. Advocate—for the Crown.

Judgment.—I think in this case the conviction must be set aside. The applicant Malkhan Singh was convicted by a learned Magistrate of the offence under S. 171 (f) of the Indian Penal Code. On appeal the learned Sessions Judge changed the conviction into one under S. 171 (f) read with S. 511 of the same Code.

In this Court the contention is that the facts found did not amount to an attempt to commit the principal offence.

I think this contention is right. I proceed on the facts as have been found in the judgments of the Courts below. It appears that the procedure for voting is something like this. The voter goes to an officer, who issues what are known as "signature slips" He has to state, or in some other way indicate to that officer, who he is. On ascertaining that the applicant is a real voter the officer, in whose charge the signature slips are, issues one to the applicant. The applicant then signs the signature slip, and on the

strength of that signature slip obtains a voting paper.

It is the application for a voting paper by a wrong person that has been made punishable under S. 171 (f) of the Indian Penal Code. In this particular case what happened was this. The applicant went to the officer who had the custody of signature slips. He did not give out his name but produced a certain piece of paper which bore a certain number. The officer looked at that number and then looked at the electoral roll and discovered that against that number the name of one Lochoo appeared. On being asked by that officer if he was Lochoo the applicant said he was. A patwari of the village was there and he said that the applicant was not Lochoo but was one Malkhan Singh. There was a dispute and ultimately the applicant admitted that he was Malkhan Singh and not not Lochoo. The question then is whether what the applicant did amounted to an attempt to commit the offence of fraudulently applying for a voting paper, and thereby personating at election.

It appears to me that an act, to amount to an attempt, must be such that if not prevented it would complete the offence. In this case the obtaining of the "signature slip" was an act which by itself would not have amounted to an application for a voting paper. The applicant was frustrated in the act of obtaining a signature slip. If he had not been frustrated, all that he would have committed was the obtaining of a signature slip on false pretences. The completion of this act would not have amounted to a completion of the act of applying for a voting paper. I hold that the offence has not been brought home and the conviction should be set aside. I set aside the conviction and sentence and order the release of the applicant. The fine if paid will be refunded

Conviction set aside.

✱ 1925 ALLAHABAD 227

DANIELS, J.

Dannu Singh and others—Appellants.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 515 of 1924, Decided on 29th July 1924 from an order of the Offg S. J., Bareilly.

Evidence Act, S. 32—Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits.

Dying declaration of one of the dacoits as to the circumstances of dacoity before a Magistrate is admissible against him, so far his implication in the crime is concerned but is not admissible against other dacoits.

[P. 228 C. 2]

Appellants were not represented.

The Govt. Pleader—for the Crown.

Judgment.—In this case seven persons, Dannu Singh, Tulshi, Gajja, Keso, Daryao Singh, Girdhari Singh and Dilsukh, appeal from the conviction under S. 395, Indian Penal Code in connection with a dacoity which occurred on the night of 7th October 1923 at the house of Umrao Singh at Nakatpur in the Bareilly district. The police had been aware for a long time that a gang of dacoits under the leadership of a man named Dhani was carrying on a series of dacoities in the Bareilly district and were endeavouring to surprise and arrest them. They had received information that a dacoity was in contemplation at the house of Umrao on this particular night and the Circle Inspector Khan Bahadur Muhammad Sayid with a number of police proceeded to the village secretly after dark and hid in a chaupal and other places adjacent to Umrao Singh's house. About 11 p.m. fifteen or sixteen dacoits came to the house, broke in, lit fires of straw at various places and commenced to loot the house. One of them had looked into the chaupal but failed to see the constables who were hiding under the wall and reported it empty. Shortly after the dacoits broke in one of the constables coughed and revealed their presence. A gun was immediately fired by one of the dacoits. The circle Inspector and the police with him came out and returned the fire. One constable was severely wounded

the ground that Girdhari Singh is one-eyed man and therefore easy to pick out. But on the other hand this very circumstance may have served to impress his appearance on the minds of those witnesses who noticed him. As the learned Sessions Judge says, there has certainly not been any wholesale identification in his case, for only three out of fifteen identifying witnesses succeeded in picking him out,

Against the appellant Dilsukh the learned Sessions Judge has relied largely on the dying statement of Dhimmi which I have found to be inadmissible. Putting this aside the only other evidence against him is the statement of Balwant which the learned Sessions Judge has declined to accept where uncorroborated and the fact that he is mentioned in Kesho's confession. The only definite statement regarding this accused is that Kesho agrees with Balwant in saying that this accused is the man known among the dacoits as "nashabaz." It appears to me very doubtful whether the learned Sessions Judge would have convicted him if he had not accepted the statement of Dhimmi as conclusive against him. It appears to me that he must be given the benefit of the doubt, and I accordingly allow his appeal and acquitting him direct that he be set at liberty. The appeals of the other accused are dismissed.

Appeal partly allowed.

✱ 1925 ALLAHABAD 230

MUKERJI, J.

Ram Nath—Applicant.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 450 of 1924, Decided on 1st September 1924, from an order of the S. J., Muttra.

✱ (a) *Penal Code, S. 171 (f)—Offence under S. 171 (f) cannot be dealt with as one under S. 465—Penal Code S. 465.*

The offence of false preparation of signature sheet at an election being specifically described and designated by the legislature, it is not open to any Court to say that, although the offence may be specifically one under S. 171 (f) of the Penal Code, it falls equally under S. 465 of the same Code and therefore, it is open to the Court to try the offender under either of the two sections. [P. 232, C. 1]

(b) *Interpretation of Statutes—Specific provision prevails over general one.*

Where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. [P. 232, C. 1]

✱ (c) *Criminal P. C. S. 195—Condition as to sanction cannot be evaded.*

Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be obtained from the local Government, it is not open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Indian Penal Code and if no sanction is necessary for the prosecution under that section, the offender may be prosecuted without any sanction. [P. 232, C. 1]

(d) *Precedents — Remarks in case dismissed for want of jurisdiction are obiter.*

Where a case is decided by the High Court on the ground of want of jurisdiction in the High Court, the remarks of the High Court in that judgment are no better than *obiter dicta.* [P. 232, C. 2]

(e) *Tort—Criminal Act is different from a reckless one.*

There is an essential difference between a reckless act, for which a man may be held civilly liable, and a criminal act, for which he may be punished by imprisonment or fine. [P. 234, C. 1]

✱ (f) *Penal Code, S. 107—Unintentionally aiding is no abetment.*

A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. If the person who lends his support does not know or has no reason to believe that the act which he was aiding or supporting was by itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence. [P. 234, C. 1]

Tej Bahadur Sapru, Narain Prasad Asthana and *Satish Chandra Das*—for Applicant.

R. Malcomson—for Opposite Party.

Judgment. — The applicant Babu Ram Nath, who is a practising Mukhtar at Agra, was convicted by a first class Magistrate of Agra of the offences under Ss. 419 and 465 of the Indian Penal Code, read with S. 114 of the same Code. He was sentenced to undergo rigorous imprisonment of two years. He appealed. The learned Sessions Judge found that the case

of abetment of cheating under S. 419 of the Indian Penal Code had not been established. But he was of opinion that the applicant was guilty of abetment of an offence under S. 465 of the Indian Penal Code and sentenced him to undergo simple imprisonment of one year

In this Court several points have been taken. But before the points urged are mentioned, it would be necessary to know exactly what the case is.

It appears that a keenly contested election to the Municipal Board of Agra was going on The applicant was one of the candidates for election. There were two vacancies in Board and there were five candidates. Dr. Ram Sarup Sarin was one of the other four candidates and the applicant and Dr Ram Sarup being friends worked together. Indeed it was Dr Ram Sarup and his agents who tried for the successful election of both. The 24th of March 1923 was the date of election. Election was going on at the premises of the Municipal office. A certain person whose identity has not been established, came forward and claimed to be one of the voters, *viz*: Hari Shanker. According to the rules, this man, professing to be an illiterate person, put his thumb-mark on the document exhibit I, called 'signature-sheet' and the applicant, Ram Nath, put his signature on the document as a witness who knew the voter. It has been established that the man who represented Hari Shanker was not the real Hari Shanker and that the applicant attested the signature-sheet without knowing that the person who put his thumb-mark to the sheet was not the real voter.

Several points have been urged against the validity of the conviction and these are:—

(1) That, there could be no prosecution without a sanction of the Local Government under S. 196 of the Criminal Prosedure Code, as the offence committed was really one under S. 176 (F) of the Indian Penal Code.

(2) That the attestation was made innocently and without any intention to abet a forgery.

(3) That attestation was wholly unnecessary and, therefore, no offence has been committed.

Point No. 1—By Act 39 of 1920, a new chapter described as "Chapter 9 (A), of offences relating to election" was added to the Indian Penal Code in 1920. One of these offences as described in S. 171 (D) is as follows:—

"Whoever, at an election, applies for a voting paper or votes in the name of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way commits the offence of personation at an election"

By S. 171 (F), the offence of personation at election was declared to be punishable with imprisonment of either description for a term which may extend to one year or with fine or with both

The description of the charge brought against the applicant clearly shows that it is alleged that the applicant committed the offence of personation at election. It is true that according to the rulings of the Allahabad High Court and some other Courts whoever prepares a false document for the purpose of establishing a claim, which need not necessarily be claim to property, must be deemed to be guilty of forgery and whoever aids or instigates the commission of such an offence must be taken to have aided or abetted such forgery. It must, therefore, be conceded that, under certain circumstances, the false preparation of a signature-sheet may amount to forgery within the meaning of S. 463 of the Indian Penal Code. It is also to be remembered that there are rulings of certain High Courts establishing a contrary proposition, *i. e.*, where it has been held that to commit forgery it is necessary to lay a claim to property. It may be due to this conflict of opinion or it may be due to some other motive, but it is a fact that the legislature has thought it fit to define as a separate offence, apart from the offence of forgery, the false preparation of a document like a signature-sheet. The question, therefore, is whether, in the circumstances, the offence committed is one under S. 171

(F) of the Indian Penal Code or one under S. 465 of the same Code.

It appears to me that where the offence in question has been specifically described and designated by the legislature, it is not open to any Court to say that, although the offence may be specifically one under S. 171 (F) of the Indian Penal Code, it falls equally under S. 465 of the same Code and that, therefore, it is open to the Court to try the offender under either of the two sections. Where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. If this view be correct, the offence committed must be treated as one under S. 171 (F) of the Indian Penal Code in preference to Section 465.

I am fortified in this view by two circumstances One is that the offence of personation. at election has been made punishable by S. 171 (F) with imprisonment extending to one year only, while the offence under S. 465 is punishable with imprisonment which may extend to two years. Evidently the legislature did not want that a case like this should be treated as an ordinary case of forgery. The second circumstance is this that the legislature has deliberately said that no prosecution under Chapter 9 (A) of the Indian Penal Code shall be undertaken without a sanction of the Local Government. Where the law clearly says that it is a condition precedent to the prosecution that a sanction shall be obtained from the Local Government, I do not think it is open to any subordinate authority to override the provision of the law by saying that the offence falls under another section of the Indian Penal Code and as no sanction is necessary for the prosecution under that section the offender may be prosecuted without any sanction.

The result is that, in my opinion, the prosecution cannot stand.

It has been urged by the learned Assistant Government Advocate that the question now before me has really been definitely answered by a Bench of two Judges of this High Court and that, therefore, I am bound to hold that a prosecution of the appellant under S. 465 of the Indian Penal Code is valid. It appears that the case was started in this way. When the applicant was elected to a seat on the Municipal Council, a rival candidate, Seth Bhik Chand, put in an election petition to have the election of the applicant set aside. The matter went before the Commissioner of the Agra Division and that learned officer, after an enquiry, found that there was a false personation by somebody of the voter, Hari Shanker, and that the applicant had been guilty of attesting the signature-sheet. The Commissioner, therefore, ordered the prosecution of the applicant. The applicant, thereupon, came before this Court with a petition to revise the order of the Commissioner. The learned Judges who heard the petition came to the conclusion that they had no jurisdiction to revise the order of the Commissioner. But it appears that several points were taken before the Bench and the judgment of this Court does contain some remarks as to those contentions. In view of the fact that the case was decided on the ground of want of jurisdiction in the High Court, the remarks of the Hon'ble Judges are no better than *obiter dicta*. These remarks, however, would be entitled to utmost respect from me. I have carefully examined the judgment in the aforesaid revision case and I find that the learned Judges never definitely decided any of the contentions now before me. I find that they used the expression '*prima facie*' when considering whether an offence which would fall under Chapter 9 (A) of the Indian Penal Code may be also treated as falling under S. 465 of the same Code. Then, I find their Lordships remarking that the matter raised before them was really a matter for the consideration of the Criminal Courts. Their Lordships were sitting on the civil side of the High Court. Then, the judgment further shows that the suggestion had been thrown out, evidently on behalf of the prosecution, that offences of a minor kind alone fell within the Chapter 9 (A) of the Indian Penal Code and serious offences like forgery were punishable under other provisions of the Code. I find myself, therefore, unable to

accept the case of *Ram Nath* v. *Emperor* (1) as an authority for the point now argued before me.

The result is that the application should succeed on the first point alone.

Second and third points may be taken together. I am unable to agree with the contention of the learned counsel for the applicant that where a voter puts his thumb-mark on the signature-sheet, it is not necessary for any body to identify the voter's thumb-mark on the document. In fact, the column 3 of the signature-sheet, as recorded in the Devanagri character, itself shows that it is contemplated that somebody should attest the thumb-mark of an illiterate voter. The contention of the learned counsel was based on the language of rule 43 of the Municipal Manual, part II. The language used is loose and it cannot be said definitely that the attestation is not necessary in the case of a thumb impression. The question, however, is not whether the attestation of the thumb mark was required by law or not. But the question is whether the attestation was made with a view to abet forgery. The question for consideration, in other words, is whether the applicant abetted the commission of forgery by attesting the thumb-mark of the person who personated Hari Shanker. Coming to the evidence, the whole of which has been read out to me, it appears that the applicant never knew Hari Shanker. Hari Shanker, although he has been misdescribed in the electoral roll as a shop keeper, is really an Assistant in one of the Government of India Offices and is now on deputation to a certain Indian State. He swore that he never knew the applicant. There is no evidence that the applicant knew the man who personated Hari Shanker. The witnesses Jageshar Prasad, who is an assistant to the polling officer, and Mr. Keshab Deo, the polling officer, tell us in what manner the election was proceeding. It appears from their evidence that the practice was this. There were present at the election either the candidates themselves and their agents or the agents alone. In the case of the applicant, as I have said above, Dr. Ram Sarup's agent was working for him. Whenever a voter appeared, somebody would announce (this somebody would generally be the agent of a candidate) that such and such voter was proceeding. The voter would be asked his name, his parent's name etc. On his replies tallying with the electoral roll, he would be given a signature sheet with the serial number and the name of the voter written down on it. The man then would mark it either with a pen or would put his thumb-mark on it. Then, the party who expected the voter to vote for him, would attest the signature-sheet. In the present case, the applicant who did not know all his voters, adopted the procedure prescribed above. In the language of the assistant to the polling officer, Jageshar Prasad, "On that day, if the agent or the candidate did not know the illiterate voter, he would ascertain from his men about the voter and then put his signature on the signature-sheet". Jageshar Prasad clearly says that when the man who personated Hari Shanker appeared before him, nobody stated that the man was not Hari Shanker himself. Mr. Keshab Deo says: "Babu Ram Nath accused was near the clerk who was writing the slip and witnessing the slip of the voters. . . . . Before witnessing Babu Ram Nath used to ask others about the voters as to their identity. He also made similar enquiries from his workers". It will, therefore be seen that the polling officer corroborates Mr. Jageshar Prasad. The applicant's case is that what he did was this. The voter appeared having been announced by somebody. He did not know the man. He asked him his name, his father's name and then asked his electioneering agent if the man was really Hari Shanker. Having been satisfied that such was the case, he put his initials to the signature slip. There can be no doubt that this is exactly what has happened. As I read the judgment of the learned Sessions Judge, he also thinks that this is exactly what has happened.

(1) 1924 All. 684=46 All. 611=5 L. R. A. Cr. 109=22 A. L. J. 497.

He does not charge Jageshar Prasad with having had knowledge of the fact that Hari Shanker had been personated and with having known that the man who put his thumb-mark on the signature-sheet was not Hari Shanker himself The learned Judge, however, thought that the applicant was reckless and however honest his motive was, he led the authorities to believe that the impostor was Hari Shanker and thereby facilitated the obtaining by the impostor of a voting paper.

There is an essential difference between a reckless act, for which a man may be held civilly liable, and a criminal act, for which he may be punished by imprisonment or fine. In my opinion the applicant acted in perfect good faith, although undoubtedly recklessly. He ought to have known that it was his attestation which really mattered and he had no right to say on the authority of his agents that he knew that the man who marked the signature-sheet was the right man. I am, however, clear that the applicant did not intentionally aid the commission of the offence of forgery. He did aid it, no doubt, but he did it unintentionally.

To the facts of the present case, clauses I and II of S. 107 of the Indian Penal Code do not apply. It is only in the third clause that the case may be said to fall. The third clause is this :—

"A person abets the doing of a thing who intentionally aids by any act or illegal omission the doing of that thing". The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated. The intention should be to aid an offence or to facilitate the commission of an offence. But if the person who lends his support does not know or has no reason to believe that the act which he was aiding or supporting was by itself a criminal act, it cannot be said that he intentionally aids or facilitates the doing of the offence. I will give an example. A, B and C are friends. A and B have fallen out, so much so that A is determined to shoot B. A goes to the house of C, and on some pretext or other induces C, to call B to his house. C has not the least idea that A would shoot B on his arrival. B arrives and is murdered by A. A committed murder. Can it be said that C is guilty of abetment, because he "intentionally aided" A? C did give his aid in calling B to his place. But he never knew why A wanted him to send for B. Whatever C did, he did intentionally, for his intention certainly was that B should come. But it was not C's intention that a crime should be committed. C cannot be held guilty of abetment of murder.

I am clear, therefore, that on the facts no charge of abetment of the offence under S. 465 has been established.

The application succeeds. I set aside the conviction and sentence and order that the applicant be restored to liberty.

Conviction set aside.

1925 ALLAHABAD 234

MUKERJI, J.

Banarsi Das—Plaintiff—Appellant.

v.

Municipal Board of Amroha and others—Defendants—Respondents.

S A. No. 545 of 1924, Decided on 4th November, 1924, from a decree of the Add. Sub-J,, Moradabad.

(a) *U. P. Municipalities Act (1900) S 211—No order can be passed in respect of a projection over private land.*

Where a projection does not overhang a street, but overhangs a private piece of property, the Municipal Board has no jurisdiction to pass an order and if an order is passed it may be called into question in a Civil Court. [P 235, C 1]

(b) *U. P. Municipalities Act (1900) S. 2 (23) —A lane is a street if people residing on its sides have a right of access through it.*

Where people residing on either side of the lane have a right of access to the lane, the lane becomes a street within the meaning of clause 23. [P 235, C 2]

K. N. Katju and Gopinath Kunzru—for Appellant.

N. P. Asthana—for Respondents.

Judgment—This is the plaintiff's appeal. His house abuts on a blind lane. He constructed a cornice projecting from the front wall of his house and over this lane. The Municipal Board gave a notice to the plaintiff to remove the cornice. The plaintiff disputed their right to issue such notice and instituted the suit, out of which this appeal has arisen.

The Court of first instance decreed the suit, but a learned Subordinate Judge on appeal dismissed it. He held that maintenance of the suit was barred having regard to the provisions of S. 321 of the Municipalities Act, 1916. He also held that the Municipal Board were within their right in issuing the notice and that lane in question was a public street within the meaning of S. 2, clause 19 of the Municipalities Act.

In this Court it has been contended that the suit is not barred and that the finding of the Court below that lane was a public street was not justified. There can be no doubt that the jurisdiction of the Municipal Board to issue a notice under S. 211 of the Municipalities Act would depend on whether or not the projection complained of overhangs a street. Where a projection does not overhang a street, but overhangs a private piece of property it may very well be urged that Municipal Board has no jurisdiction to pass an order and that if an order is passed without any jurisdiction that order may be called into question in a Civil Court. The reason for this opinion is absolutely clear. The Municipalities Act was never meant to destroy private right that may exist in property. All that it seeks is to regulate the comfort and health of the public or portion of the public by restricting their rights to do as they please with respect to their own property. As an abstract question of law therefore I hold that the suit would be maintainable provided the lane over which the projection hangs be not a street or a public street within the meaning of S. 2 of the Municipalities Act.

Coming to the question as to the character of the lane the facts appear to be these. The lane is a blind one with houses on either side and at one end amounting in number to 14. 14 different people residing on either side of the lane have been impleaded in the suit by the appellant. It was stated in paragraph 3 of the plaint that the land covered by the lane belonged to the houses of the parties in the suit other than the Municipal Board. It seems from this admission of the plaintiff to follow that the lane is a street within the meaning of clause 23 of S. 2 of the Municipalities Act The word 'street' in clause 23 defined as "any road, bridge, footway, lane .....which the public, or any portion of the public has a right to pass along, and includes, on either side.....The 14 inhabitants on either side of the lane are 'a portion of the public' and if they have a right of access to this place, *viz*: the lane, the lane becomes the street within the meaning of clause 23. If the lane be a street it will attract the provisions of S. 211 of the Municipalities Act although it may be a public street. The learned Subordinate Judge has examined the evidence and has come to the conclusion that there is, besides being a street, a public street within the meaning of sub clause (6) of clause 19 of S. 2 of the Municipalities Act. He has found that as far back as 1904 the Municipal Board at its own expense constructed a drain on one side of the lane. He has further found that the lane was repaired about two years before the litigation arose by the Municipality with public funds. The finding is a finding of fact and is therefore binding on this Court. Whatever view may be taken there is no escape from the conclusion that the lane is a street and a public street and that therefore the Municipal Board had a right to regulate the construction of any building on either side of it.

If the Municipal Board were within their rights to pass an order under S. 211, the provisions of S. 321 will be attracted and the suit would not be maintainable.

The result is that the appeal fails and is hereby dismissed with costs which will include counsel's fees in this Court on the higher scale,

Appeal dismissed.

✱ 1925 ALLAHABAD 236

RYVES AND DANIELS, JJ.

Imtiaz-un-nissa—Appellant.

v.

Chuttan Lal and others—Opposite Party.

Execution S. A. No. 512 of 1924, Decided on 18th November, 1924, from a decree of the Dt. J., Bareilly,

(a) *Civil P.C., S. 47—Section does not cover a dispute as to possession between auction-purchaser and judgment-debtor.*

A question between the auction-purchaser and the judgment-debtor with reference to the possession of property sold under the decree is not covered by S. 47. (1908) 31 All. 82 (F. B.) Foll, 1924 Bom 429 (F. B.) Ref. [P 236 C 2]

(b) *Civil P. C., S. 151--Mistake in execution sale will not be rectified after three years so as to affect a bonafide purchaser.*

S. 151 cannot properly be applied, where an application to rectify a mistake in the quantity of property sold in execution was not made till more than three years after the sale, and it was substantially directed against a purchaser for value who was no party to the decree and who acquired the property in good faith on the basis of the sale certificate. [P 237 C 1]

S. A. Haidar—for Appellant.

K. N. Katju—for Respondents.

Daniels, J.—The facts of this case are undisputed but it raises a question of law which is not altogether easy. The object of the judgment-debtor's application is to correct a mistake in an execution sale which took place in the year 1920. Undoubtedly there was a mistake. The judgment-debtor had a 4 biswa share which was converted on a partition into a share described as "20 biswas farzi." In the execution proceedings the 1 biswa in respect of which the decree-holder had got a mortgage decree was treated as having been converted into 20 biswas farzi, and the entire share of 20 biswas farzi was put up to sale, sold and bought by the decree-holder. The judgment-debtor never objected, the sale was duly confirmed, a sale certificate was prepared and the decree-holder was formally put in possession through the Court. All this took place in 1920. In the following year the decree-holder also obtained mutation of names in the revenue registers. After this the decree-holder sold the property to the respondent Chuttan Lal.

On 17th March 1923, the judgment-debtor came into Court with an application stating that he had now discovered that a mistake had been made and asking the Court to restore him to possession of 15 out of 20 biswas which had been sold. The respondent, Chuttan Lal, objected that the application was not covered by S. 47 of the Code of Civil Procedure, under which it professed to be brought, and that it was barred by Order 21, rule 92. He also averred, and this is not contradicted, that he purchased the property in good faith for adequate consideration after examining the sale certificate. The lower appellate Court accepted the respondent's contention and dismissed the application. The judgment-debtor had not based his case on S. 151 of the Code of Civil Procedure, but the learned Judge considered whether he could or should apply that section and decided that he would not be justified in doing so because to do so would be to penalise the respondent who acquired the property for valuable consideration, because the judgment-debtor contributed to the present state of things by his own negligence, and because in his opinion the judgment-debtor had a remedy by suit against the decree-holder.

The question whether S. 47 applies is concluded against the appellant by the Full Bench ruling of this Court in *Bhagwati v. Banwari Lal* (1). It was there held that a question between the auction-purchaser and the judgment-debtor with reference to the possession of property sold under the decree was not covered by S 244 of the old Code of Civil Procedure which corresponds to S. 47 of the present Code. It was argued for the appellant that there are dicta to be found in some reported judgments of this Court which throw a doubt on the correctness of that decision, but however that may be, it is impossible to hold that the Full Bench ruling has ever been superseded or that it has ceased to be binding law in this pro-

(1) [1908] 31 All. 82=6 A.L.J. 71=1 I C 416=5 M.L.T. 185.

vince. It has recently been followed by a Full Bench of the Bombay High Court in *Hargovind Fulchand* v. *Bhudar Raoji* (2) the auction-purchaser being held to be the representative of the judgment-debtor and not of the decree-holder. It also appears to be barred by the Order 21, rule 92. The judgment-debtor could certainly have applied under Order 21, rule 90 to set aside the sale on the ground that property not covered by the decree had been proclaimed for sale and sold. The appellant has not based his case on the provisions of S. 151 of the Code of Civil Procedure though the third ground of appeal seems to hint at the Court making use of that section to rectify the mistake which has been made. We think that this is not a case in which that section can properly be applied. The present application was not made till more than three years after the sale, and it is substantially directed against a purchaser for value who was no party to the decree and who acquired the property in good faith on the basis of the sale certificate. We accordingly dismiss the appeal but under the circumstances we direct that the parties bear their own costs.

Appeal dismissed.

(2) 1924 Bom. 429=48 Bom. 550=26 Bom. L.R. 601 (F. B.)

✱ 1925 ALLAHABAD 237

WALSH, J.

(*Mrs. Alice*) *King*--Plaintiff—Appellant.

v.

Mr. King — Defendant —Respondent.

F. A. No. 295 of 1923, Decided on 23rd July 1924, from the decree of the Dt. J., Agra, D/-12th March 1923.

✱ *Divorce Act, (IV of 1869) S. 10—Threat of force to pregnant woman is legal cruelty—Adultery condoned by wife can be revived by legal cruelty.*

When a husband is guilty of adultery but is excused by the wife and taken back by her, the effect of cruelty towards her on his part is to revive the previous adultery even though his actual conduct at the time may not be adulterous. Legal cruelty can be constituted by threats or force used towards a pregnant woman. [P 238 C 2]

S. Abu Ali and A. Sanyal—for Appellant.

Judgment.—This is an appeal by a petitioner in divorce. It is, in fact, a very unusual case. We do not remember any case of the same kind coming up to this Court. The wife is the petitioner, and she originally alleged adultery and cruelty of various kinds and also desertion, casting her net very wide in the petition. The learned Judge, in a careful trial, has come to the conclusion that the acts of adultery mainly relied upon before him are not established, and we are bound to say that we agree. However, suspicious they may appear to the wife herself knowing the character of her husband, they fall short of proof which can be accepted in a Court of law as establishing a serious matrimonial offence or as establishing the offence in this particular case even if it were assumed that the man was a man of loose character. He has apparently not found the cruelty to be established. He seems to think the petitioner was guilty of exaggeration, and there was undoubtedly an absence of independent evidence of cruelty. But he did grant her a decree for judicial separation with an allowance of Rs. 100 for alimony on the ground of desertion. The wife is very poor, and probably has never been able to prepare her case, and to obtain such evidence as might have been obtainable in the course of a careful preparation in order to establish her allegations, a matter about which one can feel no surprise. Like most people in her position she has had a struggle to get on depending very largely on the friendship and help of a lady, Mrs. Freeman with whom she lives. She now comes to this Court (and this is the unusual feature of the case) asking us to hold that her case is made out and the learned Judge was wrong in refusing to grant a decree for dissolution of marriage on the ground of adultery.

We took the unusual course of asking the woman to come into the box because in the learned Judge's judgment he refers to a statement by

her of an admission by the husband of adultery with Mrs. Appleton, adultery which she herself had alleged in her petition, with a circumstantial story of the years in which it had taken place and the statement that two children were born from the connection. It struck us as curious that the Judge should have mentioned this admission, which is certainly evidence against the man who makes it, and have paid no further attention to it in the course of his judgment. We, therefore, allowed the petitioner to be sworn for the purpose of examining her more in detail on the subject of this admission. The result of her evidence is that the case takes an entirely different complexion from that which it wore when the learned Judge was dealing with it. She gave abundant evidence of cruelty in great detail, and no body who realises the temptations and difficulties in this country, and specially in the hot climate, and knows that the man is neglecting his wife and running after other women, and is leading a somewhat rough outdoor life, and is also inclined to drink, can be surprised at the evidence she has given of his rough treatment of her in the house. As a rule a man of that type is either a domesticated decent husband, or he is a rough passionate animal who being tired of his wife, specially if she is pregnant has nothing good to say either to or of her and is apt to treat her with cruelty and violence, specially when in drink, in order to keep her quiet. If he is prepared to be unfaithful he probably thinks it best to frighten and to threaten her to keep her quiet. We think it very probable that this man, who is a very big man, and unfaithful, and according to the woman's evidence in the Court below given to drink, knocked her about whenever he felt disposed to do so. The story she has told us to-day we accept. She appears to be an honest woman. She says that he had left her for a period of 1 year and 10 months and returned alone to the Colah Coal Fields, where these two had previously lived and where they both had known a Mrs. Appleton, who was not believed to be a woman of upright character. He kept this woman in his house and apparently having had enough of Mrs. Appleton wrote to his wife, who was then living with her mother in Agra, asking her to take him back, just the sort of thing a selfish brute would do when he got tired of Mrs. Appleton. It appears that at this stage Mrs. Appleton was expecting a child from Mrs. King's husband. He came back to Agra and told Mrs. King, and we have no reason to doubt the truth of this statement, that Mrs. Appleton had lived with him and two children had been born, one of whom had died and the other was born a month or two after he had returned to Agra of which no secret was made in a letter which Mrs. King had received in Agra. She forgave him, and he, as expected, behaved well for a time, the result of which was that she became pregnant. He seems to have broken out again and done just what a man of the character which she gives him would be likely to do when his wife was pregnant, ran after other women and treated her with gross brutality. Threats of force used towards a woman in that condition are sufficient to constitute legal cruelty, and we have no doubt that what she said was true, that if she attempted to reproach him for his fresh frivolities and neglect he became violent, threatened her and used the whip. We accept the evidence and find that he was guilty of cruelty after she took him back and became pregnant by him in 1921. The effect of that at any rate according to some decisions, which we are entitled to follow, is to revive the previous adultery, even if it was not revived by the levity of the respondent's conduct with women at Agra after he came back. We, therefore, allow the appeal. find the husband guilty of adultery with Mrs. Appleton before 1921, that it was condoned by the wife, and revived by his subsequent cruelty before her confinement with the last child, and we grant a decree *nisi* for dissolution of the marriage, give her the custody of the two children now living. We maintain the order for alimony and costs made by the District Judge of Agra, and

give the wife the costs of this appeal for what it may be worth to her though we are afraid it will not be much.

Appeal allowed.

1925 ALLAHABAD 239

MUKERJI, J.

Har Narain—Appellant.

v.

King Emperor—Opposite Party.

Criminal Appeal No. 353 of 1924, Decided on 8th August 1924, from an order of the S. J., Budaun, D/- 27th March 1924.

✱ *Penal Code, S. 228—Giving indirect answers amounts to refusal but not insult—Penal Code, S. 179.*

Where a witness, though persistently asked by the Court to give certain information, persisted in giving an indirect answer,

Held: that this amounted to a refusal to answer question and that an offence under S. 179, was committed but not one under S. 228. [P 239, C 2 P 240, C 1]

Mushtaq Ahmad—for Appellant.

Asst. Govt. Advocate—for the Crown.

Judgment.—This is an appeal by one Har Narain who has been convicted of an offence under S. 228 of the Indian Penal Code under proceedings taken under S. 480 of the Criminal Procedure Code. The sentence inflicted is a fine of Rs. 200, in default one month's simple imprisonment. There is also an application in revision on behalf of Har Narain. This was filed against the contingency that no appeal lay. There can be no doubt that an appeal lies and therefore the application in revision is rejected.

The facts given in the judgment by which the appellant was convicted are more or less summary, but they do indicate what really happened. To understand the whole circumstance it would be necessary to know the facts of the case which were before the Sessions Judge.

It appears that six persons were charged with murder and the learned Sessions Judge was hearing the case against those men. The person murdered was one Misri. Badri Prasad was his brother. Badri Prasad said, among other matters that, he saw the actual murder from the roof of his house and also noticed who were the persons that committed the murder and were present at the time. The learned Sessions Judge wanted to get at the bottom of the case and sent for the appellant Har Narain under S. 540 of the Criminal Procedure Code inasmuch as Badri Prasad had stated that shortly after the murder Har Narain the Mukhia of the village had arrived on the scene. When Har Narain was under examination he was asked, *vide* his statement on the file of the sessions trial, what Badri Prasad had stated to him. Evidently the appellant would not say anything beyond this that Badri Prasad did not mention any names that is to say Badri Prasad did not mention if he had seen the accused persons at the time of the murder. The learned Judge has noted the question put by him and the answer given by the witness in the deposition itself. This shows that he despaired of having a relevant answer to his questions and was obliged to take the extreme step of taking down the question in order that the answer and the question together might show how things were going on in his Court. His note runs as follows:—

"Note:—This witness, asked again and again what Badri said, will reply nothing but only 'He named no one'. Asked if Badri said how the murder happened and whether he gave any other information the witness merely replies 'He named no one'".

It is clear that the Judge was attempting to find out whether Badri's story was true and whether on the arrival of the Mukhia he had given out in detail the story which he gave subsequently in Court.

It has been urged before me that the witness did not understand the question and in any case he never wanted either to insult the Court or to interrupt it while sitting in a stage of judicial proceeding. I agree that this is really not a case under S 228 of the Indian Penal Code. The case really comes under S. 179 of the Indian Penal Code. That is a section which is covered by S. 480 Cr.P.C. and the learned Judge could take action under the said rule of procedure.

On the question whether the witness deliberately refused information or whether he did not understand the

question of the Court, I think we must accept the Judge's version of the story. The question has been taken down in the vernacular record as also the answer. When the witness persisted in giving no information beyond this that Badri mentioned no names, he certainly refused to answer the questions that had been put to him. As I have already stated, the learned Judge wanted information as to what, if anything, Badri stated to the witness, as to the murder. The answer that Badri mentioned no names was no answer to the question put to him. The result was that the Judge's attempt to get at the truth was partially frustrated by this witness.

I alter the conviction from one under S. 228 of the Indian Penal Code to one under S. 179 of the same Code. As to the sentence I think that having regard to the extremely grave nature of the case which was being heard by the learned Sessions Judge, the conduct of the appellant was very reprehensible. I therefore refuse to interfere with the sentence.

Conviction altered.

1925 ALLAHABAD 240

DANIELS AND NEAVE, JJ.

Mathura Das—Plaintiff—Appellant

v.

Ramraj Singh and others—Defendants—Respondents.

S. A. No. 1068 of 1922, Decided on 3rd July, 1924, from a decree of the Dt. J., Allahabad, D/- 18th March, 1922.

Civil P. C. S. 47—Section cannot bar a suit by decreeholder specifically directed to file by an order under O. 21 R. 58 — Civil P. C. O. 21 R. 58,

A Suit filed by decree-holder in pursuance of an order passed under O. 21, R, 58 directing him to file a separate suit to establish his title cannot be dismissed on the ground that the remedy lay under S. 47. [P. 240 C. 2]

Iqbal Ahmad—for Appellant.

K. N. Katju—for Respondents.

Judgment.—This suit was filed for a declaration that a sale deed executed by the plaintiff's judgment-debtor in favour of the respondent Ramraj Singh on 23rd April 1919 is null and void as against the plaintiff and that the property is liable to sale in execution of the plaintiff's decree against the other defendants. The suit has not been tried on the merits, both Courts having dismissed it as barred by S. 47 of the Civil Procedure Code. The ground taken by the trial Court and approved by the Court below is that, according to the allegations in the plaint, Ramraj Singh's purchase was made after the issue of an injunction and of an attachment in execution of the plaintiff's decree. Under these circumstances the Courts have held that Ramraj Singh is a representative of the Judgment-debtor under the ruling in *Lalji Mal* v. *Nand Kishore* (1), and therefore the plaintiff's remedy was under S. 47. It appears to us that the Courts have not paid sufficient attention to what actually took place. Ramraj Singh's allegation on which his objection was founded was that he made his purchase prior to the attachment and was holding under an independent title. This contention was upheld by the executing Court. His objection was treated throughout as an objection under Order 21 rule 58, and the order passed was passed under that rule. The order specifically directs the decree-holder to file a separate suit to establish his title. It appears to us that, if the decree-holder had attempted to appeal against this order, his appeal would have been rejected on the ground not only that the order purported to have been passed under Order 21 rule 58, but that the Court below had held that the purchaser was a third party to the suit and not a person who had purchased pending the attachment. Under these circumstances it amounts to a denial of justice to refuse to entertain the plaintiff's suit on the ground that the remedy lay under S. 47. We set aside the decrees of the Courts below and remand the case through the lower appellate Court to the Court of first instance for trial on the merits. The appellant will get his costs of the appeal to this court including in this court fees on the higher scale. Other costs will abide the result.

Appeal allowed.

---

(1) [1897] 19 All. 332—1897 A. W. N. 73.

✱ 1925 ALLAHABAD 241 (1)

DANIELS, J.

Baldeo and others—Defendants—Appellants.

v.

Bhagwan Misir—Plaintiff—Respondent.

S. A No. 640 of 1922, Decided on 12th July 1923 against the Decree of Sub. J., Basti, D/- 20th February 1922.

✱ *Hindu Law—Alienation by father can be attacked without proving illegal or immoral debt unless the sale was an execution sale or in lieu of antecedent debt.*

The circumstances in which it is necessary for the sons to show that the debt was illegal or immoral in order to recover the property are two only. The first is, where property has passed out of the family under a conveyance executed by a father in consideration of an antecedent debt in order to raise money to pay off such debt. The second is, where property has been sold in execution of a decree for the father's debt.

In the case of a private sale executed for an amount paid in cash, there is no necessity to show that the debt supporting the alienation was illegal or immoral. [P. 241 C. 2]

Braj Nath Vyas—for Appellants.

Jung Bahadur Lal and *S. P. Sinha* - for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff sought to set aside a sale deed executed by his father in 1917 and to recover possession of the property on the ground that the sale was not for legal necessity. The case as put in the plaint was that the consideration never passed at all and that if paid it was paid for illegal purposes. However, the substantial issue in the Courts below was that of legal necessity. The sale consideration was Rs 119. Rs. 41-4-0 has been found to be binding on the plaintiff and the plaintiff has submitted to this part of the decree. The remaining amount of Rs. 77-12-0 was paid in cash at the time of registration and as to this the Court below finds that there was no legal necessity. Against this portion of the decree the defendants appeal.

Only two pleas have been urged before me. The first is that the amount of Rs. 77-12-0 was taken for legal necessity. The arguments advanced in support of this plea are purely questions of fact. The items in question were stated in the sale-deed to have been borrowed for household expenses and for payment of petty debts. The defendants adduced evidence to show that they were borrowed for the purchase of bullocks and funeral expenses of the plaintiff's grandfather. The Court below has given good reasons for disbelieving this evidence and the finding is one of fact. It is not open to attack in this appeal.

The second plea is that the plaintiff can only recover property which has once been sold by showing that the sale consideration was for illegal or immoral purposes. This plea is equally untenable. The circumstances in which it is necessary for the sons to show that the debt was illegal or immoral in order to recover the property were laid down by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1) There are two such circumstances and two only. The first is, where property has passed out of the family under a conveyance executed by a father in consideration of an antecedent debt in order to raise money to pay off such debt. The second is, where property has been sold in execution of a decree for the father's debt. Neither branch of the rule has any application to this case. This was not an execution-sale but a private conveyance, and, so far as this item of Rs. 77-12 0 is concerned, it was a private conveyance executed not in lieu of an antecedent debt but for an amount paid in cash at the time of the registration of the deed. The appeal, therefore, fails and it is accordingly dismissed with costs.

Appeal dismissed.

(1) [1873-74] 1 I.A. 321=14 B.L.R 187=22 W. R. 56=3 Sar. 380 (P.C.)

1925 ALLAHABAD 241 (2)

LINDSAY AND KANHAIYA LAL, JJ.

Murari Lal and another—Plaintiffs-Appellants.

v.

E. V. David and another—Defendants- Respondents.

F. A. No 521 of 1923, Decided on 3rd November, 1924, from a decree of the First Sub. J., Cawnpore.

(a) Civil P. C., S. 80—Official Receiver cannot be sued without notice—Civil P. C. S 2 (17)—Provincial Insolvency Act, (1920) S. 58.

As soon as a receiver is appointed under the Provincial Insolvency Act, he becomes a

public officer within the meaning of S. 2 Sub S. 17 and he is protected by S. 80. An Official Receiver stands on a higher footing than a receiver appointed in a particular case and therefore no suit is maintainable against him without the requisite notice. An action granted by Insolvency Court *ex-parte* cannot be taken as an adequate compliance with the requirements of S. 80 of the Code of Civil Procedure. [P 242 C 2 & P 243 C 1]

(b) *Civil P. C. S. 80—Plea as to want of notice may be raised at the final hearing.*

A plea as to want of notice under S. 80 is not barred even though it is raised for the first time at the date of final hearing. [P 243 C 1]

A. P. Dube—for Appellants.

K. N. Katju—for Respondents.

Judgment. — The question for consideration in this appeal is whether the suit brought by the plaintiffs-appellants for a declaration of their title to a two-thirds share of the house in dispute was maintainable against the receiver without any notice under S. 80 of the Code of Civil Procedure.

The plaintiffs are the brothers of one Behari Lal, who was adjudicated an insolvent. The defendant was appointed an Official Receiver under S. 5 of the Provincial Insolvency Act, V of 1920, and in that capacity he took charge of the estate of the insolvent, including the house in dispute whereof a two third share is now claimed by the plaintiffs.

On the date fixed for the first hearing the receiver appeared and filed his defence; but no plea was raised by him regarding the omission of the plaintiffs to send him a notice of the kind above referred to, but on the date fixed for final hearing, he filed an application urging that the suit was not maintainable without such notice; and he asked the Court to take cognizance of that objection and add another issue to those which had been previously framed. The court below amended the issues and after hearing arguments gave effect to that objection and dismissed the claim.

S. 80 of the Code of Civil Procedure requires that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. It further requires that the plaint shall contain a statement that such notice had been delivered. A public officer is defined by S. 2 (17) of the Code of Civil Procedure, and the definition includes every officer of a Court of justice whose duty it is, as such officer, to take charge of or dispose of any property and every person specially authorized by a court of justice to perform such a duty. S. 28 of the Provincial Insolvency Act lays down that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the court or in a receiver; and S. 59 declares the duties and powers of the receiver when so appointed, and among those duties and powers he has been given the power to realise the property of the debtor and to sell that property or any part thereof and to give receipts for any money received by him. His official duties, therefore, fall within the purview of S. 2 (17) of the Code of Civil Procedure; and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by S. 80 of the Code. No suit can, therefore, be instituted against him in respect of any act done by him in his capacity as such a public officer without a previous notice of the kind prescribed by that section. In *Anna Laticia De Silva* v. *Gobind* (1) it was held that as soon as a receiver was appointed under the Provincial Insolvency Act, he became a public officer within the meaning of S. 2, Sub-S. 17 of the Code of Civil Procedure and he was protected by S. 80 of the code against any plaintiff who filed a suit against him with regard to any act done by him as such receiver without giving the requisite notice. The person against whom the suit in that case was filed was a receiver appointed for particular case to take charge of the property of the insolvent. An Official Receiver stands on a higher footing and the Court below, therefore, right-

(1) (1920) 44 Bom. 595=58 I. C. 411=23 Bom. L. R. 957.

ly held that no suit was maintainable against him without the requisite notice.

It is urged on behalf of the plaintiffs-appellants that the suit had been filed after obtaining the sanction of the insolvency court and that that sanction should be taken as tantamount to a notice to the receiver or as an effective substitute for such a notice, but the proceedings taken by the insolvency court show that the order granting the sanction was an *ex parte* order granted evidently without any notice to the receiver and in no circumstance can such a sanction be taken as an adequate compliance with the requirements of S. 80 of the Code of Civil Procedure.

It is further urged that the receiver had waived the notice inasmuch as no such objection was taken by him in his written statement. But it is open to a defendant if the court permits to apply to amend his written statement or to apply to urge an additional plea before the commencement of the trial and this is what was done in this case by the receiver. The explanation of the receiver is that certain observations in the decision in *Mt. Maharana Kunwar* v. *E. V. David* (2) brought to his attention his right to claim such a notice, of which he was till then not cognizant. His failure to raise such an objection in the written statement cannot *per se* be regarded as a waiver, even if a waiver were otherwise admissible, because the objection was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised.

Our attention has been drawn to the decision in *Manindra Chandra Nandi* v. *The Secretary of State* (3) and *Bhola Nath Roy* v. *Secretary of State* (4). In the first of these cases the objection was raised at a very late stage of the case after the original written statements had been filed and the case of the plaintiff had been completely closed; while in the latter case the objection was not taken at all by the party concerned but was raised for the first time at a late stage by another party who had no right to raise the objection. The decision of the court below must, therefore, be sustained and this appeal must therefore fail and it is hereby dismissed with costs.

Appeal dismissed.

(2) 1924 All. 40=46 All. 16=21 A.L.J. 737=4 L R A Civ. 483.
(3) [1907] 34 Cal. 257=5 C. L. J. 148.
(4) [1912] 40 Cal. 503=16 I. C. 849=17 C. W. N. 64.

1925 ALLAHABAD 243

SULAIMAN AND KANHAIYA LAL, JJ.

Gulab Rai—Plaintiff—Appellant.

v.

Sundar Lal and others — Defendants—Respondents.

Letters Patent Appeal No. 75 of 1923, Decided on 8th May 1924, from a judgment of Walsh, J.

Civil P. C. S. 11—Lower Court deciding on title and possession—Appellate Court deciding on title alone—No res judicata *regarding possession arises.*

Where the decision of the previous suit proceeded in the first Court both on the question of possession and title but the decision of the appellate Court was confined to the question of title alone.

Held: there was no *resjudicata* regarding the question of possession. [P 244 C 2]

Gulzari Lal—for Appellant.

Kailas Nath Katju—for Respondents.

Judgment.—The dispute in this appeal relates to a kothari and sidhari which formed a part of a larger house, which has been the subject of litigation between the parties more than once. The original owner of the house was one Sil Chand who had two sons Gulab Rai and Parshadi Lal. He sold half the house to Gulab Rai. Subsequently a suit was brought by Sil Chand and Gulab Rai in 1909 for the ejectment of Parshadi Lal from the said house

on the allegation that he was occupying it with the consent of the plaintiffs. That suit was decreed on the 29th January, 1910, and the plaintiffs claim to have possession through Court in pursuance of that decree on the 8th July, 1910.

Sil Chand died in 1913. Parshadi Lal and his sons thereafter brought a suit against Gulab Rai for the partition of a one fourth share of the said house along with some other property. But that suit was dismissed on the ground that Parshadi Lal had separated from his father in his life-time, and that though Gulab Rai had also separated from him he had re-united with him before his death. The allegation of the piaintiff Gulab Rai in the present suit was that the defendants who are the sons of Parshadi Lal had come into the house after the death of Sil Chand on a visit of condolence and that they had remained in possession of the room and sidhari aforesaid since without any right. The Court of first instance however found that they had been in possession of the house along with their father Parshadi Lal form more than twelve years prior to the suit. On appeal the learned Additional Subordinate Judge held that it was not necessary to go into the question of adverse possession or limitation because according to the view taken by him of the evidence adduced in the case, the plaintiff had not obtained actual possession over the portion of the house in question, as required by law, and that S. 47 of the Code of Civil Procedure therefore barred the claim. There was a further appeal to this Court which was summarily dismissed with an observation that the point of law was purely academic, that the facts had been clearly found and that if the lower Appellate Court was not right, the first Court at all events was. The lower appellate Court, however, did not record any finding on the question of limitation or adverse possession. It contented itself with a finding that no actual possession had been delivered to the present plaintiffs and his father Sil Chand in execution of the decree which they had obtained against Parshadi Lal. We have however examined the evidence adduced in the case and are satisfied that the finding of the Court of first instance, namely, that the defendants and their father Parshadi Lal had been in possession of the disputed portion from more than twelve years prior to the suit was amply borne out by the evidence adduced in the case. The question of the applicability of S. 47 of the Code of Civil Procedure to the circumstances of the present case therefore ceases to be material. The decision of the previous suit for partition proceeded in the Court of first instance both on the question of possession and title but the decision of the appellate Court and this Court was confined to the question of title, and the plea of *res judicata* so far as it affects the question of possession cannot therefore be entertained. This appeal must therefore fail and it is hereby dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 214

DANIELS, J.

Faqir Mohammad—Plaintiff—Appellant.

v.

Bhaggu Khan and others—Defendants—Respondents.

Second Appeal No. 1493 of 1922, Decided on 18th February 1924, against the decree of the Dt. J., Farrukhabad, D/- 19th July, 1922.

Evidence Act, S. 116—Kabuliyat executed by person already in possession as tenant of third party does not create estoppel.

The mere execution of a kabuliyat by a person already in possession as tenant of a third party does not operate as an estoppel in favour of the plaintiff in whose favour it has been executed. Even admitting a *kabuliyat* by itself can create a contract of tenancy, where the landlord has not let the tenant into possession and thus has not performed his part of the contract, the kabuliyat cannot debar a tenant who has been already in possession as tenant from a third party from denying the plaintiff's right. [P 245 C 2]

N. C. Vaish—for Appellant.

Saila Nath Mukherji—for Respondents.

Judgment.—This is an appeal by the plaintiff Fakir Mohammad against the dismissal of his suit for arrears of rent against the defendants under the following circumstances. The three defendants Bhaggu Khan, Abid Khan and Yakub Khan are cultivating the plot in suit probably from the original occupancy tenant under a sub-lease for five years the term of which had not expired. During the pendency of the sub-lease the occupancy tenant gave a lease of the same land to the plaintiff Fakir Mohammad. This lease was contrary to the provisions of S. 35 of the Tenancy Act and it is not now disputed that it was illegal. The plaintiff however got one of the three sub-tenants Abid Khan to execute a *kabuliat* in his favour. In this Court he relies on S. 116 of the Evidence Act and urges that Abid Khan having executed a *kabuliat* in his favour is precluded from denying his title and therefore even though the suit might be dismissed against the other defendants it should have been decreed against Abid Khan.

This argument is good so far as it goes but it does not entitle the appellant to succeed. Where a contract contains mutual obligations a party who is unable to perform his part of the contract cannot exact performance from the other party. Admitting that a *kabuliat* is sufficient to constitute a contract of tenancy. [the point was left open in the Full Bench case of *Sheo Karan Singh* v. *Maharaja Parbhu Narain Singh* (1)] the lessor is deemed to contract that he will give the lessee possession as a lessee. This the plaintiff cannot do. Abid Khan remained bound jointly with the defendants to pay rent to the original tenant from whom they were jointly holding. The *kabuliat* was a mere paper transaction and intended to strengthen the plaintiff's hand in the dispute regarding the validity of the plaintiff's lease. The estoppel relied on by the plaintiff can only operate against his tenant and a tenancy implies that the tenant has been let into possession of the land by or on behalf of the land-lord. Here the defendants have been in possession throughout as sub-tenants of the occupancy tenant. The law is thus stated in Mr. Ameer Ali's commentary on S. 116 of the Evidence Act.

"Where however the tenant being already in possession has made an attornment or acknowledgment of the tenancy he may show that he did so through ignorance, mistake or the like."

In this view the mere execution of the *kabuliat* by a person already in possession as tenant of a third party does not operate as an estoppel in favour of the plaintiff.

I therefore dismiss the appeal with costs.

Appeal dismissed.

(1) [1905] 31 All. 276=2 I.C. 211=6 A.L.J. 167=5 M.L.T. 347.

1924 ALLAHABAD 245

DANIELS, J.

Basanti—Applicant.

v

King Emperor—Opposite Party.

Criminal Ref. No. 267 of 1923, Decided on 23rd May 1923, from the S.J., Saharanpur, D/- 24th April 1923.

Crim Pro. Code, S. 350—Applicability—U. P. Municipalities Act, S. 247; enquiry under.

The provisions of S. 350 Criminal P. C. apply to an enquiry, under S. 247 of the U. P. Municipalities Act.

The parties were not represented.

Judgment.—This is a reference by the learned Sessions Judge of Saharanpur asking that the order of the Magistrate in a proceeding under S. 247 of the U. P. Municipalities Act be set aside and a fresh enquiry ordered on the ground that the Magistrate did not comply with the provisions of S. 350, Cr. P. C. The enquiry was commenced by one Magistrate and concluded by another. The accused asked to have the witnesses re-summoned before the Second Magistrate as he was entitled to do, but this was not done. I agree with the learned Sessions Judge that the provisions of S. 350 apply to an enquiry under S. 247 of the Municipalities Act I accordingly accept the reference, set aside the Magistrate's order, and direct that the case be re-heard,

Re-hearing directed.

1925 ALLAHABAD 216

WALSH, Ag. C. J., SULAIMAN, J.

Karan Singh and others—Plaintiffs-Appellants.

v.

Ram Sahai—Defendant-Respondent

Letters Patent Appeal No. 29 of 1923, Decided on 2nd July, 1924, against the judgment of Stuart, J., D/- 15th November, 1922.

(a) *U. P. Land Revenue Act (III of 1901) S. 233 (k)— No question touching partition or union of mahal—Section does not apply.*

S. 233 (k) of Act III of 1901 can have no application to a case, in which no question affecting the partition or union of the mahal is at all raised. [P 246 C 2]

(b) *Civil P. C. S. 11—Proceedings for partition of co-sharer village—Rate of profits allowed to out-going sharers is not res judicata as between parties continuing as co sharers after partition.*

Where a partition of a co-sharer village took place and the present plaintiffs and defendant lambardar were on the same side and continued to be joint and co-sharers in the same mahal, even after the partition,

Held : the rate at which the profits payable to the outgoing co-sharers was calculated in the partition proceedings is not *res judicata* as between the plaintiffs and defendant *inter se* in a subsequent action for share of profits. 42 All. 309 Foll. [P 246 C 2]

S. D. Sinha—for Appellants.

A. P. Dube—for Respondent.

Judgment.—In this appeal the only question that arises for consideration is as to the amount which the *lambardar* had to give credit for in ascertaining the plaintiffs' share of the profits of the mahal. Before the partition, although the rental of one plot in question was recorded as being Rs. 75-3-9, in a previous litigation the plaintiffs were allowed their share of the profits on the basis of a fair rental payable. Subsequent to this litigation there was a perfect partition of this mahal, and certain co-sharers got their shares separated. It is, however, a fact that the *lambardar* as well as the present plaintiffs still remain co-sharers in the same mahal, which is a joint one. At the time of the partition the papers still showed the rent of this plot as being Rs. 75-3-9. The learned District Judge therefore came to the conclusion that though the papers contained this entry, there was nothing to show whether the amount of rent and the nature of the holding were in issue in the partition proceedings. He accordingly thought that the just way was to make calculations on the basis of the prevailing rate for non-occupancy tenants, and on this calculation he decreed the plaintiffs' claim. On appeal a learned Judge of this Court has taken a contrary view. He came to the conclusion that the effect of the partition proceedings has been to override the previous decisions, and he was of opinion that the present claim at the prevailing rate for non-occupancy tenants was really barred by S. 233 (k) of Act III of 1901.

We are of opinion that S. 233 (k) of Act III of 1901 can really have no application to this case, inasmuch as no question affecting the partition or union of the mahal is at all raised.

It is true that at the time of the partition this plot must have been taken as an occupancy tenancy of the *lambardar*, and for the purpose of calculating the interest of the out-going coparceners, only Rs. 75-3-9 would have been formally taken as its rent. This, it may be conceded, might have resulted in some slight loss to the out-going caparceners. But as was held in the case of *Lal Behari* v. *Parkali Koer* (1), that circumstance can in no way affect the rights *inter se* of those co-sharers who remain in the mahal. The present *lambardar* and the plaintiffs are still co sharers in the same mahal which is joint and it cannot be said that their rights as regards this plot had been adjudicated upon *inter se* at the partition. We are therefore unable to hold that the effect of the partition has been to override the previous decisions.

We accordingly allow the appeal with costs and restore the decree of the lower appellate Court.

Appeal allowed.

---

(1) [1920] 42 All. 309=55 I. C. 22=18 A. L. J. 110.

✱ 1925 ALLAHABAD 247

STUART, J.

Ram Kishen and others—Plaintiffs—Appellants.

v.

Baldeo Koeri and others-Defendants-Respondents.

Second Appeal No. 909 of 1923, Decided on 5th February 1925, against the decree of the Dt. J., Azamgar, D/-5th March 19 3.

✱ *Limitation Act. S. 6—Co-parcener existent at date of alienation debarred by limitation from setting aside alienation—After-born members though minors are also debarred.*

Where a suit by Hindu co-parceners to set aside an alienation of joint family property is barred by limitation as regards one of the plaintiffs, it is also barred as regards the other plaintiffs though they were minors at the date of the institution of the suit, if they were not in existence at the date of the alienation. 1925 A. C. 33 Foll. [P 247 C 1]

Ambika Prasad for Haribans Sahai—for Appellants.

Peary Lal Banerji—for Respondents.

Judgment—The only points argued in this appeal are the points that the suit was not barred by limitation and that the sale was not for legal necessity.

In respect of the first point the facts are very clear. Ram Kishen, Ram Das, Ram Subhag and Ram Karan the sons of Ram Raj brought a suit to set aside a sale which Ram Raj had made of certain ancestral property on the 18th February 1907. The plaintiffs and Ram Raj are members of a joint Hindu family governed by the Mitakshara Law. It has been found on the facts by the learned District Judge and this finding cannot be attacked in second appeal that Ram Kishen was over twenty one at the time of the institution of the suit and that the other three plaintiffs who were minors at the time of the institution of the suit had not been born at the time that the alienation was made. The suit was thus clearly time barred as far as Ram Kisher is concerned.

It is also time barred in regard to the remainder as they were not in existence at the time that the alienation was made; on the principles laid down in *Sita Ram Singh* v. *Cheddi Singh* (1). The view taken by the learned Judges had been accepted as correct by their Lordships of the Privy Council in a recent suit from Oudh (*Ranodip* v. *Perneswar Prasad*) which has not yet come into the regular reports. It is reported in the All India Reporter of 1925 at page 33.

It has been suggested that their Lordships of the Privy Council took a contrary view in *Banwari Lal* v. *Mahesh* (2). It is not the case that they took a contrary view. They refused to nterfere in that appeal in respect of alienation which had been made before the plaintiff was born. This finding is sufficient to dispose of the appeal.

I need only add shortly that I agree with the finding of the learned District Judge on the question of legal necessity. This appeal is dismissed with costs on the higher scale.

Appeal dismissed.

(1) 1924 All 798=46 All. 882=22 A. L. J. 809=5 L. R. A Civ 631.
(2) [1919] 41 All 63=35 I. A. 294=21 O. C. 328=23 C. W. N. 577=6 O. L J. 168=49 I. C. 540=1919 M. W. N 490 (P. C.)

✱ ✱ 1925 ALLAHABAD 247

Full Bench.

MEARS, C. J., PIGGOTT AND MUKERJI, JJ.

A Vakil, in the matter of—

Mis. Case No. 487 of 1924, Decided on 22nd December 1921.

✱ ✱ *Legal Practitioner — Instituting on client's behalf, manifestly improper criminal complaint is highly censurable.*

To lodge on behalf of a client an obviously improper and groundless criminal complaint against a person is serious misconduct on the part of a practitioner. If it was due to deliberate dishonesty, the practitioner should be removed from the roll of legal practitioners. But even otherwise, if it had its origin in carelessness, incompetence and a lack of sense of responsibility, then too, the conduct of the practitioner is open to severe censure. It is the bounden duty of the practitioner before presenting a complaint to make due enquiries of the clients and to act with such care and prudence that his good faith could never successfully be questioned He ought not to regard his function as that of a mere machine

and his only duty to transmit to the Court any half truths and insinuations which his clients desired him to record. [P. 249, C 2]

Lalit Mohan Banerji — for the Crown.

Tej Bahadur Sapru, *Saila Nath Mukerji* and *Shambu Nath Seth* — for Opposite Party.

Mears, C. J. — A Vakil appears before us to show cause why he should not be removed from the roll of vakils or otherwise dealt with for that he, on the 10th of April 1923, drafted and presented to a Criminal Court a complaint in which he suppressed certain facts then professionally known to him, which would, if stated, have shown that one Nand Kishore had not committed the offence alleged against him or any criminal offence.

It appears that there are two rival firms in Cawnpore who import betel leaves from the District of Midnapur in Bengal. Consignments are sent from one of two stations, Denteen or Nikersen. Both these firms employed the same claims agent, one Nand Kishore, and in December 1922 the firm of Baldeo Prasad Lachman Prasad had a claim against the Railway Company in respect of a consignment of betel leaves which had, according to them, gone bad, by reason of some default of the Railway. At this date or later the other firm also had claims on several consignments against the Railway Company. All these matters were in the hands of Nand Kishore for settlement. Some confusion arose about the respective claims, due as we now know to the mistake of the Railway Company, over way bills No. 58 and 59, and the demands of one firm were intermixed with the demands of the other. Eventually, however, Nand Kishore advised his principals, Baldeo Prasad Lachman Prasad, to sue the Railway Company, and they did so on an allegation that the consignment was despatched from Denteen. As a fact it appears to have been sent from Nikersen, but this was in reality immaterial. At all events when Baldeo Prasad Lachman Prasad took action, the Railway Company looked into the matter and discovered that payment for the damage done to this consignment had been made to the other firm of Babu Lal Munna Lal.

Mr. Hoon, Barrister of Cawnpore, appeared for Baldeo Prasad Lachman Prasad, and when on the 15th of January 1923, the case was called on, announced that there had been a mistake, but that he had received the money, and the action might be dismissed. At that date he in fact had received the money from the firm of Babu Lal Munna Lal, who had recognized that the payment was not intended for them.

For some reason not apparent, some or all the members of the firm of Baldeo Prasad Lachman Prasad were dissatisfied with Nand Kishore and wished to harass him with criminal proceedings. Some if not all the members of that firm were perfectly aware that their own counsel had described the suit instituted by them as based upon a mistake, and they knew that it had been said in Court by Mr. Hoon that he had received the money and the case could be dismissed.

Nothing has been shown to us to suggest that Nand Kishore acted in the slighest degree dishonestly, and indeed the Railway Company may have paid the money direct to the firm of Babu Lal Munna Lal. If, however, they paid it through Nand Kishore, it is evidence that Nand Kishore paid it over to the firm of Babu Lal Munna Lal, as it was from that firm that Mr. Hoon had in fact received payment.

It must have been obvious to the firm of Baldeo Prasad Lachman Prasad that neither Mr. Hoon nor the two other gentlemen who appeared for them in the Civil Court would lend themselves to a criminal prosecution, and it was equally obvious to them that it was desirable for them not to run any personal risk of counter criminal proceedings when the vexatious nature of any criminal charge became apparent. Therefore they obtained a man of no position to act as their special agent in the intended prosecution of Nand Kishore. The person willing to do their bidding was Haidar Husain. The next essential was a lawyer who had to be a person

of dishonest methods or grossly careless and credulous.

Their choice fell on the respondent before us. He has told us that he discussed the matter with the members of the firm as well as with Haidar Husain, and also that he inspected the file of the Civil Court. He proved to be all that the most unscrupulous client could desire, for notwithstanding that he had read that plain statement endorsed on the claim by the Court that Mr. Hoon had said that the money was paid and the suit might therefore be dismissed, he became a party to the drafting of a complaint alleging criminal breach of trust against Nand Kishore. In the complaint he distorted the words used by Mr. Hoon, and in particular added the half truth that "the principals of the complainant have not yet received the money on the parcel". Yet he knew that the counsel acting for Baldeo Prasad Lachman Prasad had asserted that the money had been paid to him, and he made himself a party to the request that the matter might be further enquired into by the police.

The complaint is manifestly a most improper document. What we have to decide is whether it was brought into existence by deliberate dishonesty on the part of the respondent, in which case he is unfit to remain a member of the profession, or whether it had its origin in carelessness, incompetence and a lack of sense of responsibility.

There are circumstances which go some way to exclude any other theory but that of dishonesty, but the respondent in questions put to him by the Court somewhat lightened the gravity of the case and led us to the conclusion that in reality he had no appreciation of the fact that he had any responsibility to the Criminal Court when presenting the complaint to it. We need not say that this is a wholly erroneous view of the duty of a legal practitioner and the respondent was bound before presenting the complaint to make due enquiries of the clients and to act with such care and prudence that his good faith could never successfully be questioned. His caution should have been awakened at once when he found a man whom he knew to be of no position had been chosen to present the firm of Baldeo Prasad Lachman Prasad for this particular case. Moreover, he knew from the inspection of the file of the Civil Court the statement which had been made by Mr. Hoon, and it was his positive duty to have required the clients to tell him:—

1. The date on which they alleged that Nand Kishore had received the money.
2. The person from whom the money was received.
3. The amount of such money.
4. On whose behalf it was received
5. In whose hands the money was at the moment of drafting the complaint.

These questions would, in our opinion, have been put by a careful and cautious practitioner and they were also essential facts which should have been set out in the complaint. Had these questions been asked, it would at once have become apparent to the respondent that they could not be satisfactorily answered and it would then have become evident to him that he was being invited to involve himself in a very doubtful and dangerous transaction. He has asserted before us that he had no dishonest intentions but he admits that he now realises that he acted at least with great foolishness. We express the strongest disapproval of the conduct of the respondent in this matter and it is advisable for him to remember in future the serious responsibility which a practitioner assumes in invoking the criminal law on behalf of a client. He seems to have regarded his function as that of a mere machine and his only duty to transmit to the Court any half truths and insinuations which his clients desired him to record. We commend Mr. Mir Ali Raza, the Deputy Magistrate, for bringing this matter to the notice of the Court, but we are surprised to find that when an application came up before Mr. K. G. Banerji, District and Sessions Judge, he made observations which showed that he entirely overlooked the manifest duty of a legal practitioner to the Court and regarded

the matter as one exclusively between the client and the lawyer. In this he was undoubtedly wrong. With some hesitation we give the respondent the benefit of the doubt and allow him to remain a vakil of this Court. His conduct, however, deserves censure, and though we discharge the rule issued against him, we order him within 21 days to pay to the Registrar the sum of Rs. 250 being the costs incured by the Government in this matter. If default in payment is made, such default is to be communicated to the Court.

Rule discharged.

✱ 1925 ALLAHABAD 250

MUKERJI, J.

Ram Prasad and others—Applicants

v.

Emperor—Opposite Party.

Criminal Rev. No. 374 of 1924, Decided on 29th September, 1924, against the order of S. J., Bareilly.

✱ *Criminal P. C., S. 110—'Dacoit' does not come under S. 110—Person guilty of definite offence—Preventive sections do not apply.*

S. 110 does not prov de for any person being called upon to furnish security on the ground that he was by habit a dac it and belonged to a gang of dacoits. Being a member of a gang of dacoits is a definite offence defined and punishable under the Penal Code and it cannot be permitted that instead of the specific charge being tried in a proper Court on a proper evidence, the person should be indirectly punished by proceedings under the preventive sections. [P 250 C 2]

J. M. Banerji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—Four persons, Ram Prasad, Sheo Prasad, Bhairon Prasad and Naubat Singh, have come up before this Court with a petition in revision to revise an order calling upon them to furnish security to be of good behaviour for three years under S. 110 of the Criminal Procedure Code.

There seems to have been some amount of confusion in procedure in the Court below. By an order dated the 15th of March, 1924 a learned Magistrate called upon seven persons, the four applicants and Mian Khan Jwala Prasad and Nizam Shah, to show cause why they should not be bound over on the ground that they were "habitual dacoits and belonged to the dangerous gang of Dhani and Ram Kishan, dacoits". After hearing the case the learned Magistrate modified his notice and bound over two of the seven persons, *viz*: Jwala Prasad and Nizam Shah to furnish security for one year only. He ordered that so far as the five persons were concerned who have been asked to furnish security for three years, the proceedings should be laid before the Sessions Judge. Apparently under some misapprehension an appeal was filed through a learned vakil to the Sessions Judge on behalf of all the seven persons. The learned Sessions Judge treated the proceedings before him as one in appeal. By his order dated the 20th of May, 1924 he cancelled the order as to bonds against Jwala Prasad and Nizam Shah and purported to dismiss the appeal of the remaining five persons.

It is needless to say that it was for the learned Sessions Judge to have himself passed the order as to security as there was no appeal on behalf of the five persons mentioned which could be dismissed.

Several points have been taken and the point No. 2 is that the proceedings were illegal inasmuch as the notice called upon the applicants to furnish security on the ground that they belonged to a gang of dacoits.

On a reference to S. 110 of the Criminal Procedure Code it will be found that it does not provide for any person being called upon to furnish security on the ground that he was by habit a dacoit and belonged to a gang of dacoits. It is not for the courts to find out the motive for the omission, but if it were necessary one could easily be found. Being a member of a gang of dacoits is a definite offence defined and punishable under the Indian Penal Code and, it was for that reason that under the preventive sections, action could not be taken for having committed a specific offence. In this particular case seven persons were jointly tried for being members of a gang of dacoits. The charge was very definite that they not only belonged to a gang of dacoits, but they

belonged to a gang of which the heads were two specific persons. Thus it was a clear charge under S. 400 of the Indian Penal Code against the applicants and Mian Khan. It cannot be permitted that instead of the specific charge being tried in a Court of session on a proper evidence the applicants should be indirectly punished by proceedings under the preventive sections although S. 110 does not apply to a case like this.

It has been urged that if a man can be called upon to furnish security on the ground that he is by habit a robber. there is no reason why he should not be bound over on the ground that he is by habit a dacoit. I have really already answered this argument. A man may be by habit a robber and so long as he is not charged with a definite act of robbery, he may be bound over under the preventive sections. But as soon as it is said that he along with four or more others, habitually commits robbery, the man becomes at once a member of the gang of dacoits and thereby commits a definite and specific offence under the Indian Penal Code. In my opinion S. 110 deliberately omitted 'dacoity' out of its purview.

In this view of the law it is not necessary for me to go into the merits of the case.

Mian Khan has not filed any application in revision, but there is no reason why he should continue to be bound over while the other four men should be set at liberty.

I set aside the order of the Sub-Divisional Magistrate dated the 22nd of April, 1924, and the order of the Sessions Judge dated the 20th of May, 1924, so far as the latter affects the applicants and Mian Khan, quash the orders as to security to be taken from the applicants and Mian Khan and order their release.

Revision allowed.

1925 ALLAHABAD 251

BOYS, J.

Ram Lal—Applicant.

v.

The Municipal Board, Budaun—Opposite Party.

Criminal Ref. No. 274, of 1924 Decided on 17th July 1924, from the S. J., Budaun, D/- 29th April 1924.

U. P. Municipalities Act, S. 307 (b)—Accused fined for dis-obedience of notice—Further daily fine is illegal.

Under S. 307 (b) of the Municipalities Act, it is illegal for a Magistrate to sentence the accused to a further daily fine at the same time that he sentences him to a fine for disobedience of the notice. [P 251 C 2]

Sarkar Bahadur Johari—for Applicant.

Mushtaq Ahmad-for Opposite Party.

Judgment.—This is a case in which the learned Sessions Judge refers a conviction arrived at by a Magistrate under S. 307 (b) of the Municipalities Act on the ground that it was illegal for the Magistrate to sentence the accused to a further daily fine at the same time that he sentenced him to a fine for disobedience of the notice. The learned Sessions Judge has in support of his reference quoted the decision of Mr. Justice Piggott in *Amir Hasan Khan* v. *Emperor* (1) It has been urged before me that the words in clause (b) "and, in case of a continuing breach, to a further fine" indicate that the sentence of a further fine may be passed along with the fine for the original offence. I agree entirely with the view taken by Mr. Justice Piggott and it is therefore unnecessary for me to add much. If it were to be possible for the Magistrate to pass a sentence of fine for the continuing offence at the same time as his original order of conviction, it is clear that it would mean that he could determine the rate at which the fine is to be exacted before the new offence of retaining the construction had been committed and before he knew the circumstances under which that offence had been and was being committed. To illustrate the inequity of this, I may instance the case of a

(1) [1918] 40 All. 569=19 Cr. L.J. 694=46 I.C. 150=16 A.L.J. 527,

Magistrate convicting two men on the same day in regard to two separate constructions and fining each of them, Rs. 50 for the original offence committed by him and ordering each of them to pay a further fine of Rs. 5 a day during the continuance of the refusal to obey the notice. A month later they both come up before him for having failed to remove their respective constructions; one pleads that, as a matter of fact, he has done his best to make arrangement for demolition but for one reason or another has been prevented. As regards the other it is proved that he has gone about the city saying that he will see the Board at the bottom of the sea before he obeys any of its orders, and yet in terms of his previous orders the Magistrate has already fined them both at the rate of Rs. 5 a day. I am quite clearly in agreement with the decision of Mr. Justice Piggott and I have only quoted this instance in order to show how any other interpretation than his would work injustice. Accepting therefore the reference of the learned Sessions Judge I delete from the order of the Magistrate the words "and also to a fine of Rs. 2 per day after one week from this day if the encroachment is not demolished within this week and until it is demolished."

On proof of the accused still disobeying the notice it will be open to the Municipality to prove for how many days he has disobeyed it and for the Magistrate to exercise his discretion as to the rate of daily fine which he will inflict according to the circumstances of the case. Let the record be returned to the Sessions Judge with this order.

Reference accepted.

1925 ALLAHABAD 252

DANIELS, J.

(*Babu*) *Madho Dass and another*—Defendants—Applicants.

v.

His Highness The Maharajah of Benares—Plaintiff—Opposite Party.

Civil Rev. No. 144 of 1924, Decided on 25th November, 1924, against an order of the Dt. J., Benares, D/-16th February, 1924.

Civil P. C., O. 17, Rr. 2 and 3—Court wrongly acting under R. 3 instead of under R. 2—Remedy is by appeal.

The defendant had taken time for framing of issues, and on the day finally fixed he did not appear. The plaintiff was present. The Court framed issues, took evidence on behalf of the plaintiff, and decided the case on that evidence.

Held: that as the Court in fact decided the case on the merits under O. 17, R. 3 the defendant's remedy was by way of appeal if he considered himself aggrieved. The right of appeal does not depend on what a Court ought to have done but on what it actually did. If the Court acted wrongly in deciding the case on the merits, the Appellate Court had full power to put things right.

S. P. Sinha (for *K. N. Katju*)—for Applicants.

Badri Narain—for Opposite Party.

Judgment. — This is a revision against an order refusing to restore a case which had been decided on the merits under O. 17, R. 3. The point taken in revision is that the Court should have decided the case *ex parte* under O. 17, R. 2. The defendant had taken time for framing of issues, and on the date finally fixed he did not appear. The plaintiff was present. The Court framed issues, took evidence on behalf of the plaintiff, and decided the case on that evidence. The learned Judge of the Court below has held that as the Trial Court in fact decided the case on the merits under O. 17. R. 3, his remedy was by way of appeal. That decision is in accordance with the decision of a Bench of this Court in the case of *Nasir Khan* v. *Itwari* (1). There the rule was laid down that the right of appeal does not depend on what a Court ought to have done, but on what it actually did. If the Court actually decided a case on the merits, then the remedy of the aggrieved person is by appeal. If the Trial Court acted wrongly in deciding the case on the merits, the Appellate Court had full power to put things right.

I, therefore, hold that the applicant's remedy was by way of appeal from the decision, and that the present application fails. It is accordingly dismissed with costs.

Application rejected.

---

(1) 1924 All. 144=45 All. 669=21 A. L. J. 667=5 L.R.A. Civ. 26.

1925 ALLAHABAD 253 (1)

MUKERJI AND DALAL, JJ.

Jaswant Rao—Applicant.

v.

Kashi Nath Rao and others — Opposite Parties.

Rev. No. 1 of 1924, Decided on 23rd July 1924, against the order of the Dt. J., Cawnpore.

(a) *Civil P. C., S. 115—Lower Court referring a case to Collector under local Act—Revision lies as to correct exercise of jurisdiction.*

The lower Court found that the mortgagor was a member of an agricultural tribe and referred a mortgage suit to the Collector under sub-S. 3 of S. 9 of the Bundelkhand Land Alienation Act with a view to the Collector exercising powers under sub-Ss. 1 and 2 of the section,

Held: that a revision lay to the High Court on the question whether the lower Court had exercised its jurisdiction correctly in refusing to pass a decree in favour of the plaintiff and referring the case to the Collector.

(b) *Hindu Law — Brahman becoming Bairagi does not necessarily lose caste.*

The mere fact that a Brahman becomes a Bairagi does not connote a renunciation involving loss of caste as a Brahman. [P. 253, C. 2

Anandi Prasad Dube—for Applicant.

Ram Nama Prasad—for Opposite Parties.

Judgment. — We do not think that there is any force in this application for revision. The plaintiff-applicant sued on foot of a mortgage bond. The original mortgagor was one Kashi Nath and he sold his right of redemption to Mahanth Parmeshwar Das, defendant. The plaintiff Jaswant Rao is transferee of the rights and interests of the original mortgagee Bansidhar. On a suit being instituted the learned Subordinate Judge held that the mortgage was enforceable. He was further of opinion that both Kashi Nath and Parmeshwar Das who were Brahmins, were members of an agricultural tribe as defined in the Bundelkhand Land Alienation Act. He therefore acted under clause 3 of S. 9 of the Act because the mortgage had been executed subsequently to the passing of the Bundelkhand Land Alienation Act No. 2 of 1903. He referred the case to the Collector of the district of Banda with a view to the exercise of the power conferred on the Collector by sub-Ss. 1 and 2 of S. 9. No decree was passed under the circumstances. The plaintiff appealed to the District Judge who refused to admit the appeal on the ground that no decree had been passed or could be passed by the trial Court under the circumstances of the case.

The plaintiff has come here in revision. Revision would lie in so far as this Court would consider whether the Subordinate Judge has exercised his jurisdiction correctly in refusing to pass a decree in favour of the plaintiff and referring the case to the Collector. The ground taken here is that Parmeshwar Das was a Bairagi and that therefore ceased to be a Brahmin and a member of an agricultural tribe. We have looked through the evidence. Two witnesses were examined on behalf of the plaintiff; the plaintiff Jaswant Rao himself and one Chuttan Lal. Both of them expressed their ignorance as to whether Parmeshwar Das was a Brahmin or not. One Banwari, Mukhtar-am of Parmeshwar Das, was examined on behalf of the defence. He stated that, Parmeshwar Das was a Brahmin and had become a Bairagi. This by itself does not connote renunciation by Parmeshwar Das, involving loss of his caste as Brahmin. There may be Bairagis of various status in life, some who may have renounced all civil status, and some who have not. The plaintiff has made no attempt to prove that Parmeshwar Das has ceased to be a Brahmin. In the circumstances the learned Subordinate Judge was correct in holding that Parmeshwar Das was still a Brahmin and a member of an agricultural caste. It can be pointed out that Parmeshwar Das engages a mukhtar and buys property. This shows that he has no desire to give up his caste or property.

We dismiss this application with costs which shall include counsel's fees here on the higher scale.

Application dismissed.

✱✱ 1925 ALLAHABAD 253 (2)

PIGGOTT, J.

Ram Ugrah Singh—Plaintiff—Appellant.

v.

The Benares Hindu University—Defendant—Respondent.

Original Suit No. 1 of 1924, Decided on 16th December, 1924.

* * *Specific Relief Act, Ss.* 42, 54 *and* 55—*Suit against University to declare candidate to have passed in an examination does not lie—Neither declaration nor injunction is open.*

When a student enters any University as an undergraduate, and *a fortiori* when a graduate of such University presents himself for a course of post-graduate study he is a member of the "Universitas" or corporation, and as such he is subject to the authority and discipline of those persons who have been duly placed in authority in this corporation. If he considers himself to be oppressed by some misuse of authority on the part of a person, or body of persons set over him, it is open to him to consider whether he cannot obtain redress from higher authorities within the same corporation. The question whether he has or has not passed a certain examination is one in respect of which by the very act of presenting himself for such examination, he submits himself to the decision of the authorities appointed by the University for the conduct of the same. No Court of Law can entertain a claim on his part that he has passed a certain examination when the authorities of the University conducting the examination, and lawfully empowered to adjudicate upon its results, declare him to have failed. Therefore, neither a suit for declaration nor one for injunction against the University lies in such a case. The result is not affected by the fact that the University authority in their publication of the results of the examination have been guilty of violating the provisions of any Regulations etc, by which they may be governed. [P. 261, C. 1.]

The University must have absolute discretion over its students in the matter of the classes to which the students are admitted. An injunction directing the authorities of the University, against their will and against their better judgment, to place a young man in a class where he will receive instruction by which he is not, in the opinion of those authorities, as yet prcperly qualified to benefit cannot be granted. [P. 261, C, 2]

Peary Lal Banerji and *Janki Prasad*—for Appellant.

Tej Bahadur Sapru, A. P. Dube, Sankar Saran and *P. N. Sapru*—for Respondent.

Judgment.—The plaintiff, Ram Ugrah Singh, is a graduate of the Benares Hindu University. In the month of July, 1924 he presented himself at an examination held under the authority of the said University, described as the "Previous LL. B. Examination". The results were published on the 11th of August, 1924, and the plaintiff's name did not appear in the list of candidates who had passed the examination. On the 30th of August, 1924 the plaintiff addressed to the Vice-chancellor of the Benares Hindu University a petition (Ex. 5), in which he protested that, under the regulations of the University in force at the time when he sat for the examination and which continued in force until after the results of the said examination had been published, he (the petitioner) had in fact passed the examination in the third class. He, therefore, requested the Vice-chancellor to reconsider the whole situation, to adjudge the petitioner to have passed the Previous LL. B. Examination and to promote him to the Final LL. B. class, alleging these things to be his right by virtue of the declarations and pronouncements of the University. The answer returned was to the effect that the matter was under consideration. On the 8th of September, 1924 Ram Ugrah Singh instituted the present suit in the Court of the Subordinate Judge of Benares. The defendant was the Benares Hindu University. The reliefs sought were by way of declaration and of injunction. The declaration sought was to the effect that the plaintiff is entitled to have been declared as passed in the Previous Law Examination of the Benares Hindu University held in July, 1924 and promoted to the Final LL. B. class. The relief sought by way of injunction was that the defendant-University be compelled to pass and promote the plaintiff to the Final LL. B. class. There was an alternative prayer that, if for any reason the plaintiff be held disentitled to the other reliefs claimed, he should be given a decree for Rs. 5,250 by way of damages. The plaint was not rejected by the trial Court on the ground that on the face of it, it disclosed no cause of action; but summons having been issued to the Benares Hindu University through its Vice-chancellor, the case was set down for settlement of issues, and after one adjournment, granted for the convenience of the defendant, the trial Court, on the 9th of October, 1924, settled eight issues which it proposed to try. At this stage this Court intervened, and the suit was transferred from the jurisdiction of the Subordinate Judge of Benares to that of this Court and directed to be tried as an original suit in this Court.

As soon as the case came up before me for hearing, Sir Tej Bahadur Sapru, appearing for the defendant, pointed out that certain pleas in the written statement were of the nature known in English law as "demurrer", and went to the question whether this Court, or any other Court of civil jurisdiction in this province, could entertain a plaint of the nature now before me. I have recorded a memorandum of the proceedings which took place

before me yesterday, which were largely directed to ascertaining from the learned counsel representing both parties whether they were at issue upon any definite question of fact and what was the precise meaning and effect of the pleadings entered by the respective parties. Having done this, I passed an order superseding altogether the issues fixed by the Subordinate Judge of Benares, and in their place I fixed the three following issues :—

1. On the facts alleged and the pleadings of the parties, has the plaintiff any cause of action ?

2. In the event of an affirmative finding on issue No. 1, to what relief is the plaintiff entitled, either,

(i) by way of declaration, or
(ii) by way of mandatory injunction, or
(iii) by way of a decree for damages ?

3. If it be held that the plaintiff is entitled to relief by way of a decree for damages, then at what sum should the said damages be fixed ?

I then intimated my intention of hearing both parties on the first two issues before I proceeded to consider the third. No oral evidence has been taken on either side, the matter being treated by both parties as one falling within the scope of Order XIV, rule 2, of the Code of Civil Procedure, that is to say, as being a case in which issues of law were raised which went to the root of the whole matter and the determination of which in a certain sense might make it unnecessary for the Court to take oral evidence, or to proceed to the determination of any issue of fact. In the course of argument, however, certain documents were put in, which I have admitted in evidence, and I must, therefore, take it that evidence has been offered in respect of the two preliminary issues of law. Whether or not this course was strictly regular, it is certain that no injustice has been done to the plaintiff in the matter, as the documents before me are documents produced at his instance. A printed booklet, described as the "Prospectus of Studies" issued by the Benares Hindu University for the examinations of 1923, and containing the regulations of the University, was put in and admitted by both sides to be an authoritative publication. This book or pamphlet was already on the record when the case came before this Court, and I have now marked it as exhibit 6. The other exhibits, to which I need not necessarily refer in numerical order, are the following :—

Exhibit 5 is the petition addressed by the plaintiff, Ram Ugrah Singh, to the Vice-Chancellor of the Benares Hindu University, dated August 30, 1924, and exhibit 6 is the reply to the said petition. Exhibit 4 is a copy of the minutes of a meeting of the Senate of the Benares Hindu University held on the 18th of August, 1924. Exhibit 1 is a copy of what are described as the minutes of an emergency meeting of the Syndicate of the same University, held on the 16th of November, 1923. Exhibit 2 is a letter signed by the Registrar of the Benares Hindu University, specifying the papers taken by the plaintiff in the course of the Previous LL. B. examination of 1924, with a statement of the maximum marks allowed for each paper and of the marks awarded in each to the plaintiff. Exhibit 3 is a copy of a letter addressed by the Registrar of the Benares Hindu University to the Secretary to Government of the United Provinces, Education Department, dated the 8th of September, 1924. The authenticity and admissibility in evidence of these exhibits has been conceded on both sides. It will be noticed that I have admitted copies to be put in evidence in certain cases, and I have done so without concerning myself to enquire too curiously into the question whether copies were technically admissible in evidence. The documents in question were called for by the plaintiff from the defendant, and the copies produced by the latter have been accepted by consent of both parties as the most convenient method of placing upon the record the evidence which the plaintiff desired to have there.

The examination of July 1924 was the first examination in Law held under the auspices of the Benares Hindu University, the Law class at the said University having only been opened in the course of the previous year. It was at one time suggested that a question of fact requiring determination might be whether the plaintiff joined the aforesaid Law class in the month of November, or in the month of December 1923 ; but I do not think that anything turns upon this. It has been admitted that the plaintiff's attendance, for the purpose of certain rules relating thereto, was reckoned from the 1st of December, 1923, and that he paid the required fees for the entire session reckoned to

have commenced in the month of July, 1923. Nothing really turns upon the question whether or not the plaintiff had already joined the Law class when the Syndicate held its meeting of November 16, 1923.

Having opened a class in Law and determined to institute examinations leading up to the degree of Bachelor of Laws, it became the duty of the University to frame proper regulations for the conduct of such examinations. The Syndicate entered upon the performance of this duty, in so far as it was within the competence of that body, on the 16th of November, 1923 as aforesaid. A resolution was passed, the meaning and effect of which is perhaps the principal matter in controversy now before me. For the present I am content to say that the intention of that resolution in the minds of the persons who passed it seems to me to be beyond question. In order to pass the examination a candidate was to be required to fulfil two conditions: in each of the papers set for the examination he was to obtain at least 30 per cent. of the marks; but over and above this, in order to pass the examination at all, he was to obtain 50 per cent. of the total marks in all the papers added together. What the plaintiff actually did obtain is shown in the document exhibit 2. He did obtain over 30 per cent. of the marks in each of the five papers set and taken by him, but his aggregate of marks in all the papers came to 225 out of 500, which is 45 per cent. instead of the prescribed minimum of 50 per cent. This is the reason why the plaintiff's name did not appear in the published list of candidates who had passed the examination.

It may be useful to pause at this point in order to remark that the suit now before me is not one to which relief is sought, by way of damages or otherwise, upon an alleged breach of a contract, or quasi-contract, between the parties. There are passages in the petition exhibit 5, and also in the plaint itself, which suggest a contrary intention on the part of the plaintiff; but, as put to me in argument, this was certainly not the plaintiff's case — and rightly so — because a suit on this basis could not possibly have succeeded. There is no document on the record of which it could be said, by any stretch of reasoning, that the defendant-University had thereby held out assurance, either to the plaintiff or to any other person, that, if he obtained 45 per cent. of the marks in certain papers set at an examination described as the Previous LL. B., examination, he would be held to have passed the same, provided he had obtained at least 30 per cent of the marks in each paper separately.

What the plaintiff's case really is I now proceed to consider. The foundation of it is to be found in regulation 10 of Chapter XXVI of the Regulations of the Benares Hindu University. These are the original regulations of the University which, in accordance with S. 18 (2) of the Act No. XVI of 1915, by which the said University was constituted, were framed under the direction of the Governor-General in Council, received the approval of the Governor-General in Council and were to remain in force unless and until added to, amended, or repealed by the Senate of the University. The rule in question runs as follows:—

"Candidates passing any University examination will be placed in three classes, namely, the first, second and third. The Syndicate shall from time to time prescribe conditions under which candidates will be placed in each of these classes."

Now, by its resolution of November 16, 1923, the Syndicate proposed to divide candidates who had passed the examination into two classes, and not into three. I have already spoken of the "intention" of the framers of this resolution, and in using that expression I did refer to Exhibit 4, the proceedings of the Senate at its meeting of the 18th of August 1924, and to exhibit 3, the letter addressed by the Registrar of the University, under the orders of the Vice-chancellor and the Senate, to the Secretary to Government, United Provinces. The plaintiff's contention, however, is that the Syndicate's resolution, if interpreted,

(*a*) according to its plain meaning and effect; or

(*b*) with reference more particularly to the provisions of Regulation 10 of Chapter XXVI already referred to, is to constitute, not two classes of successful candidates, but three. According to this interpretation, candidates obtaining 60 per cent of the aggregate marks in all papers were to be adjudged to have passed the examination in the first class; candidates obtaining 50 per cent were to be placed in the second class of passed candidates. There was to be a third class, consisting of those candidates who had obtained at

least 30 per cent of the marks in each of the papers set at the examination, but whose aggregate fell short of 50 per cent of the total. In so far as this is alleged to be the meaning of the resolution, considered by itself and independently of any documentary evidence as to the interpretation put upon the same by the persons who framed it, I am unable to accept the contention. The words in the resolution which run, "Minimum pass marks in the total, 50 per cent," exclude the interpretation contended for on behalf of the plaintiff. The resolution as it stands, considered according to its plain meaning and apart from any other document on the record, does lay down that in order to pass the examination a candidate must have obtained in the aggregate at least 50 per cent. of the total marks. It is, however, contended that the resolution must be interpreted in the light of the regulation by which the Syndicate was empowered to act in the matter. According to that regulation, candidates passing any University examination were to be placed in three classes. The argument on this point was pressed upon me in two different forms. It was contended that the Syndicate of the Benares Hindu University should be presumed to have acted in accordance with, and not in coutravention of, the regulations by which it was bound, and that, therefore, any reasonable or possible interpretation of the terms of the resolution of the 16th of November 1923, which brought it into conformity with the provisions of the regulation, must be preferred to any interpretation involving the assumption that the Syndicate was contravening the said regulation. In the second place, it was contended that, in any event, in view of the provisions of the regulation, the Syndicate must be deemed to have divided the candidates who had passed the examination into three classes, and that, if the resolution be considered in this light, then the only possible interpretation is that there was to be a third class of passed candidates as contended for by the plaintiff. The first of these arguments fails to my mind, not only on the broad ground that there is a limit beyond which a presumption such as that suggested by the plaintiff cannot be allowed to prevail against the plain meaning of the recorded resolution which shows what the Syndicate actually did ; but also because, on a review of the entire situation, I do not find any real presumption in favour of the suggestion that the Syndicate was dividing the candidates who passed this particular examination into three classes. It is quite true that regulations could be altered only by the Senate ; but under clause (4) of S. 18 of Act No. XVI of 1915 the Syndicate had authority to draft and propose to the Senate regulations that should be made by the Senate. I do not say that on the 16th of November 1923, the Syndicate of the Benares Hindu University was consciously preparing for the consideration of the Senate an amended regulation affecting the examinations to be held for the degree of Bachelor of Laws. What impresses me is that the Syndicate, in the exercise of its lawful power in respect of the fixing of standards for the said examinations, would not necessarily feel themselves bound to divide the successful candidates into three classes, because there was a regulation saying that this ought to be done in all University examinations. They would know that this provision was capable of amendment by the Senate, for adequate cause shown ; and they were at full liberty to draft a proposal which should involve the classifying of successful candidates into two classes instead of three, in reliance on the fact that, if the Senate approved of the arrangement, it could easily amend the regulation. I am unable, therefore, to make any presumption with regard to the meaning of this resolution of the 16th November 1923 contrary to what appears to me to be its plain and unambiguous terms. There remains the question whether, in spite of all this, the effect of the resolution actually passed was or was not something other than what its framers intended and what the words themselves import. When the Syndicate was empowerd by the regulation itself, which is the foundation of the plaintiff's case, to prescribe conditions under which candidates would be placed in each of the three classes into which candidates passing the examination were to be placed, that body was *a fortiori* empowered to prescribe the conditions under which a candidate would be held to have passed the examination at all. Moreover, by clause (22) of the first schedule appended to Act No. XVI of 1915, which contains the statutes, of the University, it was the duty of the Syndicate, amongst other things, to declare the results of

the various University examinations. The Syndicate was, therefore, within its statutory authority when, in the month of August 1924, it caused to be published the result of this Previous examination for the degree of Bachelor of Laws, and excluded from the list of passed candidates those persons who had obtained less than 50 per cent. in the aggregate of the total marks, even though some of these persons, including the present plaintiff, had obtained the minimum of 30 per cent of the marks allotted for each paper singly.

I cannot undertake to say why the question of amending regulation 10 of Chapter XXVI, so as to permit the successful candidates to be classified in two classes instead of in three, was not taken up by the responsible authorities of the defendant University at an earlier date. To this extent certainly there was an irregularity in the proceedings of the said authorities. The examination was over and the result had actually been published a full week, before the Senate met on the 18th of August 1924 and took into consideration this matter, amongst others. The record of the proceedings shows clearly enough that the question of fixing a lower minimum than 50 per cent. of the aggregate marks, as a condition essential the passing of the examination, was never debated at all. That was treated, and in my opinion was rightly treated, as having been concluded by the resolution of the syndicate and the subsequent publication under authority of the Syndicate of the examination results The learned gentlemen of the Senate had awakened, though rather late in the day, to the difficulty with which they were faced by reason of the fact that the regulations of the University, as they stood, did not permit of their classifying passed candidates into fewer than three classes. They could have met this difficulty by requiring a higher qualification than sixty per cent. of the marks from candidates aspiring to a place in the first class; but this they were reluctant to do. If the minimum qualification for the first class was to be fixed at 60 per cent of the aggregate marks, it was obviously difficult to get in two more classes between that limit and the interior limit of 50 per cent. For this reason the Senate proposed and carried a formal amendment of regulation 10 of Chapter XXVI, permitting candidates passing any of the Law examinations to be placed in two classes only, a first class and a second. Now, this resolution required under the law the previous approval of the Visitor, that is to say, the Governor of the United Provinces. This approval had not been obtained when the Senate met to consider the matter on the 18th of August 1924. Here, again, the authorities of the University seem to have been either ill advised or dilatory, and a point has been made on behalf of the plaintiff, not altogether without reason, that it was only on the 8th of September 1924, the very day on which the present suit was instituted in the Court of the Subordinate Judge, that the authorities so far bestirred themselves as to direct the Registrar of the University to submit the proposed amendment of the regulation for the approval of His Excellency, the Visitor. To the letter itself was appended a prayer that His Excellency would be further pleased to accord permission to give retrospective effect to this sanction, "so that t may be applicable to the cases of candidates who appeared at the previous LL. B. examination held in July 1924." There is a telegram on the record, marked exhibit 7, which suggests that His Excellency the Visitor intended to comply, and did comply, with this prayer of the Senate. As to the legal effect of this subsequent sanction I am, more or less, in agreement with the argument pressed upon me by the learned counsel who represented the plaintiff. I doubt whether the retrospective effect of the sanction could be anything more than to give the resolution of the Senate the same effect as it would have had if the Visitor's approval had been obtained beforehand, as required by S. 18, clause (5) of the Act. The position, therefore, is virtually this :—When the Syndicates of the defendant University published the list of candidates who had passed the Previous LL. B. examination held in July 1924, they did contravene an existing regulation requiring them to place those candidates who had passed the examination in three classes. The effect of the subsequent proceedings, as it seems to me, is that the regulatior has now been amended by proper authority, and as regards future examinations no such question can arise. The resolution of the Senate of the 18th of August 1924 and the sanction of His Excellency the Visitor, although they cannot, in my opinion, obliterate the fact that the Syndicate committed a breach of the exist

ing regulation when they tabulated and published the result of this examination, are not, however, wholly without effect even as regards this past transaction. Under S. 6 of Act XVI of 1915 the Visitor of the University is empowered to see that its proceedings are in conformity with the Act, the statutes and the regulations. It having been brought to the notice of His Excellency the Visitor that a particular regulation, now proposed to be amended, was sought to be applied to an examination already held and the results of which had already been tabulated and published, it would have been open to the Visitor to annul the published list of passed candidates, as not being in conformity with the regulation in force at the time, and to require the University to publish a fresh list classifying the passed candidates in strict conformity with the regulation. He has not seen fit to do this, but, on the contrary, by purporting to grant the application of the Senate to give retrospective effect to its resolution, he has condoned the breach of regulation of which the Syndicate has been guilty.

This being the state of affairs disclosed by the admitted facts of the case and the documentary evidence, I am now in a position to turn to the consideration of the questions of law involved in the first two issues settled by me. On behalf of the plaintiff reference was very properly made to the general provisions of S. 9 of the Code of Civil Procedure, on the basis of which it is contended that the present suit, being one of a Civil nature, is within the jurisdiction of the Court in which it was instituted, the cognizance of the said Court being nowhere barred by statute. It is not enough, however, to describe this suit as one of a civil nature. It is one for relief by way of declaration and injunction, and therefore subject to the provisions of the Specific Relief Act (I of 1877). The plaintiff must show that he has a valid cause of action within the provisions of that Act, before he can obtain an affirmative finding on issue No. 1. The relevant sections of the Act are 42, 54 and 55. It serves little purpose to refer to the provisions of S. 45 of the same Act, which, admittedly have no application to this Court, and *a fortiori* no application to the Court of the Subordinate Judge of Benares in which this suit was instituted. Before the plaintiff can obtain relief by way of declaration under the provisions of S. 42 of Act I of 1877, he must show that he is a person entitled to some legal character, and that this right of his is being denied, or contravened, by the defendant-University. Under Ss. 54 and 55 of the same Act it is necessary for a successful plaintiff to show that the defendant, against whom the suit is brought, is under some obligation in favour of the plaintiff, the breach of which can only be prevented by the granting of the injunction which the plaintiff seeks. The general question of law involved has been argued with much force and keenness by the learned counsel on both sides; and it is only in order to do justice to their learning and the zeal they have displayed in the cause of their respective clients that I feel it incumbent upon me to notice the various cases to which I have been referred. On the side of the plaintiff two cases were principally relied on. One is, *In the matter of G. A. Natesan* (1). The other is a case which came before the Privy Council from the Supreme Court of New South Wales—that of *Leslie Williams* v. *Haines Thomas Giddy* (2). The former of these cases is authority for the proposition that a High Court possessing authority to act under S. 45 of Act 1 of 1877 will make an order requiring a specific act to be done by the Syndicate of an Indian University, where it is clearly of opinion that the Syndicate is under a statutory obligation to perform that act, is refusing to do so without lawful cause, and the act is one the performance of which can readily be enforced under the order of the Court. The second case is only remotely applicable to the facts now before me, It shows that their Lordships of the Privy Council held themselves empowered to interfere with the discretion of a statutory body, called the Public Service Board, and to correct by way of *mandamus* or injunction an injustice apparently perpetrated by the said Board in the exercise of its statutory powers. Two other cases referred to on behalf of the plaintiff were cases in which Courts granted injunction against Municipal Corporations; vide, *Vali Ammal* v. *The Corporation of*

(1) [1917] 40 Mad. 125=38 I.C. 847=31 M.L.J. 634.

(2) [1911] 15 C.W.N. 669=21 M.L.J. 641=1 I.C. 509=10 M.L.T. 288 (P.C.)

Madras (3), and *Gur Baksh Singh* v, *Chutta Singh* (4). Their Lordships of the Madras High Court laid it down that the principle governing such cases is that "when a right and an infringement thereof is alleged, a cause of action is disclosed," On the side of the defendant reference was made to two cases decided in this country, namely, *In the matter of Purna Chunder Dutt* (5) and *In the matter of Probhas Chandra Roy* (6). In each of these cases the learned Judges were dealing with the proceedings of a Board of Examiners appointed by the High Court itself and acting on the powers delegated by the High Court, I do not find much assistance in either of these cases, except in certain remarks on the principles applicable to a writ of *mandamus* which their Lordships quote from a Privy Council case : *The Bank of Bombay* v. *Suleman Somji* (7). The words quoted are :—"One of the principles is that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise the right and none other, and that his claim has been refused." Sir Tej Bahadur Sapru, on behalf of the defendant, also called my attention to a number of English cases which I may refer to by their description in the various reports actually laid before me. There is the case of *Thomas* v. *The University of London* (8) ; the case of *Reg* v. *Hartford College* (9) ; the case of *Neate* v. *Denman* (10) ; the case of *Rex* v. *Burnard's Inn* (11) ; and the case of *The King* v. *The Benchers of Lincoln's Inn* (12). In connection with this last-mentioned case I am impressed with the energy with which the learned Judges repelled the suggestion that any person has an inchoate right to be admitted to one of the colleges of the University.

The case actually before me seems to me a fairly simple one, and perhaps a little in danger of being smothered under the weight of legal learning which has been brought to bear upon its elucidation. What the plaintiff wants essentially is a declaration that he has passed a certain examination and an injunction to the defendant-University to admit him to a certain class of post-graduate study, namely, the second-year class of students preparing for the LL. B. degree. When all is said and done, the effect of the proceedings of which the plaintiff complains is obvious enough. There is nothing in the action of the University capricious, or spiteful, or directed against the plaintiff personally. The responsible authorities of the defendant-University have arrived at the conclusion that young men preparing themselves for the degree of Bachelor of Laws, to be awarded by that University, who at the end of one year's study have failed to show to the satisfaction of the examiners a higher proficiency in the various subjects of their study than that attained by the present plaintiff—a proficiency, in fact, at least equal to the obtaining of 50 per cent. of the total marks in the aggregate of all the papers set for the examination—are not properly qualified to proceed to the advanced course of study devised for the benefit of the second-year class. The resolution has been taken in the interests of the young men themselves. It is the considered opinion of the University authorities that it will be for the benefit of students in the position of the present plaintiff to submit to another year of study in the first or preliminary law class, that is to say, in the class which is preparing for the Previous LL, B. examination, before they obtain promotion to the class which is preparing for the Final examination in Law. Now, the plaintiff wants first of all a declaration that he has passed the Previous LL. B. Examination. He says, referring to the provisions of S. 42 of Act No, 1 of 1877, that he has a "legal character," namely, that of a graduate student of the Benares Hindu University who has passed the Previous Examination for the degree of LL. B. held in the month of July 1924. The overwhelming answer to this contention is that the plaintiff does not possess the

---

(3) [1912] 38 Mad. 41=23 M.L.J. 531=12 M.L.T. 469=16 I.C. 971=(1912) M.W.N. 1162.
(4) [1918] 5 O.L.J. 471=47 I.C. 960.
(5) [1908] 35 Cal. 915=12 C.W.N. 873=4 M.L.T. 157.
(6) [1913] 40 Cal. 588=17 C.L.J. 354=18 I.C. 527=17 C.W.N. 1225.
(7) [1909] 33 Bom. 1=35 I.A. 130=10 Bom. L.R. 1065=12 C.W.N. 993=4 M.L.T. 201=18 M.L.J. 435=5 A.L.J. 661=8 C.L.J. 345=1 I.C. 369 (P.C.)
(8) 10 L.T. 403.
(9) 39 L.T. 18.
(10) L.R. E.S. 18.
(11) 5 A. & E. 17=2 H. & W. 62.
(12) 4 B & C.R. 855.

"legal character" claimed by him. He has not passed the examination. Stated at its very highest, the argument submitted to me on his behalf is that, if the constituted authorities of the defendant-University had taken a proper view of the regulations of the University and of the legal effect of the Syndicate's proceedings of the 16th of November, 1923, the Syndicate would have declared him to have passed the examination. The fact remains that the Syndicate, which was the body competent to determine such matters, declared that the plaintiff had failed to pass the examination. When a student enters any University as an undergraduate, and a *fortiori* when a graduate of such University presents himself for a course of post-graduate study, he is a member of the "Universitas" or Corporation, and as such he is subject to the authority and discipline of those persons who have been duly placed in authority in this corporation. If he considers himself to be oppressed by some misuse of authority on the part of a person, or body of persons, set over him, it is open to him to consider whether he cannot obtain redress from higher authorities within the same corporation. The question whether he has or has not passed a certain examination is one in respect of which, by the very act of presenting himself for such examination, he submits himself to the decision of the authorities appointed by the University for the conduct of the same. No Court of Law can possibly entertain a claim on his part that he has passed a certain examination when the authorities of the University conducting the examination, and lawfully empowered to adjudicate upon its results, declare him to have failed.

These considerations apply *a fortiori* to the further relief sought by way of injunction. As a student of the Benares Hindu University, and still more as a post-graduate student holding by virtue of his degree a certain status in the corporate body known as the University, and bound as such to set an example of discipline and good conduct to members of the University of lower status than himself, the plaintiff is not entitled to challenge the decision of those in authority over him that it is expedient for him, if he desires to proceed to the degree of Bachelor of Laws, to spend a second year in preparing for the Previous LL. B. Examination, before he passes on to any higher class. The University must have absolute discretion over its students in the matter of the classes to which the students are admitted. An injunction directing the authorities of the University, against their will and against their better judgment, to place a young man in a class where he will receive instruction by which he is not, in the opinion of those authorities, as yet properly qualified to benefit is to my mind simply unthinkable.

On the first of the issues set for trial my finding is that the plaintiff has no valid cause of action.

On the second issue I find that he is entitled to no relief by way of declaration or injunction; also that he has suffered no loss by being required to repeat the year of study in the first law class from which he had failed to derive adequate benefit.

The third issue does not arise.

The suit fails on these grounds, and I dismiss it accordingly with costs, including fees on the higher scale.

Suit dismissed.

✱ 1925 ALLAHBAD 261

MEARS, C. J. AND PIGGOT, J.

Rajrup Kunwar—Plaintiff—Appellant

v.

Gopi and others — Defendants—Respondents.

Letters Patent Appeal No. 24 of 1924, Decided on 9th January, 1925, from a judgment of Kanhaiya Lal, J.

✱ *T. P. Act, S. 51—Permanent lease by Hindu widow—Lessee trusting in widow's power—Eviction by Reversioner—No compensatian for improvements is due.*

Where a Hindu widow grants a permanent lease and the lessee makes improvements on the land although believing that she has a right to grant a permanent lease, he is not entitled to be compensated for the improvements when he is evicted by the reversioners, on the widow's death. [P 262 C 2]

Shiva Prasad Sinha for *Kailas Nath Katju*—for Appellant.

The Respondents were not represented.

Judgment.—This is an appeal from a decision of a single Judge of this Court, who made an order that possession of a certain property could be recovered by plaintiff, provided that the plaintiff made

a payment of a thousand rupees on account of improvements made by the defendants during the subsistence of a certain lease. The position was this. The lessees had taken what was described as permanent lease from Mt. Asmedh Kunwar. She was a Hindu widow, and the lessees may have believed that she, having acquired the property from her father, had a right to grant a permanent lease. The matter, when enquired into the lower Court, showed that, if investigation had been made by the lessees, they would have ascertained that the interest of Mt. Asmedh Kunwar, was a life interest only. On the death of Mt. Asmedh Kunwar, this suit was brought for possession by the plaintiff (reversioner). The question now arises whether the lessees are entitled to receive from the plaintiff the sum of Rs. 1,000 which has been put as a fair figure for the improvements. S. 51 of the Transfer of Property Act (No. IV of 1882) lays down the conditions under which improvements may be compensated for. The section is in these words :—

"When the transferee of immovable property makes any improvement of the property, believing in good faith that he is absolutely entitled thereto and he is subsequently evicted ....., the transferee has a right to require the person causing the eviction to have the value of the improvement estimated and paid..."

The important words which have to be considered in connection with this case are, "believing in good faith that he is absolutely entitled thereto." If we had to construe this section without the aid of any authorities, we should be inclined to say that the words "absolutely entitled thereto" meant a justified belief that he had the full proprietary right. In this case it is found that if the lesseess had required Mt. Asmedh Kunwar to make clear to them the title under which she was acting, it would have been evident at once to them that on the death of the lady, they were liable to be evicted. Indeed one may go further and say that even accepting the case as they themselves put it, they had no higher title than that of permanent lessees. In one or two decisions it has been stated in terms that S. 51 does not apply between landlord and tenant and that, if there is any limitation of interest the section does not apply. We might refer in passing to the case of *M. Narasayya* v. *Unde Rajaha Valugoti Sree Raja Gopala Krishna Yachendrulavaru Bahadur* (1). A case very like the present was decided by the Madras High Court in 1914 and is to be found in *Perumal Gramani* v. *Mohamad Kasim Sahib* (2). There in terms it was decided that the right to claim compensation does not extend to the person who is aware that he has got merely a permanent right of occupancy in the premises, but that the person must in good faith believe that he is absolutely entitled to the land in question. In that case there was a permanent lease of a religious trust property, and improvements having been effected and eviction having taken place, compensation was claimed. It was decided that that case did not come within S. 51 of the Transfer of property Act. In the case of *Hans Raj* v. *Mt Somni* (3), Mr. Justice Lindsay, and Mr. Justice Kanhaiya Lal, had to consider this very case of a transfer by a Hindu widow, and there they took what, in our opinion, was the right ground. The transfer having been made by a Hindu widow, those learned Judges decided that S. 51 of the Transfer of Property Act had no application, because in the case of a Hindu widow a person dealing with her would ordinarily know that she had only a life-interest, and that he ought also to be expected to make enquiries in, for instance, the case of a mortgage as to whether there was any legal necessity for the mortgage and any right in the widow to make the transfer. The same arguments, which satisfied that Bench, seem to us sufficient here, and we cannot, indeed, find any distinction to be drawn between this case of *Hans Raj* v. *Mt. Somni* (3), and the case under consideration by us. We think that, in the circumstances, this appeal must be allowed and the decree of the lower appellate Court restored with costs and fees in this Court on the higher scale.

Appeal allowed

---

(1) [1910] **37 Mad.** 1=7 I. C. 202=8 M. L. T. 258=1910 M. W. N. 369.
(2) [1914] 28 I. C. 840.
(3) 1922 All. 194=44 All. 665=20 A. L. J. 524

✱ 1925 ALLAHABAD 263

MEARS, C. J., AND PIGGOTT, J.

Mumtaz-Ud-Daula Mukarram Ali Khan of Pahasu—Petitioner.

v.

James R. R. Skinner—Opposite Party.

P. C. A. No. 24 of 1924, Decided on 1st December, 1924.

✱ *Civil P. C., S. 109—Final Order—Remand order directing lower Court to re-hear application under O. 22 R. 9 is not a final order.*

Where an application to set aside abatement of suit by excusing delay of two days in making it was rejected and in appeal from the order, the High Court accepted the appeal and directed the lower Court to re-hear the application.

Held: that the order of remand was not a final order. *Solomon* v. *Warner*, (1891) 1 Q. B. D., 734 Foll. [P. 264 C. 1]

Iqbal Ahmad and Gopi Nath Kanzru—for Applicant.

B. E. O'Coner—for Opposite Party.

Mears, C J.—This application which is for leave to appeal to His Majesty in Council comes before us under the following circumstances. The plaintiff commenced a suit against the Nawab of Pahasu. That gentleman died on the 26th of March, 1922. The plaintiff alleged that she had been away in the hills and had not in fact heard of the death of the defendant until June 21st. The legal practitioner representing the plaintiff took the view that the plaintiff had six months within which to bring the heirs upon the record. When three months and two days had expired, namely on the 28th of June, 1922, he made an application in the usual form asking for permission to implead the heirs. The Court on the 6th of November, 1922 rejected that application, holding that the period within which such an application should be made was three months, and declared the suit to have abated.

On the 9th of December, 1922 a further application was made asking that the order of abatement might, in the special circumstances, be set aside, having regard to the provisions of S. 5 of the Limitation Act. That application was rejected on the same day.

The plaintiff appealed to this Court against this order of December 9th and this Court allowed the appeal and directed the learned Subordinate Judge to rehear the application. From this order leave is sought to appeal to the Privy Council.

Two points are urged. First, that it is a final order; second, that the case is "otherwise a fit one for appeal to His Majesty in Council". It will be convenient to take the latter point first. The proposed suit is one for redemption and, whether the plaintiff be right or not in contending that she had six months within which to implead the heirs, there can be little doubt that, if there had been a prompt application based on S. 5 of the Limitation Act, counsel for the plaintiff need not greatly have concerned himself with the question whether the limitation was three or six months, but could have contended that, if he were wrong in his belief that it was six months, the two days' default ought to be condoned, in view of the Full Bench decision of this Court in *Shib Dayal* v. *Jagannath Prasad* (1). This very question, whether the time allowed was three months or six months, was considered with great care by the Punjab High Court in the case of *Gobin Dis* v. *Rup Kishore* (2), and that Court decided that, notwithstanding what appears *prima facie* to be an alteration in the time by S. 2 of Act 26 of 1920; in fact the legislature did not intend to make such alteration, and the period within which the heirs could be impleaded remained as hitherto at six months. Whatever importance this point may have had in the past, a decision by the Privy Council as to whether in this particular case now under consideration the time should be three or six months will have no general importance, nor will it be of value in the elucidation of future cases, because the matter is now conclusively set at rest by Act No. XI of 1923 which has prescribed the time as three months. We, therefore, hold that there is nothing in this application which would make it "otherwise a fit one for an appeal to His Majesty in Council".

We now come to the question whether the decision of this Court falls within the category of a final order. We are of opinion that it does not. There has been no adjudication on the merits. They have not yet been discussed. All that this Court has decided is that the Judge is to

(1) 1922 All. 490=44 All. 636=20 A. L. J. 674 (F. B.)

(2) 1924 Lah. 65=4 Lah. 367=6 L.L.J 25.

rehear the application for permission to implead the heirs. We are aware that an appeal lies to the Privy Council in cases where an order has been made, which, whilst leaving undecided subordinate or consequential matters, has decided an issue which goes to the root of the case and in effect practically disposes of it in favour of one or the other. In such cases, however, there has been a contest on the merits; each litigant has been heard and has submitted the crucial facts of his case for consideration and a decision has been obtained on the respective rights of the parties. Our attention has been called to cases of *Radha Kishen* v. *The Collector of Jaunpur* (3), and *Ram Chand Manjimal* v. *The Firm of Goverdhan Das Ratan Chand* (4), and we are of opinion that these decisions govern the present case and are in principle undistinguishable from it. In our opinion the order now sought to be appealed is an interlocutory and not a final order. See also *In re Riddell* (5) where an order dismissing an action for want of prosecution was held not to be a final one. The present order exactly satisfied the definition of an interlocutory order laid down by Lord Esher and Fry, L. J. and concurred in by Lopes, L. J., in *Solomon* v. *Warner* (6); and though this case was not followed by the Court of Appeal in *Boyson* v. *Altrinckam Urban District Council* (7), we do not consider the decision in that case is of any assistance to the present applicants. The order of this Court did not decide the rights of the parties. Their respective rights have yet to be determined if and when the plaintiff succeeds in impleading the heirs. For these reasons we reject the application with costs.

Application dismissed.

(3) [1900] 23 All. 220=28 I. A. 28=5 C. W. N. 153 (P. C.)
(4) [1920] 47 I. A. 124=24 C. W. N. 721=18 A. L. J. 591=22 Bom. L. R. 606=39 M.L.J. 27=12 L. W. 15=(1920) M. W. N. 407=56 I. C. 302=28 M.L.T. 87 (P. C.)
(5) [1888] 20 Q.B.D. 512=57 L. J. Q. B. 259=58 L. T. 838=5 Morrell 59=36 W. R. 532.
(6) [1891] 1 Q.B.D. 734.
(7) [1903] 1 K. B. 547=72 L. J. K. B. 271=51 W.R. 337=67 J. P. 397=19 T.L.R. 266.

1925 ALLAHABAD 264

SULAIMAN AND MUKERJI, JJ.

Fateh Lal—Auction-Purchaser—Applicant.

v.

Sher Singh—Judgment-debtor — Opposite-party.

Civil Rev. No. 40 of 1924, Decided on 30th July, 1924, from an order of the Dt. J., Aligarh, D/- 2nd November, 1923.

(a) *Civil P. C., O. 43, R. 1 (i)—No revision lies against an order by the Appellate Court.*

Where an appellate Court dismisses an appeal from an order of the lower Court setting aside an execution sale, the dismissal is not open to revision. [P 265 C 1]

(b) *Civil P.C., S. 2 (2)—"Decree" includes Revenue Court decree.*

A decree may include not only a Civil Court decree but also a Revenue Court decree. [P 265 C 2]

(c) *Civil P.C., O. 21, R. 53 (1)—Proceedings as if decree not covered by Rule are only irregular.*

A Court in proceeding to attach and execute a decree which is covered by the Rule, as if it were a decree other than that covered by O. 21, R. 53, sub-cl. (1) merely commits only an irregularity and the sale of such decree is not a nullity, [P 265 C 2]

(d) *Civil P.C., O. 21, R. 92—Decree amended after sale—Sale is not affected—Setting aside is revisable.*

If the property has been sold in execution of an incorrect decree the amendment of the decree does not make the sale liable to be set aside. So long as there is a valid decree standing the execution is perfectly valid and the subsequent event that decree was amended or even set aside would not necessarily nullify the sale. Setting aside the sale in such a case, as if no option were left to the Court, is liable to revision. [P 266 C 1]

(e) *Civil P. C., S. 115—Revision may be refused in the discretion of the Court.*

Under S. 115 of the Civil P.C., the High Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. [P 266 C 1]

M. A. Aziz—for Applicant.

Panna Lal—for Opposite party.

Sulaiman, J. — This civil revision arises out of certain execution proceedings, A suit was decreed and under the judgment there ought to have been an instalment decree passed against the defendant. Owing to some mistake of the office the decree which was prerared did not specifically mention that the money was payable in instalments. An application for execution of that decree was put in by the decree-holder within one year of the decree and accordingly no notice of it was issued

the judgment-debtor. Among the properties sought to be attached was a Revenue Court decree in favour of the judgment-debtor. It appears from the deposition of the judgment-debtor subsequently made and the record that notices were issued to the Revenue Court requesting it to abstain from executing the decree sought to be attached until such notice was cancelled, and a notice was also sent to the judgment-debtor prohibiting him from transferring or charging the same in any way. Apparently these notices were issued under Order 21, rule 53, sub-clause IV. The judgment-debtor took no steps in the matter and kept quiet. Ultimately the Revenue Court decree was put up at auction and sold and purchased by the applicant Fateh Lal for a much smaller sum.

It may be noted that by the time the Revenue Court decree was actually put up for sale one of the two instalments had actually fallen due and the amount so due was more than the amount for which the decree was actually sold. But till then the decree as it stood did not contain any direction as to the payment of the decretal amount in instalments. Subsequently the judgment-debtor put in an application before the Subordinate Judge for an amendment of the decree so as to bring it in accordance with the judgment. That decree was then rightly amended. After having amended the decree the learned Subordinate Judge at the instance of the judgment-debtor set aside the sale of the Revenue Court decree and the only ground mentioned by him was that inasmuch as the original decree had been amended the sale of the attached decree had become *ipso facto* nullified. From that order the auction-purchaser appealed to the District Judge. The District Judge dismissed the appeal.

Speaking personally for myself, I would hold that no revision lies from the order of the District Judge On an appeal preferred by the present applicant himself he had jurisdiction to go into the question whether the first court's order was right or wrong and after having considered the matter he has expressed his opinion one way. I cannot hold that in expressing this opinion and upholding the order of the Court below he has acted with any material irregularity or illegality in the exercise of his jurisdiction. His opinion may or may not be correct. That is after all merely an error of law.

At the same time if the learned Subordinate Judge had no jurisdiction to set aside the sale or if he acted with illegality or irregularity it would be open to this Court, to which no appeal lies, to revise his order.

The question we have to consider is whether the sale of the Revenue Court decree was merely irregular or whether it was illegal and without jurisdiction. Under the old Code, having regard to the definition of a decree given in that Code, it was held by this Court that a Revenue Court decree was not a decree within the meaning of the Code and that it was not governed by the first portion of S. 273, vide the case of *Aulia Bibi* v. *Abu Jafar* (1). It is possible that at the time when this decree was sought to be attached the Court was under the impression that it being a Revenue Court decree could be attached and sold. It cannot, however, be denied that under the definition of the decree as given in S 2 of the new Code, the word "Civil" has been omitted and therefore a decree may include not only a Civil Court decree but also a Revenue Court decree. It follows therefore that the proper way to attach such a decree would have been that provided for in Order 21 rule 53, sub-clause I. This does not appear to have been done. The attachment of the Revenue Court decree was therefore irregular. But the new Code consists of substantive provisions contained in the first XI Parts and then the Rules contained in three Schedules attached thereto. Under S. 60 of the Code the Court is given jurisdiction to attach and sell in execution of a money decree all properties moveable and immovable other than those exempted under it. Provisions contained in the rules comprised within the schedules are mere rules of procedure and they would not oust the jurisdiction of the Court. Non-compliance with any of the provisions contained in the rules would be an irregularity. This has always been held in cases where provisions with regard to the issues of sale proclamations &c. have not been complied with. The Court therefore in proceeding to attach and execute the decree as if it were a decree other than that covered by order XXI rule 53, Sub. I clause I, merely committed an irregularity. I have already pointed out that the judgment-debtor had full notice that

(1) [1899] 21 All. 405 = (1899) A.W.N. 157.

the Court was so proceeding. He did not intervene and take any objection. He allowed the execution to be carried out after the property had been sold. I am therefore unable to hold that the sale was a nullity and without jurisdiction, The utmost that can be said is that the sale had taken place with some irregularity.

The learned Subordinate Judge was of opinion that if property has been sold in execution of an incorrect decree then as soon as the decree is amended the sale must *ipso facto* be set aside even though a third party has purchased the property. In my opinion this view is erroneous. So long as at the time when the sale took place there was valid decree standing the execution was perfectly valid and the subsequent event that the decree was amended or even set aside would not necessarily nullify the sale. It must therefore be said that the learned Subordinate Judge has not acted legally in setting aside the sale. He has also acted with material irregularity in not directing his attention to the main question before him, but has simply set aside the sale as if no option was left to him.

It is however necessary to note that under S. 115 of the Civil Procedure Code this Court is not bound to intervene but may refuse to exercise its discretion if the circumstances require that such discretion should not be exercised. In the present case the Revenue Court decree was sold for a small value and purchased by a third party. Under S. 93, clause (i) of the Tenancy Act no application for the execution of a decree shall be made by an assignee of the decree unless the assignor's interest in the land to which it relates has become vested in such an assignee. It is not suggested that this auction-purchaser has in any way acquired an interest in the tenancy in respect of which the Revenue Court decree for arrears of rent was passed. It is apparent therefore that the Revenue Court would not entertain an application for execution at the instance of the auction-purchaser. Had the application been made by the attaching creditor before the Revenue Court decree had been sold the position would have been different. On the other hand the judgment-debtor has suffered considerable loss inasmuch as his Revenue Court decree has been sold for a much smaller amount. It also appears from the record that he has as a matter of fact paid off the entire sum due to the decree-holder and has also deposited the full amount with interest payable to the auction-purchaser in case the sale is to be set aside. Having regard to all these circumstances I am of opinion that we should not interfere in this case and the application in revision should be dismissed.

Mukherji, J.—I agree that the circumstances of the case are such as do not call for any exercise of our revisional powers.

By the Court—The application is accordingly dismissed but without any order as to costs.

Application dismissed.

1925 ALLAHABAD 266

SULAIMAN AND MUKERJI, JJ.

B. Dwarkadhish Prasad Singh—Plaintiff—Appellant.

v

Maharaja Keshava Prasad Singh—Defendant—Respondent.

Letters Patent Appeal No. 52 of 1925, Decided on 14th July 1924, from the judgment of Piggott, J.

(*a*) *Civil P. C., O. 23, R. 3—Compromise due to coercion—Decree passed—Remedy is by suit.*

Where a compromise decree is attacked on the ground that the compromise was brought about by undue influence, coercion and compulsion, the proper remedy is by way of a regular suit. [P 267 C 1]

(*b*) *Civil P. C., O. 23, R. 3—Compromise avoidable but not avoided—Decree can be passed.*

Compromise under through made undue influence coercion or compulsion is good so long as it has not been avoided. The Court has perfect jurisdiction to pass a decree on such compromise. [P 267 C 1]

Narain Prasad Asthana—for Appellant.

The Respondent was not represented.

Judgment.—This appeal arises under the following circumstances.

An original suit pending in the Court of the Subordinate Judge, Benares, was transferred to this Court to be tried originally. It was pending before Mr. Justice Piggott. An application was filed in the case purporting to be a compromise between the parties under which the suit was to be withdrawn under certain circumstances. Mr. Justice Piggott ordered that the plaintiff should appear in person and fixed a date for his appearance. On that date he did not appear but his counsel, Mr. Sul-

tan Ahmad,appeared and assured the learned judge that he had been personally instructed by his client to press the application. Acting on this assurance of the learned counsel and the affidavit before him, the learned Judge held that the suit had been properly adjusted and ordered it be decreed in the terms of the compromise. A decree was accordingly drawn up.

Subsequently the plaintiff applied to the learned Judge to set aside that compromise decree. The application did not state whether it was made under S. 151, C.P,C. or under Order 47 of the Code. No express allegations of fraud were contained in the affidavit filed in support of the application, but there were allegations of undue influence, coercion, criminal intimidation, wrongful confinement and compulsion.

The learned Judge came to the conlcusion that this was not a case which called for the exercise of any inherent powers which he possessed. He also held that the application did not directly come under Order 47, and that even if it could be said to fall under that Order he was not prepared to allow it as he was not prepared to believe the allegations made in the affidavit. He accordingly dismissed the application.

An appeal under the Letters Patent has been preferred from this order. Assuming that order was a judgment and that an appeal under the Letters patent lies from it, we are of opinion that it has no merits.

The allegations of the plaintiff merely amount to saying that the compromise filed in Court was a voidable document, having been executed under undue influence, coercion and compulsion, that is to say, at a time when he was not a free agent or a free consenting party. The document, therefore, on those allegations was a voidable document and was good so long as it had not been avoided, At the time when the compromise was filed before the learned Judge he was perfectly justified in passing a decree in terms of it.

If it is true that the undue influence, coercion or compulsion, have now been removed and the applicant wishes to avoid the compromise decree he is entitled to do so by a regular suit. The compromise decree stands on the same footing as the compromise itself and would be vitiated equally with the compromise. The proper remedy in a case of this kind is by a regular suit. We may refer to the case of *Shami Nath Chaudhri* v. *Ramjas Chaudhri* (1) where it was held that even if there was a remedy by way of motion or application for review of judgment, nevertheless it was open to the plaintiff to proceed by suit in the matter of attacking a compromise decree which was voidable. We accordingly dismiss the appeal summarily.

Appeal dismissed.

(1) [1912] 34 All. 143=13 I. C. 80=9 A.L. J. 1

✱ 1925 ALLAHABAD 267

SULAIMAN AND MUKERJI, JJ.

(*Firm*) *Ganeshi Lal Harnarain*—Applicant.

v.

Debi Das—Opposite Party.

Civil Rev. No. 52 of 1924, Decided on 29th July, 1924 from an order of the Dt. J., Agra, D/- 3rd January, 1924.

(a) *Civil P. C. O.*, 17, *R.* 2—*Wrong decision that O.* 9. *R.* 13 *did not apply—Revision lies.*

Where a Court in the case of an order under O. 17 R. 2 wrongly holds that no application under O. 9, R. 13 lies it amounts to refusal to exercise jurisdiction and Revision is competent. [P 268 C 2]

(b) *Civil P., C., S.* 115.

S. 115 would be inapplicable where appeal lies to the High Court. [P 268 C 2]

(c) *Civil P. C., O.* 9 *R.* 13—*Scope.*

No second appeal lies against an order refusing to set aside an *exparte* decree.

(d) *Civil P. C., O.* 17, *Rr.* 2 *and* 3—*Defendant absent at adjourned hearing—Order should be presumed to be under R.* 2 *in absence of mention otherwise.*

Where the defendant did not appear on the date to which the hearing of the case had been adjourned and judgment was pronounced on that day, *Held*: that in the absence of any express mention that the order passed was under O. 17, R. 3 it must be presumed that it was an order passed under O. 17 R. 2 and therefore in deciding the case the Court must be deemed to have proceeded under the provisions of O. 9 of the Code An application to have the decree set aside as being an *ex parte* one would lie. [P 269 C 1]

Per Mukerji, J.—*Held* in this particular case inasmuch as the lower Court had passed the judgment as on contest, it should be deemed to have acted under O. 17, R. 3.

(e) *Civil P. C., S.* 115—*Refusal of jurisdiction—Appellate Court concurring—Revision lies against orders of both Courts.*

Per Mukerji, J.—Where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge who comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. It would be different if the District Judge came to a different conclusion from that of the first Court. [P 222 C 1]

✱ (f) *Civil P. C., O. 43 R. 1 (d)—Order of appellate Court that no application lay under O. 9 R. 13—Order is not in appeal against order under O. 9, R. 13.*

An appeal would lie to the District Judge only when an application would properly lie to the Court of first instance under O. 9, R. 13. Where the District Judge says, in appeal, that no application lay under O. 9, R. 13, it can hardly be said that, he was entertaining an appeal against an order passed under O. 9, R. 13. [P. 270, C. 2.]

(g) *Civil P. C., O. 17 R. 2—Defendant taking time for producing evidence, but absent—Rule applies.*

Where a party absents himself, whether on the adjourned date or not and whether he had taken time to produce any particular evidence or not, the provisions of O. 17, R, 2 become applicable.

[P. 270, C. 2.]

S. B. Johari and Bishambhar Dayal—for Applicant.

S. K. Dar—for Opposite Party.

Sulaiman, J.—This is a defendant's application in revision from an order of the District Judge of Agra. It arises under the following circumstances:—

On the 7th of July 1923 a suit was brought in the Court of the Munsif of Agra for recovery of a certain sum of money. On the 24th of July 1923 a written statement was filed on behalf of the defendant and issues were framed. The 21st of September 1923 was fixed for final hearing in the case, but on an application made by the plaintiffs the date was subsequently altered to the 17th of August 1923. On that date the defendants were absent owing to an alleged illness and produced a medical certificate. The court was prepared to adjourn the case on payment of a certain amount of costs. Readiness was expressed on behalf of the defendants to pay the amount and the court then directed that it would proceed to hear the plaintiff's evidence and postpone the case for the defendants' evidence. Defendants' vakil objected to this procedure and ultimately intimated that he would apply for transfer of the case from that court. A week's time was granted, but no application was made for transfer. On the 27th of August 1923 the defendant firm, neither through any recognised agent, nor through any pleader, put in an appearance. The learned Munsif then proceeded to dispose of the suit. As the defendant had filed a written statement denying some of the allegations of the plaintiff, and issues had been framed on the pleas raised, the court was bound to consider the issues and decide them even if the proceedings were *ex parte*. The operative portion of the order passed by him was in these words:—

"Suit of the plaintiff for Rs. 547-15-3 is decreed with costs and usual future interest." It is important to note that the judgment did not expressly say whether the Munsif proceeded under Order 17 R. 2 or Order 17 R. 3.

The defendant firm did not prefer an appeal from this decree, but filed an application under Order 9 R. 13 treating this order to have been passed *ex parte* against them. By the time this application came up for disposal the Munsif had been transferred and his successor dismissed the application holding that the previous order had been passed under Order 17 R. 3 and therefore no application for setting it aside at all lay. The defendant firm not being satisfied with this last order preferred an appeal before the District Judge. The learned District Judge entertained the appeal and heard arguments in support of the appeal, but came to the conclusion that the previous order of the 27th of August 1923 was an order passed under Order 17 R. 3 and that therefore the order of the Munsif dismissing the application was quite correct. This is an application in revision from this last order of the District Judge.

The first point which arises before us is whether a revision at all lies from the order of the District Judge. In my opinion even if no revision lies from the order of the District Judge, it is open to us to entertain a revision from the order of the Munsif himself. So far as the order of the Munsif is concerned, I am clearly of opinion that he refused to exercise jurisdiction, provided of course it be assumed that the previous dismissal was under Order 17 rule 2 and an application to set aside the *ex-parte* decree was preferred before him. He refused to hear the application on the ground that no application lay under Order 9, rule 13. If he himself was wrong in his conclusion that no application lay it is clearly a case of a refusal to exercise jurisdiction.

The next question is whether it is open to this Court to interfere in revision and set aside the order of the Munsif when an appeal lay to the District Judge and was actually dismissed by him. Section 115 would be applicable only where no appeal lies thereto.' Clearly the word 'thereto' refers to the High Court. It is clear that either no appeal lay to the District Judge at all or if an appeal refusing to set aside

an *ex-parte* decree lay to him then no second appeal lies to this Court. I would therefore be prepared to set aside the order of the Munsif provided the contention of the applicant is correct that he has refused to exercise jurisdiction on the erroneous ground that the previous dismissal was under Order 17 rule 3.

This brings me to the real question involved in the case. I have already indicated that in the judgment pronounced by the Munsif on the 27th of August 1923 there was no express mention as to whether he was proceeding under Order 17 rule 2 or Order 17 rule 3. It also has to be admitted that on the day when the judgment was pronounced the defendant did not appear. It is also quite clear that that was a date to which the hearing of the case had been adjourned. In the absence of any express mention that the order passed by him was under Order 17 rule 3 it must be presumed that it was an order passed under Order 17 rule 2 and therefore in deciding the case he must be deemed to have proceeded under provisions of Order 9 of the Code. In this view of the matter an application to have the decree set aside as being an *ex-parte* one would lie.

At the Bar a larger question was raised that even if the lower court had purported to pass an order under Order 17 rule 3 it must be deemed that its order was only under rule 2 because this was a case where the defendant had failed to appear. It is contended that if the defendant fails to appear, then, no matter whether he also fails to produce his evidence or to cause the attendance of the witnesses or to perform any act necessary for the further progress of the suit for which time has been allowed, Order 17 rule 2 and not rule 3 would apply and that rule 3 can only apply to the case where the defendant does appear and yet fails to perform any of the things mentioned in that rule. I would prefer not to express any opinion on this last question. I would only say that in the ruling of *Ram Charan Lal* v. *Raghubir Singh* (1) to which I was a party there was no mention of Order 17 rule 3 in the judgment and the court had not expressly said that it was proceeding under rule 3. In the view which I have taken of the other points in the case which are quite sufficient to dispose of the application I would allow this application and revising the order of the Munsif dated the 19th of September 1921 direct that the application be restored to its original number and disposed of according to law.

Mukerji, J.—This is an application to this Court to revise the order of the two Courts below, *viz* : the order of the Munsif of Agra and the order of the District Judge of Agra dated respectively the 27th of August 1923 and the 3rd of January 1924. The application arises in the following circumstances :—

A suit was brought against the applicants who were the defendants in it. The defendants filed a written statement and a date was fixed for final hearing. On the application of the plaintiffs, another date, which was a little earlier than the date originally fixed, was fixed, *viz* ; 17th of August 1923. On that date, the defendants applied for an adjournment and they obtained one for a period of seven days. The learned Munsif definitely fixed that date for the disposal of the suit. On that date which was the 27th of August 1923, the defendants did not appear and the suit was decreed. It is a matter for consideration whether the Munsif purported to act under Order 17 rule 2 or Order 17 rule 3. I am decidedly of opinion that the learned Munsif did purport to act under Order, 17 rule 3. My reasons are these. The Munsif wrote out a judgment as he would write in the case of a contested suit. He wrote out all the issues that had been raised by the defendants. He took up the issues one by one and then passed an order decreeing the suit. He nowhere said that he was treating the defendants as absent and therefore was passing a decree *ex parte*. A few days later, an application was made to the learned Munsif to set aside the decree on the ground that it had been an *ex parte* one. The successor in office to the Munsif, who had decided the suit held, as I hold now, that, the decree purported to have been passed on contest, in the sense that it was passed under Order 17, rule 3 and that, therefore, no application under Order 9 rule 13 lay to him. Being dissatisfied with this order the defendants appealed to the District Judge. The learned District Judge affirmed the order of the Munsif, coming to the conclusion that no application under Order

(1) 1923 All. 551=45 All. 618=21 A. L. J. 495=5 L. R. A. Civ. 294.

9 rule 13 lay in the circumstances of the case. His language, which it will be necessary to quote, is as follows :—

" The rulings...mentioned by Mulla govern the case and show that the case comes under Order 17 rule 3. It is therefore not possible for the decree to be set aside under Order 9 rule 13".

In this Court two points have been urged against the granting of the application in revision. First it has been urged that no application in revision lay and secondly the Courts below were right inasmuch as the learned Munsif was right in making a decree under the provisions of Order 17 rule 3.

On the first point some argument was addressed as to whether any revision lay from the order of the learned District Judge. It has been urged that the learned District Judge was competent to entertain an appeal from an order passed under Order 9 rule 13 of the Code of Civil Procedure and he did entertain one and that therefore even if he decided wrongly, he decided so in the exercise of his jurisdiction and therefore no revision lay under S. 115 of the Civil Procedure Code. This is a subject on which a good deal has been said by different Judges in different High Courts. In this case, this is really a matter of pure academic interest. My reason for saying this is that the application in revision is directed against the order of both the learned Munsif and the learned District Judge. If the District Judge acted within his jurisdiction it must be conceded that the Munsif did not and it would be open to this Conrt to set aside the order of the Munsif, disregarding the order of the District Judge.

Personally speaking I am of opinion that where there is a refusal to exercise a jurisdiction which was undoubtedly possessed and there is an appeal to the District Judge and the District Judge comes to the same conclusion as the Court below, an application in revision would lie against the orders of both the Courts. It would be different if the District Judge came to a different conclusion from that of the first Court. An appeal would lie to the District Judge only when an application would properly lie to the Court of first instance under Order 9 rule 13. If we look to the language of Order 43, rule 1. clause (d) we shall find that an appeal is provided against " an order under Order 9 rule 13 rejecting an application for an order to set aside the decree passed *ex parte*". Where the District Judge says, in appeal, that no application lay under Order 9 rule 13, it can hardly be said that, he was entertaining an appeal against an order passed under Order 9 rule 13. In my opinion both the Munsif and the District Judge, in a case like this, refused to entertain jurisdiction and therefore, the orders of both the Courts are liable to revision by the High Court. As I have said, the point is not free from difficulty and various opinions have been given by various Judges. I may quote in support of my view some opinions expressed at different times To start with, comes the case of *Badami Kuar* v. *Dinu Rai* (2) which was a case decided by five learned Judges of this Court. In that case there had been an appeal to the District Judge who confirmed the order of the Munsif and this High Court had no hesitation in entertaining an application in revision. There is the case of *Vuppuluri Atchayya* v. *Sri Kanchumarti Venkata Seetharamachandra Rao* (3). Here, there was a dissentient voice in the person of the third Judge, and two Judges took the same view as I take. In the case of *Vishvanath Govind Deshmane* v. *Rambhat* (4) there was an appeal to the District Judge who confirmed the order of the Subordinate Judge and the High Court interfered. The order of the Court was : "We reverse the orders of the lower Courts and direct the Subordinate Judge..." Lastly I may mention that in a recent case decided by myself sitting with Dalal, J. in Civil Revision No. 155 of 1923, decided on the 21st of July 1924, this very question was decided by us and we held that an application did lie for the revision of both the orders of the Munsif and the District Judge. I hold therefore that both the orders are open to revision.

Coming to the second point, I am decidedly of opinion that where a party absents himself, whether on the adjourned date or not and whether he has taken time to produce any particular evidence or not, the provisions of Order 17, rule 2 become applicable. In the language of Lindsay, J. in the case of *Ram Charan Lal* v. *Raghubir Singh* (1) the words

(2) [1886] 8 All. 111=(1886) A.W.N. 28 (F.B.)
(3) [1916] 39 Mad. 195=13 M.L.T. 60=18 I.C. 555=24 M.L.J. 112.
(4) [1891] 15 Bom. 148.

"make such other order as it thinks fit" in rule 2 Order 17 do not entitle a Court in a case, where one of the parties is absent, to purport to decide the case as if it were a contested suit. In the revision case already mentioned Dalal, J. gave our considered opinion and I gave some additional reasons for our view. It is not necessary to report our views here. It would be sufficient to state that, a Court by purporting to decide a case before it as a contested case, where, as a matter of fact, the contest has ceased owing to the absence for the time being of a party, cannot deprive the absent party from showing to the Court that he had a very good reason for his absence. He may have the very best of reasons for his absence and an appeal would be no remedy for him, because the appellate Court would not be in a position to find out from the record what were the reasons of his absence. I agree, therefore, in the order proposed to be passed by my learned brother.

By the Court:—This application is allowed and the order of the Munsif dated the 29th of July 1923 is set aside and the application purporting to be under Order 9 rule 13 is restored to its original number to be disposed of according to law. Costs in all Courts will abide the event.

Application allowed.

1925 ALLAHABAD 271

MEARS, C. J. AND RYVES, J.

Ram Sunder Misra—Plaintiff—Appellant.

v.

Jai Karan Singh and others—Defendants—Respondents.

Letters Patent Appeal No. 66 of 1924, Decided on 23rd January, 1925 from a Judgment of Daniels, J.

Civil P. C., O. 23, R. 3.—Defendant's offer that suit may be decreed if certain person ate food out of plaintiff's hands—Offer acted upon—Suit must be decreed—O. 23, R. 3 does not apply.

Where the defendant in a suit offered that if a certain person ate food served by the plaintiff, the suit may be decreed and the offer was acted upon,

Held: the defendant cannot resile from his promise and the suit must be decreed. O. 23, R. 3 has nothing to do with such cases.

[P. 271, C. 2; P. 272, C. 1]

Uma Shankar Bajpai—for Appellant.

S. S. Sastry—for Respondents.

Judgment.—This is an appeal which raises a rather interesting point. One Badal owned a certain property and he left behind him a widow Mt. Tal ashi. her death disputes arose as to who was the heir of Badal, and two claimants came forward, one Ram Sunder and the other Bhawani Prasad. In mutation proceedings the Court declared in favour of Ram Sunder, and proceedings were taken with regard to the redemption of a mortgage, and there was an arbitration and an award which as between mortgagee and mortgagor fixed the price of the redemption of this mortgage at Rs. 250-8-0. Bhawani Prasad disregarded the mutation proceedings and the award by which the property could be redeemed on payment of Rs. 250-8-0 and sued for redemption. He included in that action Jai Karan Singh and Ram Sunder. He withdrew the action against Ram Sunder, and came to a compromise with Jai Karan Singh, which compromise was embodied in a decree and provided that he (Bhawani Prasad) might claim redemption. Thereupon Ram Sunder commenced a suit asking that the compromise decree above mentioned was not binding upon him, and he undoubtedly set himself up as having been the legal heir of Badal, and as the property had by virtue of the compromise decree passed into the hands of Bhawani Prasad, Ram Sunder sought possession of that property on payment of Rs. 250-8-0. In that action the principal, and indeed, from looking into the record, the only substantial issue was whether Ram Sunder was the legitimate son of Bhikha. He contended that he was. Bhawani Prasad said he was not, and that he was an illegitimate son. In support of his legitimacy Ram Sunder put one Dukharan Dube into the box. Dukharan Dube was obviously going to support Ram Sunder, and thereupon Bhawani Prasad made, with the permission of the Court, an offer to the plaintiff through his vakil, which offer was reduced to writing. Bhawani Prasad offered that if Dukharan Dube, a member of the biradri, would eat kachcha food cooked by Mt. Pargashi and served by Ram Sunder, "the plaintiff's suit may be decreed". That offer was accepted by the plaintiff, and the hearing of the suit temporarily suspended. Mt. Pargashi cooked food; it was served by Ram Sunder and eaten by Dukharan Dube, and on the acceptance of that offer and due performance of all

the conditions, the Munsif, in our opinion, with perfect propriety decreed the suit. Bhawani Prasad was a man who put forward that offer upon the advice of his vakil, and it was an offer which could have been accepted, and all conditions that he made were complied with, and he having made the offer expressed his willingness that the plaintiff's suit should be decreed if the conditions were complied with. It is surely open to a litigant, be he plaintiff or defendant, at any stage of the proceedings to make an offer to the other side to bring litigation to a close. That is all that Bhawani Prasad did. If the offer made by him had not been accepted, he would have relied on its refusal as a wrong ground for rejecting the evidence of Dukharan Dube and that was the advantage which he sought to gain. That was no doubt the purpose that he sought to get by making the offer. He cannot now be heard to say, every thing having been done by the offeree, the person to whom the offer was made, that the promise that he made that the suit should be decreed should not thereafter take effect. The learned single Judge of this Court looking at the matter said, "Apart from authority I should have been disposed to accept the view taken by the Courts below." But he felt himself overborne by a decision in which cases of this kind were supposed to have some relation to "adjustment of suits" within the meaning of Order 23 rule 3 of the Code of Civil Procedure. In our opinion this type of cases have nothing to do with adjustment of suits at all, but must be regarded in each case as an offer capable of acceptance or rejection by the person to whom it is made. If the offer is accepted in its terms and complied with accurately and fully, the promises made by the offeror must be carried out by him.

The result is that this appeal is allowed and the judgment of lower Court restored with costs.

Appeal allowed.

1925 ALLAHABAD 272

BOYS, J.

Nathji and another—Plaintiffs—Petitioners.

v.

Languria and another—Defendants—Opposite-parties.

Civil Rev. No. 92 of 1924, Decided on 28th July, 1924, against an order of the Munsif, Muttra, D/- 15th March, 1924.

Civil P. C., O. 23, R. 1 (2)—Withdrawal allowed but permission to bring fresh suit refused—Revision lies.

Where in the case of an application to withdraw a suit in terms of O. 23, R. 1 (2), the Court allows the suit to be withdrawn but refuses permission to bring a fresh suit the Court's order is liable to be set aside in revision.

N. P. Asthana—for Applicants.

Shambu Nath Chaube—for Opposite-parties.

Judgment.—The facts here are practically admitted and certainly they cannot be denied. The plaintiffs asked to be allowed to withdraw their suit in terms of Order 23 rule 1 (2) C. P. C. The learned Munsif refused to allow them to withdraw the suit with permission to bring a fresh suit and apparently was quite justified in that refusal. But then instead of merely refusing the plaintiff's request or giving them any further option in the matter the learned Munsif treated the application as if it were alternatively under rule 1 sub-section 1 and granting the application as if it had been an unconditional or unqualified application to withdraw, ordered that the suit be allowed to be withdrawn, coupled with refusal of permission to file a fresh suit. It is clear that there is no justification for this. If the learned Munsif saw no reason for allowing the withdrawal in terms of Order 23 rule 1 sub-Section 2, he should simply have refused the application and proceeded with the suit; or give the plaintiff an opportunity of accepting or refusing an unconditional withdrawal. I set aside the order of the Munsif dated the 15th of March 1924 and remand the case to his court with the direction that he should proceed to decide the case on the merits. Costs will abide the result.

Order Set aside.

1925 ALLAHABAD 273

BOYS, J.

The East Indian Railway Company—Defendant—Applicant.

v.

Fazal Elahi—Plaintiff—Opposite Party.

Civil Rev. No. 85 of 1924, Decided on 29th July 1924, against the order of the Judge, Sm. C. C. Allahabad, D/- 13th February 1924.

(a) *Provincial Small Cause Courts Act (IX of 1887) S. 25—Finding of fact is unassailable.*

The High Court will not interfere in revision with a finding of fact. Wilful negligence is a finding of fact. [P 273 C 2]

(b) *Railways Act, S. 77—"Non-delivery"—Notice is essential.*

It does not make any difference for the purpose of the notice to be given by a plaintiff suing a Railway company, whether the suit is based on non-delivery or loss of goods consigned. 1922 Patna 106 Dissented from. [P 274 C 1]

(c) *Provincial Small Cause Courts Act, S. 25—No Substantial injustice caused—No Revision lies.*

High Court will not interfere in revision unless there has been substantial injustice occasioned by the order or decree attached. [P274C2]

(d) *Railways Act, S. 72—Risk note B—"Running train"—Stop for a few minutes is immaterial.*

A stop for a few minutes at the signal does not mean that the train ceased to be a running train. [P 274 C 2]

(e) *Railways Act, S. 72—Risk note B—Guard not endeavouring to recover article known to have been removed—No wilful neglect by company.*

Semble: Where the guard knew that the article in question had been thrown out by thieves and neither he nor any body else took any step to endeavour to recover it and he confined his interest in the matter to making a report, *Held* it is not sufficient to brand the Railway with wilful neglect through its servants. [P 274 C 2]

Ladli Prasad Zutshi—for Applicant.

Mustaq Ahmad—for Opposite Party.

Judgment.—This is a Civil Revision from the decree of the Court of Small Causes. The plaintiff sued the Railway for damages on account of the "non-delivery' of one of four cases of matches. The Court of Small Causes found as a fact that "the box I think was thrown out by any thieves or thief who got into the wagon when the train stopped near the signal." He did not find whether or not this temporary stopping of the train in his opinion made it a case of theft from a running train. He went on further to hold that inasmuch as the guard saw the box thrown out of the train and made no attempt to recover it beyond reporting the loss at the next station, there was "wilful neglect on the part of the Railway and on this ground he held that the Railway were not protected by the owner's risk-note form B. The Railway further raised the defence that six months notice had not been given to the Agent of the Railway. But this defence was rejected, the Judge of the Small Causes Court relying on *East Indian Railway Company* v. *Kali Charan* (1) a case in which Mr. Justice Jwala Prasad of the Patna High Court held that there is a difference between a suit founded on "loss" and a suit founded on "non delivery," and that in the latter case, which is also the case here, no notice was necessary. The Railway have applied in revision to this Court urging firstly, that the lower Court, having found that the goods were stolen from a running train, it ought to have dismissed the suit; and, secondly, that the lower Court erred in holding that the railway through its servants ought to have made some effort to recover the box. I need not deal with these grounds (the first of which is in itself not an accurate statement of the lower Court's finding) as the finding of wilful neglect is a finding of fact. The next two grounds of revision deal with the question of notice. Notice to the Agent was admittedly despatched after the lapse of more than six months. The main question therefore, calling for decision here is whether the fact that the suit was based on "non delivery" takes the case out of S. 77 of the Railways Act which calls for notice to be given within six months. It is clear that what the plaintiff wants in this case and in all similar cases is compensation because he has not got his goods. He does not care whether the Railway have got his goods and are witholding them or whether they have lost his goods or whether they have been stolen or whether they have delivered them to somebody else. Regarded from this point of view there is certainly no material difference between a suit for "loss" and a suit for "non-delivery." It may be admitted at once that for some purposes there is a material distinction between a suit for "loss" and a suit for "non-delivery" *e. g.* for the purposes of the Limitation Act, Articles 30 and 31. The reason is sufficiently obvious but it is clear that while there may be a material distinction for the purposes of the Limita-

(1) 1922 Patna 106=3 P.L.T. 215=(1922) P.H.C.C. 145,

tion Act, and even for the purposes of the Carriers Act, Ss. 9 and 10 (S. 10 is actually repealed by the Railways Act) it does not follow by any means that there is any effective distinction for the purposes of Ss. 72 and 77 of the Railways Act and of the risk-note form B. Mr. Justice Jwala Pershad in the Patna case *East Indian Railway Company* v. *Kali Charan* (1) to which I have already referred, gave as one reason for holding that for the purposes of S. 77 there is a material distinction between "loss" and "non-delivery," that in the case of the former the Railway required notice in order to give them a chance of enquiring into the loss and how it occurred, while according to the learned Judge in the case of "non-delivery" notice for this reason would not be necessary to make any enquiry. I am unable to appreciate this distinction. It would seem that the Railway might require equally an opportunity for enquiring into the causes which had led them to fail to deliver. I should therefore find myself in any case unable to assent to the proposition that for the purposes of S. 77 there is any difference between a suit for "loss" and a suit for "non-delivery." So far as the ruling to which I have referred and on which the lower Court based its judgment is concerned I am relieved from the necessity of considering it in greater detail as it has been overruled as it would seem in *G.I. P. Railway Company* v. *Jitan Ram* (2). A reference to this latter case will show that the case quoted in the earlier portion of the judgment *The Agent, East Indian Railway Company* v. *Ajudhia Pershad* (3) must certainly be misquoted for *East Indian Railway Company* v. *Kali Charan* (1). I am therefore of opinion that the fact that the suit was for "non-delivery" did not absolve the plaintiff from giving notice to the Agent within six months.

I may mention here that the defendant Company has relied on *Ram Sahai Chhidda Lal* v *East Indian Railway Company* (4), *Cawnpore Cotton Mills Co.*, v. *Great Indian Peninsula Railway* (5) and *the East Indian Railway Company* v. *Sri Ram Mahadeo* (6). I only mention these cases because they have been pressed upon my attention but they appear to me to have no bearing on the distinction between "loss" and "non-delivery" for the purposes of S. 77.

The next question for consideration is whether I ought to set aside the decree or whether I should hold that substantial justice having been done this Court should not interfere merely on the ground that the notice was two or three days late. I am not, however satisfied that substantial justice has been done. I am *prima facie* in revision bound by a finding of fact even in a case under S. 25 of the Court of Small Causes and I have therefore accepted the lower Court's finding of fact that there was "wilful neglect" and I should not consider any opinion of my own to the contrary a justification for setting aside the decree on that ground ; but I hold that I am entitled to take into consideration the grounds of that finding in considering the question whether I should give the defendant Railway the full benefit of the fact that notice was not served in time even though it was only two or three days beyond time and even though no earlier notice would have enabled them to recover the property. It is clear that if this was a theft from a running train and no further wilful neglect was proved the Railway would be absolved by the risk-note. The learned Judge of the Court of Small Causes has not found whether or not the theft was from a running train. If he meant to hold that a stop for a few minutes at the signal meant that the train ceased to be a running train, I should find great difficulty in agreeing with him. He has however apparently based his decree on what he finds to be a wilful neglect and as far as I am able to ascertain the only basis of that finding is that the guard knew that the box had been thrown out and neither he nor anybody else took any step to endeavour to recover it and he confined his interest in the matter to making a report. I feel great doubt myself as to whether there were really any steps which the guard could have taken which would have led to the recovery of the box and this means that I have grave doubts as to whether the finding of wilful neglect was justified. To these doubts I am entitled to give weight when determing the question whether the Railway should be given the full benefit of their technical plea that they had been

(2) 1923 Patna 285=2 Pat. 442=1 Pat.L.R. 139=(1923) P.H.C.C. 2=4 P.L.T. 173.
(3) [1919] P.H.C.C. 150=49 I.C. 478.
(4) 1922 All. 280=44 All. 645=20 A.L.J. 664.
(5) 1923 All 301=45 All 353=21 A.L.J. 223=4 L.R A.Civ. 371.
(6) 1924 All. 177=46 All. 125=21 A.L.J. 893=4 L.R.A.Civ. 612.

given notice a few days beyond time. I hold therefore that they are entitled to the full benefit of that plea which I have decided in their favour. I accordingly allow the application in revision and set aside the decree of the Court of Small Causes with costs on the higher scale.

Application allowed.

1925 ALLAHABAD 275 (1)

DANIELS, J.

Moti Lal—Petitioner.

v.

Yar Muhammad—Opposite Party.

Civil Revision No. 115 of 1924, Decided on 6th August 1924, against the order of the Judge, Small Causes Court, Cawnpore, D/- 8th March 1924.

(a) *Evidence Act, S. 116—Lessee ejected by true owner—Rent suit by lessor—Plaintiff's title cannot be denied.*

Where a property is leased by a person without title to it and the lessee is ejected by the true owner, it is not open to the lessee in a suit by his lessor against him, to deny the plaintiff's title. [P 275 C 2]

(b) *T. P. Act, S. 108 (c)—Lessee ejected by stranger—Lessee is not bound to pay any rent to the lessor.*

Where the lessor has no title to the property and the lessee is ejected by the true owner, the lessee is not bound to pay any rent to the lessor. [P 275 C 2]

I. B. Banerjee—for Applicant.

The Opposite Party was not represented.

Daniels, J.—This is an application in revision against a decree of the Small Cause Court, Cawnpore, dismissing a suit for rent of a shop It appears that the ownership of the shop is in dispute between the plaintiff Moti Lal and one Kanhaiya Lal. The plaintiff gave a lease to the defendant, who entered into occupation of the shop. Shortly afterwards the defendant was ejected by Kanhaiya Lal. The learned Judge of the Small Cause Court has dismissed the suit holding (1) that the *prima facie* title to the shop is in Kanhaiya Lal, and (2) that the plaintiff failed to secure to the defendant possession over the property. By the second finding the learned Judge evidently means to find that there has been a breach of the covenant implied by S. 108 (a) (c) of the Transfer of Property Act, for he finds earlier in the judgment that the defendant was ejected after entering into occupation of the property.

As to the first of these findings, the applicant rightly objects that under S. 116 of the Evidence Act it was not open to the defendant to deny the plaintiff's title. It is not clear however, that the second finding is wrong. If the plaintiff, knowing that he had no title, gave the defendant a lease, but in consequence of his want of title either failed to secure possession to the defendant in the first instance, or, as in this case, failed to secure him undisturbed possession, he has, according to the view of at least two High Courts, failed to carry out the obligation imposed by S. 108, Transfer of Property Act: *vide Tayawa V. Gurshidappa* (1) and *Naorang Singh* v. *A. J. Meik* (2). The order complained of does complete justice between the parties and on full consideration I am not disposed to interfere with it. I therefore dismiss the application but without costs as the respondent is not represented.

Application dismissed.

(1) [1901 25 Bom. 269=2 Bom.L.R. 1070.
(2) 1923 Cal. 41=50 Cal. 68=36 C.L.J. 28=27 C.W.N. 71.

1925 ALLAHABAD 275 (2)

DANIELS, J.

Lachmi and another—Plaintiffs—Appellants.

v.

Ram Bahadur — Defendant—Respondent.

Civil Rev. No. 120 of 1924, Decided on 19th November, 1924, from an order of the Sub. J., Pilibhit.

Civil P. C. O., 3 R. 5 (d)—Rejection of application on ground of suit matter being res judicata is illegal and revisable.

To reject an application to sue as a pauper on the ground that the matter in suit between the parties was *res judicata* is illegal and apt to be revised. [P 276 C 1]

Uma Shankar Bajpai—for Appellants.

Saila Nath Mukerji—for Respondent.

Judgment.—It appears to me in this case that the learned Judge has misunderstood the meaning of the words in clause (d) of rule 5 of Order 33 of the Code of Civil Procedure, "where his allegations do not show a cause of action." He has

rejected the application to sue as a pauper not on the ground that the plaint does not disclose a cause of action, but on the ground that the defendant had a good defence to the suit, namely that the matter in suit between the parties was merely *res judicata*. It was not open to the learned Judge to dismiss the application on this ground and in doing so he has exercised a jurisdiction not vested in him by law or has at any rate acted with material irregularity in the exercise of his jurisdiction.

I accordingly allow this application, set aside the order of the court below and direct that court to enquire into the application on the merits. Costs will abide the result.

Application allowed.

1925 ALLAHABAD 276 (1)

DANIELS, J.

Banwari Lal—Plaintiff—Appellant.

v.

Municipal Board of Cawnpore—Defendant—Respondent.

Civil Rev. No. 127 of 1924, Decided on 24th November, 1924, from an order of Judge, Small Cause Court, Cawnpore.

U. P. Municipalities Act, S. 326 (3)—Suit by employee to recover arrears of pay—Claim rejected by employers—Demand reasserted—No fresh period begins.

In a suit for recovery of arrears of pay alleged to be due to the plaintiff, if once limitation has begun to run, the mere fact that the plaintiff made another attempt to get his employers to alter their decision would not stop it running nor would it give him a fresh period. [P 276 C 2]

Narain Prasad Asthana—for Applicant.

Shiva Prasad Sinha for Kailas Nath Katju—for Opposite Party.

Daniels, J.—This application arises out of a claim by the applicant who was at one time employed by the Municipal Board of Cawnpore for certain arrears of pay to which he says he was entitled. The suit has been dismissed by the Small Cause Court on the ground that it was beyond the period of six months limitation provided by S. 326 (3) of the U. P. Municipalities Act. It is not now contended that that section does not apply, and the section has been applied in a similar case in *Abdul Wahid* v. *The Municipal Board* (1). The contention pressed before me is that the cause of action really arose on 14th May, 1923 which was within limitation, the suit having been originally filed on 13th October, 1923 though it was returned for presentation and subsequently presented to the proper Court on a later date. The date when the plaintiffs' service ceased was 18th Nov, 1922 and this was given as his cause of action in the plaint as originally framed. On 23rd January, 1923 he actually gave to the Municipal Board the notice required by S. 326 (1) so that he himself treated his cause of action as complete on that date. On 31st January, 1923 the Chairman of the Municipal Board sent him officially a reply dealing with each of the items claimed by him and declining to entertain any of them. This is the date with reference to which the Court below finds that at any rate the plaintiff's cause of action was complete on that date. What appears to have happened subsequently was that the plaintiff sent some further letter to the Municipal Board reiterating his demands and they replied to him in a letter which is on the file, stating that the records had been consulted and it was found that everything that was due to him had been paid, and nothing further was due. It is impossible to treat this letter as giving a fresh cause of action. When once limitation had begun to run, the mere fact that the plaintiff made another attempt to get the Municipal Board to alter their decision would not have the effect of stopping it or giving it a fresh period. The revision fails and it is hereby dismissed with costs.

Application dismissed.

(1) 1933 All. 267=21 A. L. J. 161=4 L. R. All. (Civ.) 479.

1925 ALLAHABAD 276 (2)

WALSH, AG. C. J. AND DALAL, J.

(*Sheikh*) *Muhammad Habibullah*—Appellant.

v.

R. B. Seth Tikam Chand—Respondent.

First Appeal No. 134 of 1924, Decided on 30th July, 1924, from a decree of the Small Causes Court, Agra, D/-1st March, 1924.

(a) *Civil P. C., S. 24—"Suit" includes execution proceedings.*

The word 'suit" in S. 24 will include execution proceedings. A particular execution application can be transferred under the section.[P. 277, C. 1.]

(b) *Civil P. C., S. 38—Section is not exhaustive Particular execution application may be transferred under S. 24—Civil P. C. S. 24.*

S. 38 was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court A is transferred to Court B and Court B decided it, S. 38 enjoins that application for execution shall be presented to Court B and not to Court A, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24.

[P. 277, C. 2.]

A. P. Dube and *P. L. Banerjee*—for Appellant.

S. N. Sen and *N. P. Asthana*—for Respondent.

Judgment.—It is objected in this appeal that the Court of Small Causes at Agra had no jurisdiction to carry on execution proceedings on the application of the decree-holder in Execution case No. 76 of 1923. The decree was passed by the Additional Subordinate Judge, and the application for execution was filed by the decree-holder in that court. Subsequently on 30th November 1923, the District Judge of Agra transferred, for overwhelming reasons, this particular application for execution to the Court of the Small Cause Court Judge. It was argued here that the District Judge had no jurisdiction under S. 24 to do so. We are of opinion that the word "suit" in S. 24 will include execution proceedings. This was held by this Court so far back as 1876 under Act VIII of 1859, S. 6 [*Gaya Pershad* v. *Bhup Singh* (1).] It was pointed out that under S. 38 a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution, and that therefore, no other Court can execute a decree. The reason for the passing of S. 38 is different. It was enacted to decide the question as to the jurisdiction of a Court when a suit is transferred. If a suit instituted in Court A is transferred to Court B and Court B decides it, S. 38 enjoins that that application for execution shall be presented to Court B and not to Court A, that is, the application is to be presented to the Court which passed the decree and not to the Court in which the suit was instituted. The section is not exhaustive and a decree can be executed by the Court to which it is transferred under S. 24. The analogy of the provisions of S. 141 does not hold except in favour of the view that suits include execution proceedings. Under that section the procedure provided by the Code in regard to suits is made applicable to all proceedings in any Court of Civil jurisdiction. This means that the procedure for suit as well as the procedure for executing decrees shall apply to other proceedings both as to the trial of those proceedings and the carrying out of the orders passed in those proceedings.

Reference by the appellant's learned counsel to S. 39 of the Code of Civil Procedure indicated a confusion between two totally different matters. S. 39 covers cases of transfer of a decree and not of an application for execution. Once a decree is transferred under S. 39 the Court which passed the decree ceases to have jurisdiction till it receives a certificate under S. 41. Under Order 21 rule 10 an application for execution is to be presented to the Court to which the decree is transferred, when the decree is sent to another court for execution, and not to the Court which passed it. This is totally different from the transfer of one particular application for execution under S. 24 of the Code of Civil Procedure. For instance, in the present case, the Small Cause Court has jurisdiction to dispose of this particular execution matter but not to receive any fresh application for execution, which will lie in the Court of the Additional Subordinate Judge.

We hold that the lower Court had jurisdiction and dismiss this appeal with costs which shall include counsel's fees here on the higher scale.

Appeal dismissed.

---

(1) (1876) 1 All. 180 (F. B.)

1925 ALLAHABAD 277

WALSH AND SULAIMAN, JJ.

Harbans Singh and others—Applicant.

v.

Rajinder Kuar—Opposite Party.

Civil Rev. No. 160 of 1924, Decided on 26th November 1924, from an order of the Dt. J., Aligarh.

✱ *(a) Guardians and Wards Act [VIII of 1890]—Scope — Power to dispossess third persons—Dt. Judge has none.*

An order purporting to be passed under the Guardians and Wards Act cannot bind third parties who are in possession of the estate. Under the Guardians and wards Act a District Judge has no jurisdiction to dispossess third persons from the property of which they may be, rightly or wrongly, in possession, but can at best give directions to the guardian to take necessary steps to recover the property. [P 279 C 1]

(b) Trusts Act, S. 77 — Trustee dissatisfied with co-trustees' management—Trust cannot be cancelled.

A trust cannot be cancelled at the instance of one trustee applying for cancellation on the ground of his dissatisfaction with the management of other co-trustees.

Durga Charan Banerji and P. N. Sapru—for Appellants.

Peary Lal Banerji and Ram Nama Prasad—for Respondent.

Sulaiman, J.—This is an application in revision to get revised an order of the District Judge of Aligarh dated the 25th of July, 1924, rather difficult to define and say under what Act or section it was passed.

It is necessary to state briefly certain facts leading up to this application before disposing of it finally.

Kunwar Mahendrajit's grand-father, Rao Umrao Singh, died in the year 1898 leaving a considerable estate behind him and considerable debts. It is admitted that some years afterwards, his three sons representing the three branches became separate in estate, In order to arrange for the payment of the debts that were outstanding, the three brothers, on the 1st of August, 1912' executed a deed of trust under which three trustees were appointed to take charge of the management of the entire estate and to pay out of its income the debts that were standing against it. Provisions were made how in case of the death of any of the trustees his successor should be appointed. We may mention that in 1912 Mahendrajit Singh was a minor of tender years and he could not himself have been a party to the deed and there can be no doubt that his father Hari Raj Singh acted as the head of the family and entered into the deed of trust along with his brothers. In 1918 Hari Raj Singh unfortunately died. After his death his widow was appointed the guardian of the person and property of the minor by an order dated the 16th of February, 1920. The learned Judge who passed that order thought that it was desirable that the management should contiuue in the hands of the trustees so long as the Court of Wards did not take over the nanagement of the minor's share in the estate. Accordingly in appointing Rani Rajinder Kuar, the widow, as the guardian of her minor son, he made reservations that the management of the property should continue to vest in the trustees pending the decision of the question whether it could not be taken over by the Court of wards. Subsequently it seems to have been conceded by all the parties concerned that it was not possible for the Court of Wards to take over charge of the minor's share unless his interest be separated and his liability clearly defined. With a view to carry out his purpose the learned District Judge permitted the guardian to enter into a deed of partition with the other proprietors, under which the minor's share was separated and the exact amount of his liability allocated. This deed was executed after the sanction of the District Judge on the 9th of August, 1921 and was duly registered. In his order the learned Judge sanctioned the continuance of the property of the minor under the management of the existing trustees with the addition of the name of Rani Rajinder Kuar as a trustee. There were numerous subsequent orders or directions under which the trustees were directed that Rs. 500 a month should be paid to the widow as maintenance allowance to her and her minor son.

For some reasons which it is not necessary to consider here, Rani Rajender Kuar became dissatisfied with the management of the other trustees. Numerous applications, one after another, were filed in the Court complaining against the trustees and pointing out various grievances said to exist. The order in question is supposed to have been passed on one of the nine applications made by her.

Under the order before us the learned Judge after expressing the view that it was no longer in the interest of the minor that the trustees should continue to manage the minor's property when his mother was altogether excluded from the management, said that he thereby "cancelled the trust". He also directed that the Rani herself should manage the property of the minor and that as she was a pardanashin lady, she should employ two leading pleaders of the Court

to work as managers of the estate on a remuneration fixed.

So far as the order of the District Judge can be said to amount to directions given by him to the guardian under S. 32 of the Guardian and Wards Act, it is impossible to say that it was without jurisdiction. Whether that order was a proper one or not, was a matter for the District Judge to consider. It is even now open to him to reconsider those directions at any time if certain fresh circumstances are brought to his notice and he is satisfied that the purdanashin guardian cannot be a fit person to manage the estate. Those directions are also open to a further amendment in case the Court of Wards is actually prepared to take over the charge of the minor's estate. We, therefore, do not propose to say anything with regard to this order so far as it affects the guardian appointed by the Court.

The question that remains is: How far that order can bind the trustees?

It is clear that an order purporting to be passed under the Guardian and Wards Act cannot bind third parties who are in possession of the estate. It has been laid down in several cases that under the Guardian and Wards Act a District Judge has no jurisdiction to dispossess third persons from the property over which they may be, rightly or wrongly, in possession, but can at best give directions to the guardian to take necessary steps to recover the property.

The learned Advocate for the respondent has contended that inasmuch as the deed of partition had been sanctioned by the District Judge and as such sanction was absolutely necessary under S. 7 of the Indian Trust Act, it must be taken that the trustees came under the direct control and supervision of the District Judge and that he had absolute power of directing them to give up possession at any time when he was satisfied that they could not act in the interests of the minor. We are unable to accept this contention. It is true that the deed of partition was executed after the sanction of the District Judge had been obtained, but the sanction of the District Judge merely amounted to a permission to the guardian to enter into a deed of partition. Assuming for the sake of argument that this partition deed really created a new trust, even then the creation of the trust must be deemed to have been made by the guardian after the permission of the Judge. It cannot be said that it was the District Judge who appointed the trustees. The trustees not having been directly appointed by the Judge are not under his direct control and the learned Judge in a summary proceeding had no jurisdiction either to issue orders to the trustees to hand over the possession of the property or to terminate the trust. We are far from saying that the partition deed of 1921 created a new trust. On the other hand, in the proceedings it seems to have been assumed all along that the old trust which was created by the deceased father of the minor, who then admittedly was the head of the family, was still in existence. Even in his order dated the 9th of August, 1921 Mr. Sams referred to that trust as the existing trust. The deed of partition also does not anywhere suggest that the old trust had terminated and a new trust was being created. If, therefore, it be taken that the old trust had continued and all that had happended was that a new trustee was added then the learned District Judge would still more clearly have no jurisdiction to set that old trust aside. On the other hand, even if it be assumed that a new trust was created on behalf of the minor by the guardian in 1921, it cannot be cancelled or revoked unless the case falls within the provisions of Ss. 77 and 78 of the Indian Trust Act. S. 77 obviously cannot apply because the purpose, namely the payment of the debts for which it was created, has not been completely fulfilled, nor has it become unlawful, nor impossible. Sub-clauses (*a*) and (*b*) of S. 78 do not apply. The learned Advocate for the respondent has contended strenously that clause (*c*) of S. 78 does apply and he says that this is a case where the trust, being for the payment of the debts of the author of the trust and not having been communicated to the creditors, is liable to be revoked at the pleasure of the author of the trust. The first difficulty in his way was that there were three authors of the trust and only one of them can be said to be trying to revoke it. The learned Advocate, however, has tried to get over it by saying that this is really a composite document under which three distinct trusts were created and that therefore under the Trust Act this is merely a revocation of the trust by its sole author. But assum-

ing that that position can be taken, it is clear that clause (*c*) does not apply unless it would be a fact that the trust has not been communicated to the creditors. In the present case this of course is impossible to say. Although the creditors were no parties to the deed of partition or the deed of trust neverthless they have been receiving part of the debts all along from the trustees and there is no suggestion, either in the applications or anywhere on the record that the trust had not been brought to their notice. The learned District Judge has not passed this order on this ground, nor was this made a ground of attack in the applications filed on behalf of the Rani. It, therefore, seems to us that this cannot be said to be a case where the trust can be revoked by the District Judge in these proceedings.

On the other hand, it may be possible for the minor to say that he is not bound by the deed of trust which was created by his father as joint owner of the property. That would be a mixed question of law and fact which cannot be decided in these summary proceedings. It may also be open to the guardian of the minor to have this deed of trust set aside by a subsequent instrument or hrough Court. Or if there was in reality no trust at all but a mere appointment of managers, her course would be easier.

We accordingly do not in any way wish to suggest that it is not open to the guardian to have the deed set aside or revoked in the way open to her and allowed by law. All that we wish to say is that in these summary proceedings the learned Judge had no jurisdiction to pass an order setting aside the trust so as to bind the trustees for all time to come and compel them to hand over the property immediately. If really the trust can be revoked and has been validly revoked by the guardian, then the possession of the minor's estate by the trustees would be without right and they may be liable to pay mesne profits to the minor. But that is altogether a different question.

We are accordingly of opinion that the order of the learned District Judge cancelling the trust as against the present trustees was passed without jurisdiction and cannot be upheld.

We may, however, note that Mr. Durga Charan Banerji and Mr. Sapru on behalf of the trustees have given an undertaking that they have never objected to the payment of Rs. 500 a month to the Rani Saheba for her maintenance and the maintenance of her son so long as the management remains in their hands and they undertake to pay this sum to her regularly month by month.

In view of these undertakings we would set aside the order of the District Judge *so for as the trustees are concerned*, leaving the contents of that order as if they were mere directions to the guardian to take steps as directed. We would also like to add that the receipt of the monthly allowance of Rs. 500 by the lady from the trustees would in no way prejudice her right to get this trust revoked or cancelled in the way allowed by law.

In view of the fact that, except on the last date when the trusteee did not agree to the trust being put an end to at once, there seems to have been some acquiescence on their part in the procedure adopted by the learned Judge, we direct the parties to bear their own costs of these proceedings both here and in the Court below.

Order set aside.

1925 ALLAHABAD 280

MUKERJI, J,

East Indian Railway Company—Defendant—Appellant.

v.

Jit Mal Kallo Mal—Plaintiff—Respondent.

Civil Rev. No. 175 of 1924, Decided on 15th January, 1925, from an order of the Judge of Small Causes, Allahabad.

Civil P. C., S. 151—Def's. granted adjournment on condition of paying costs—Default in paying—Defence can be struck off—Civil P. C., O. 17 R. 1.

Where payment of costs is made a condition precedent of adjournment granted to the defendants, it is open to the Court to strike off the defence and proceed *ex parte*, when the costs are not paid as directed. [P 281, C 1]

Ladli Prasad Zutshi—for Appellant.

Damodar Das—for Respondent.

Judgment.—This revision arises under the following circumstances. The respondent sued the applicant, the E. I. Railway Company, for recovery of certain damages. 28th of February, 1924 was fixed for the hearing of the case. Then the

case was adjourned to the 7th May 1924. In adjourning the case the Court said :—

"Defendant wants time. Case postponed to 7th of May on payment of Re. 1 costs. If costs are not paid, defence will be struck off."

The case came up for hearing on the 7th of May and was again adjourned, the court passing the following order :—

"I cannot issue commission now. I give 15 days' time to produce the witnesses. Defendant to pay Rs. 2 as damages for postponement. If damages be not paid, no evidence of the defendant will be taken."

On the 27th of May, 1924 the costs of adjournment not having been paid, the plaintiff's vakil pressed upon the court the view that the defendant had made a default and his defence was liable to be struck off. The court, before acceding to this request, asked the defendant's vakil whether he was ready to pay the costs. His statement was taken down in the following language :—

"Defendant's vakil is present and is ready to proceed with the case. But he is unable to pay costs of adjournment."

After recording this statement the learned Judge was of opinion that the defendant had no right to go on with the defence and he, treating the case as an *ex parte* one, decreed the plaintiff's suit after hearing the evidence. In this court, it is contended that the learned Judge of the Court below could not lawfully dismiss the suit and that all that he could do was to make an order of payment of the costs as a part of the costs as a part of the decree.

The learned counsel for the applicant has based his argument on rule 3 order 17 of the Civil Procedure Code. His argument was that his client was ready to go on with the case and the court was bound to go on with the case in spite of the fact that its orders had not been obeyed. The learned counsel for the respondent relies on rule 4, order 15 of the Civil Procedure Code. It enables the court to proceed at once with the disposal of the case if it finds that one of the parties had not sufficient reason for not being ready to go on with the case.

In my opinion the whole question is one of enforcement of the order of the court and relates to the method of enforcement. The general rules of 1911 prepared by the High Court for the guidance of the courts below have the force of law and chapter 3, rule 26 lays down the procedure to be adopted by courts. It says :—

"In no case, when one of the parties is ready to proceed, should an adjournment be granted at the request of the opposite party, except on conditions that a sum commensurate with the costs which, in the opinion of the court, the party ready to proceed will have to incur, owing to the adjournment, be paid as *and when* directed by the court to the party ready to proceed, and be his costs in any event."

This rule really reproduces in a different language the provision contained in order 17, rule 1 of the Civil Procedure Code. There, it is said that the court may make such order as it thinks fit with respect to the costs occasioned by the adjournment. In this case, as already quoted, the order of the 28th of February, 1924 imposed the penalty of the defence being struck off in case the defendant failed to pay the costs of adjournment. This was an order clearly within the competence of the court. The term laid down was not at all oppressive or improper. If the defendant had on the 28th of February 1924 intimated to the court that he was not going to pay the costs of adjournment, the court would have been justified in proceeding with the hearing of the case at once. Similar remarks would apply to the order passed on the 7th of May, 1924. The Judge adjourned the case on condition of the payment of Rs. 2 as damages and said that in case the damages were not paid the defendant would not be entitled to adduce his evidence. This order, in my opinion, was a perfectly competent and proper order.

Now the question is whether the Judge was entitled to enforce his orders by refusing to take the defendants's evidence and by striking off the defence or whether he was bound to allow his orders to be disobeyed and all that he could do was to make the costs of adjournment a part of the costs in the cause. In the case of *Veerabhadrappa Chetty* v *Chinnamma* (1) the learned Judges were of opinion that unless payment of costs is made a condition precedeut to adjournment it is not open to the court to strike off the defence and proceed *ex parte*. I need not express my opinion as to the correctness or otherwise of this case. But the present case does certainly come within the purview of

(1) [1898] 21 Mad. 403=8 M. L. J. 189.

even this ruling, which takes a very lenient view. The orders of the learned Judge of the Small Cause Court were perfectly clear orders. They imposed certain penalties on the defendants and the learned Judge has simply enforced those penalties. I have already said that the orders passed were perfectly reasonable orders and were within the competence of the court both under the general rules and the provisions of the Civil procedure Code. Further, section 151 of the Civil Procedure Code would also justify the court in acting in the way in which it did act. To have allowed the defendant to flout the orders of the court would certainly have been an abuse of the process of the court and would certainly not have been consistent with the ends of justice. I am prepared, therefore to hold that no other rule applied. Section 151 would enable the court to exercise its inherent power by enforcing its reasonable orders. The petition in revision has no merits and must fail and it is hereby dismissed with costs.

Application rejected.

1925 ALLAHABAD 282(1)

RYVES, J.

Sunder Khatik—Defendant—Appellant.

v.

Mahadeo Pande — Plaintiff—Respondent.

Civil Rev. No. 178 of 1924, Decided on 22nd January, 1925, from an order of the Sub. J., Mirzapur.

(a) *Negotiable Instruments Act, (amended) (VIII of 1919) S. 13 Expln. 1 — Promissory note payable to specified person only, is negotiable instrument.*

Promissory note which makes the payment due to a specified person only is a negotiable instrument within the meaning of Expl. 1 to S. 13 as amended by Act VIII of 1919. 13 A. L. J. R. 683 Dist. [P. 282, C. 2]

(b) *Negotiable Instruments Act, (XXVI of 1881) S. 87—Promissory note—Stipulation to pay interest interpolated without executant's knowledge—Instrument becomes void.*

Where a promissory note being a negotiable instrument, did not originally contain any stipulation to pay interest but a stipulation to pay interest was subsequently interpolated without the knowledge or consent of the executant,

Held: that the alteration was a material alteration and that the instrument had become void. [P. 282, C. 2]

Sailanath Mukerji—for Applicant.

Hamid Hasan—for Opposite Party.

Judgment.—The plaintiff brought the suit out of which this application arises to recover Rs. 300 principal and Rs. 186 interest due on a promissory note executed by the defendant. It has been founded by both Courts and it is indeed apparent on the face of the document itself that originally there was no agreement to pay interest and that the agreement to pay interest at Rs. 2 per cent. per mensem was interpolated after the note was written. Both Courts have found that this was done without the knowledge or consent of the defendant. The Courts, however, have held that S. 87 of the Negotiable Instruments Act which renders a negotiable instrument absolutely void where a material alteration has been made in it does not apply, because this particular note "is not a negotiable instrument for it makes the payment due to a specified person only. This finding is opposed to the Negotiable Instruments Act, S. 13 as amended by Act VIII of 1919. This document is clearly a negotiable instrument within the meaning of Explanation I to S. 13 as amended by Act VIII of 1919. Reliance has been placed by the learned counsel for the opposite party on the case of *Makhdum Baksh* v. *Shaukat Ali* (1). That was a decision of 1915 before the Act was amended. It seems to me that as the law now stands the Court had no option but to dismiss the suit on its finding that the promissory note sued upon had been materially altered. I, therefore, allow this application, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

Application allowed.

(1) [1915] 13 A.L.J. 683 = 29 I.C. 1008.

1925 ALLAHABAD 282 (2)

BOYS, J.

Malik and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Rev. No. 243 of 1924, Decided on 30th July 1924, from an order of the S. J., Mainpuri, D/- 31st March 1924.

Criminal P. C., S. 340 — Opportunity for arguments in defence must be allowed.

Though literally speaking, the Code does not provide for the legal right of the pleader for the accused to submit arguments, the Court is bound to allow to the accused a proper opportunity to be heard in argument. [P. 283, C. 1]

J. M. Banerjee—for Applicants.

The Asstt. Government Advocate — for Opposite Party.

Judgment.—This is another case arising out of the same rioting which was the subject of Cri. Rev. No. 247 of 1924 [1925 All. 285] which I have just dealt with and which was tried by the same Magistrate. The objection taken in revision here and it was also made a ground of objection before the learned Sessions Judge is again an objection to the procedure of the Magistrate and again the facts are evidenced that the Deputy Magistrate is guided too much by the letter of the law than by the spirit and proper practice of it. In this case it has been stated on affidavit that before he passed orders in the case the Magistrate was requested to give time so that a vakil might be called from the Civil Courts to submit arguments. The Deputy Magistrate does not say that this statement is false but merely says that he has no recollection of having said so and that he finds no corroboration from the record. I have the statement of fact made to me in an affidavit which is moreover endorsed on the back of it by the vakil who appeared. I therefore take it as true. In paragraph No. 7 of the affidavit it is sworn "that the Magistrate said that the pleaders for the accused had no legal right to submit arguments and that he did not want to hear arguments". The Deputy Magistrate does not say that this statement of fact is false but his reply goes all round it by saying that the allegation is perfectly groundless and goes on to support this by saying that there was no reason for him to refuse. In view of the way the Deputy Magistrate dealt with the case (Criminal Revision No. 247 of 1924) in which I have just passed orders it seems to me that a similar view would very probably be taken by him that the accused had no right to be heard in argument. Literally, again, the Code does not provide for such a right of the accused. But there cannot be the slightest question that it is the invariable practice of all Magistrates' Courts to hear the accused at the end of the case and the Magistrate ought indubitably to hold himself bound by such practice. In an analogous case there is no right of reply given to the accused or his counsel in an appeal in the Sessions Court, but it has been held by this Court in *Radha Rwan* v. *Emperor* (1) that it is the invariable practice in the High Court and by implication that practice should be conformed to in the Sessions Court. It appearing that in this case the accused were not allowed a proper opportunity of being heard in argument I set aside the convictions and sentences and the proceedings from the stage immediately before judgment and direct that an opportunity be given to the pleader for the accused to argue the case for his clients. I am informed that the Magistrate has been transferred. In any case, the arguments will be heard and the case decided by some other Magistrate as the District Magistrate may think fit.

Revision accepted.

(1) Cr. Rev. No. 699 of 1909.

1925 ALLAHABAD 283

MUKERJI, J.

(*Sheikh*) *Muhammad Akbar*—Applicant.

v.

Emperor—Opposite Party.

Criminal Civ. No. 213 of 1923, Decided on 21st October, 1924.

(a) Criminal P. C., S. 528 — Case transferred by Dt. Magistrate — Fresh transfer cannot be ordered by Sub-Divisional Magistrate.

S. 528 cannot be so read as to imply that after a District Magistrate has transferred some cases from one file to the file of another Magistrate, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file. [P. 284, C. 1]

(b) Criminal P. C., Ss. 526 to 528—Strong language used by Magistrate—Apprehension of unfairness may be justified—Criminal trial.

Use of strong language by Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions, but as soon as he expresses himself strongly, he gives himself away and if he raises, by his language, an apprehension in the mind of a party that the Officer is prejudiced the officer has only himself to thank. Besides a calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal.

[P. 284, C. 2]

Saila Nath Mukerji—for Applicant.

Lalit Mohan Banerji—for the Crown.

Nirmideshwar Prasad Upadhiya—for Opposite Party.

Mukerji, J.—This is an application for transfer of two cross cases now, *de facto*, pending before Mr. Janki Nath Sahai, a Magistrate of Azamgarh, exercising the powers of a Sub-Divisional Magistrate.

It appears that one Deepu filed a complaint against one Akbar. The case was sent to the Court of an Honorary Magistrate, Rai Sahib Babu Din Dayal Sahu.

Akbar filed a cross complaint, which was also pending before the said Honorary Magistrate. Akbar induced the Officer to send the cases back to the Sub-Divisional Magistrate, evidently because Akbar did not want that Sahu Din Dayal should hear the cases. The learned Sub-Divisional Magistrate returned the cases. Akbar then applied to the District Magistrate for transfer. The learned District Magistrate transferred both the cases from the file of Sahu Din Dayal to the file of the Tahsildar Magistrate. Then, it appears, that Deepu put in an application before the Sub-Divisional Magistrate asking him for transferring the cases from the Court of the Tahsildar Magistrate. Babu Janki Nath Sahai passed an order dated the 27th of August, 1924 and thereby purported to have the cases transferred from the file of the Tahsildar Magistrate to his own file.

In the transfer application two points are made. One is that the Sub Divisional Magistrate had no jurisdiction to practically set aside the order of the District Magistrate transferring the cases to the Court of the Tahsildar Magistrate. The second point is that having regard to the temper expressed in his order dated the 27th of August, 1924, the applicant Akbar feels that he would not have impartial justice at the hands of the learned Sub-Divisional Magistrate.

On the first point, it is pointed out by Deepu's counsel and also by the learned Sub-Divisional Magistrate that the learned District Magistrate has, so to say, condoned the order of transfer passed over his head by the Sub-Divisional Magistrate. There can be no doubt that under S 528 of the Criminal Procedure Code a Sub-Divisional Magistrate has the power to withdraw any case pending before a Subordinate Magistrate. This would give jurisdiction to Babu Janki Nath Sahai to withdraw the cases pending before the Tahsildar Magistrate. But, in my opinion the section cannot be so read as to imply that after a District Magistrate has transferred certain cases from one file to the file of another Magistrate, a Sub-Divisional Magistrate, who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the cases to his own file. There is a clash of jurisdiction and authority in a case like this and it must be ruled and I do rule that the Sub-Divisional Magistrate's order dated the 27th of August, 1924 was *ultra-vires*. The cases must, therefore, be still, in law, taken as pending before the Tahsildar Magistrate.

It has been urged that the District Magistrate's order which I will quote presently, may be taken as withdrawing, by his own authority, the cases from the Court of the Tahsildar Magistrate and transferring them to the Court of Babu Janki Nath Sahai. The language is this :

"Seen. The cases will be disposed of by the Sub Divisional Officer. He has every right to take them on his file."

I am not satisfied that the learned District Magistrate was really, by the use of the language mentioned, transferring the cases from the Court of the Tahsildar Magistrate to the Court of the Sub-Divisional Officer. He does not assign any reason which would be necessary for him to record under clause (5) of S. 528 of the Criminal Procedure Code. The statement that the Sub Divisional Officer has every right to take the cases on his file goes to show that the learned District Magistrate was merely *approving* of the action taken by the Sub-Divisional Officer.

I, accordingly, set aside the order of the learned Sub-Divisional Officer passed on the 27th of August, 1924 as also the order of the learned District Magistrate dated the 9th of September, 1924, lest the latter should create any further complication in the case.

In the view of the law I take, it is not necessary to discuss the second point. I will, however, point out to the learned Sub-Divisional officer that use of strong language by a Court is never calculated to satisfy the litigant public before it. An Officer is sometimes bound to feel strongly on particular occasions, but as soon as he expresses himself strongly, he gives himself away and if he raises, by his language, an apprehension in the mind of a party that the Officer is prejudiced, the Officer has only himself to thank. Besides a calm state of mind is absolutely essential for the disposal of all cases whether civil or criminal.

On the ground already stated, I order that the cross cases now on the file (but without jurisdiction) of Babu Janki Nath Sahai be transferred to the Court of some stipendiary Magistrate other than Babu Janki Nath Sahai, at the head-quarters at Azamgarh, as the learned District Magistrate may choose.

Case transferred.

1925 ALLAHABAD 285

BOYS, J.

Pita and others—Applicants.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 247 of 1924, Decided on 30th July 1924, from an order of the S. J., Mainpuri.

(a) *Criminal P. C., S. 340—Reasonable opportunity to engage pleader must be allowed—Opportunity to accused's pleader to cross-examine must be allowed.*

When after the commencement of the trial an application is made for an opportunity to engage a pleader the reasonable course to adopt would be for the Magistrate to proceed with the evidence for the prosecution-in-chief and then, to allow, if it had not already been allowed, a reasonable time for the accused to appoint a pleader. The accused's pleader ought to be given a reasonable opportunity to cross-examine the Prosecution witnesses. The fact that the accused who have been refused an opportunity to engage a pleader were asked if they wished to cross examine and that they answered that they did not wish to do so is only a literal compliance with the law and a breach of its spirit

[P 287 C 2, P 288 C 1]

(b) *Criminal P. C., S. 540—Both sides can freely cross-examine—Questions suggested by defence and put by Court are not cross examination.*

If a witness is called under S. 540 both sides have a right to cross-examine that witness freely. It is wholly misleading to describe as a cross-examination that which consists of certain questions being suggested by the defence to the Court and those questions being put by the Court.

[P 286 C 1]

J. M. Banerji—for Applicants.

The Asstt. Government Advocate—for Opposite Party.

Judgment, J.—In this case certain persons have been prosecuted and convicted of assaulting the police and rescuing certain persons whom the police had arrested on the 28th of October, 1923. On that occasion the police were driven off after they had used their fire arms killing two men and injuring others. Later a number of villagers were arrested and were placed before a Magistrate on the 3rd of November, 1923. It is a matter of complaint in this Court in revision that these accused persons were never given a reasonable opportunity of defending themselves. On the date on which they were produced in Court, the 3rd of November, 1923, the Magistrate at 3-30 p. m. ordered that the case should be heard the next day in the Jail. It appears from the record that practically the first step in the proceedings in the jail on the 4th which was a Sunday was the presentation of an application by some friend of the accused asking for an opportunity to engage a pleader and that the evidence might be taken in that pleader's presence. In view of S. 340 there can be no doubt that the accused were entitled to be represented by a pleader. But this is not the most serious error complained of by the applicants here in revision. The reasonable course to adopt if that had been the only application, would have been for the Magistrate to proceed with the evidence for the prosecution-in-chief and then, at any rate, to allow, if it had not already been allowed, a reasonable time for the accused to appoint a pleader. This application was, however, bluntly refused on the allegation that the accused had plenty of time to appoint pleaders since the previous day and that he would have to sent the prosecution witnesses away again. Neither of these reasons appear to me a valid reason. What he should have done is to tell the accused thathe would proceed with the evidence in chief of the prosecution witnesses and would then allow them a reasonable time to appoint a pleader. The next step was that he examined six of the prosecution witnesses and took down the accused's statements, framed a charge sheet and said that he would take the remaining prosecution witnesses the next day. At the end, after the statements of the accused, he asked them whether they wished to cross-examine. Having had their application for time to appoint a pleader rejected, these ignorant villagers very naturally said, "no they do not wish to cross-examine." No one who has had 12 months' experience of the lower Courts and of this type of villager would for one moment expect that they would give any other answer. They would be utterly incapable of themselves cross-examining the witnesses. On the 5th of November further prosecution witnesses were examined and the accused were further examined and they stated that they, would produce defence witnesses. By this time they had succeeded in engaging the services of a pleader who put in an application asking for another date to be fixed for cross-examination. There was nobody there who could properly instruct him on behalf of the accused. The pairo-

kar and relatives of the accused lived in Agra and the pleader had no time to get his instructions through the relatives who had come from Agra to Mainpuri. The Deputy Magistrate refused this application on the ground that the pleader could get his instructions from the accused themselves. In a later application which was filed on the 6th, it is stated that the pleader also made an oral application to be allowed to cross-examine the accused on the 5th, presumably when the application for postponement had been rejected, and that this application was refused on the ground that he had no right left. On the 6th a further application in which all the previous proceedings were set out at length was filed asking for the prosecution witnesses to be resummoned. On this application the pleader was told that the case was not fixed for the 6th and if the accused wanted the prosecution witnesses he could summon them as defence witnesses paying the necessary expenses. Subsequently on the 13th of December it appears that the Deputy Magistrate summoned three of the prosecution witnesses, not four as he says under S. 540, Criminal Procedure Code. In an explanation which has been furnished by the learned Deputy Magistrate to this Court he says that, as the defence had left no legal right of cross-examination at that stage, he re-called the witnesses under S. 540 of the Criminal Procedure Code at the desire of the counsel for the defence, and questions of the nature of cross-examination suggested by the defence counsel were put to the witness "from the chair". There is nothing whatever to justify this procedure. If a witness was called under S. 540 both sides had a right to cross-examine that witness freely. It is wholly misleading to describe as cross examination that which consisted of certain questions being suggested by the defence to the Court and those questions being put by the Court. I have detailed these proceedings at length because I have no hesitation in holding that the accused were not fairly treated. This was an important case and a serious case for the Crown. It was no less serious for the accused. It is obviously in accordance with the spirit of the law that they should be represented by a pleader if they wished to be so represented. It is obviously in accordance with the spirit of the law that they should have an opportunity of cross-examining the witnesses. The prosecution and the Deputy Magistrate cannot fall back on the fact that on the 4th of November when the accused were examined they were asked if they wished to cross-examine. Even putting aside the fact that their right of being represented by a pleader as laid down in S. 340 had been refused, I should still hold that this was merely a literal compliance with the law and a most obvious breach of it in the spirit, and I would invite the attention of the Deputy Magistrate to the remarks of Mr. Justice Aikman in *Empress* v. *Ram Charan*, (1) and particularly to the remarks of Ameer Ali and Pratt, JJ. in *Sheo Prakash* v. *Rawlins*, (2) where they said "The work of this Court would be appreciably lightened, if the Subordinate Magistrates, in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guilty the moment he is accused and every attempt on his part to prove his innocence is regarded as vexatious." I have no hesitation whatever in holding that while the Magistrate could have been right in proceeding up to the end of the prosecution witnesses, from that stage he should have allowed an adjournment in order to enable the accused to appoint a pleader if there had not already been a sufficiently long period, and that adjournment should have been long enough to enable the pleader to get proper instructions and to prepare himself for cross-examination. What is a proper period must be a question for reasonable decision in each case. In this case the whole proceedings of the 4th and the 5th were most unwarrantably rushed and the accused were really given no proper opportunity of defending themselves.

I set aside the whole of the proceedings subsequent to the termination of the evidence of the last prosecution witness on the 5th of November and direct that the Magistrate proceed to hear the case properly and fully from that stage. To this extent the application is allowed. I am informed that the Magistrate in

(1) [1895] A.W.N. 40.
(2) [1901] 28 Cal. 594.

question has been transferred. If this is not so, the District Magistrate will see that the case is taken up again, not by the same Magistrate but by some other Magistrate.

Appeal accepted.

1925 ALLAHABAD 287

WALSH AND RYVES, JJ.

Chunni Lal Kalyan Das—In the matter of.

Mis. Case No. 268 of 1924, Decided on 18th December, 1924.

✱ *Income-Tax Act*, (11 *of* 1922) *S.* 4—*Profits arising from wagering business-Tax can be levied.*

The profits or losses arising from wagering contracts are to be taken into account in an assessment for income-tax purposes. [P. 287 C. 1]

Tej Bahadur Sapru and *Gopi Nath Kunjru*—for Applicant.

Lalit Mohan Banerjee—for the Crown.

Walsh, J.—We have no hesitation in answering the question submitted to us in this case by the Commissioner of Income-Tax in the statement of the case dated the 23rd of May, 1924, "are the profits or losses arising from wagering contracts to be taken into account in an assessment for income-tax purposes", in the affirmative. There is no ground for saying that the profits arising from an illegal business are not taxable. There is not a word in the Act to suggest anything of the kind, and it is a fallacy to say because the taxing authority levies from a person who is carrying on a profitable business, but an improper and illegal business or profession, that therefore the authorities are countenancing such a profession. They are doing nothing of the kind. Their permission is not required and is not given, and cannot be withheld to a person who chooses to carry on an illegal business, but the tax upon the profit arising therefrom has to be paid in common with the tax paid by every honest trader. S. 6 (4) provides the head of income chargeable in respect of business. The mere fact that the business is speculative, or even gaming and wagering within the meaning of that expression, does not make it any the less business. For example, supposing the question was one of profit made by a book-maker, as to whose business there can be no doubt whatever that it is entirely gaming and wagering. S. 11 provides that the tax shall be payable under the head of professional earnings in respect of the profits of any vocation followed by the assessee. In the year 1886 the English Courts decided and the decision has never been called in question, that a book-maker attending a race course was carrying on a vocation; *Partridge* v. *Mallan-daine* (1). Where both the words "business" and "vocation" are used, it may be appropriate to describe a book-maker's business as a vocation, but the greater includes the less, and it is clearly included in the word "business" in our opinion. The same view seems to have been taken in the text-books on the subject with regard to the vocation of a singer or prostitute, and the Calcutta High Court in the case of *Brindra Kishore Manikya* v. *Secretary of State for India* (2), held that illegal cesses were assessable to income-tax. No doubt a burden is placed on the Income-Tax Commissioner to discover how far losses returned by assessees may be genuine, or to what extent an assessee may have attempted to conceal gain, but that is what the Commissioner is there for. Although it is not strictly relevant, we may point out that any other view would result in an enormous burden being placed upon the Income-Tax authorities, namely of deciding in every single transaction, which appeared in the books of any assessee in their jurisdiction to be of a speculative nature, whether it was a gaming transaction within the meaning of the Contract Act, and, therefore, against public policy. That question is an extremely difficult question to decide in many cases. A large number of merchants and other people carry on extensive business of a speculative nature, which is not hit by the section in the Contract Act with regard to gaming because although the transaction may result in differences, the legal effect of the contract may be to entitle the party to actual delivery. It is nonetheless speculative in character, and anybody concerned with the daily business of the Courts knows how difficult it is sometimes to ascertain whether a speculative transaction is really a gaming one or not. All such transactions in our opinion, are business, and the profits

---

(1) 56 L. J. Q. B. 251=18 Q.B.D. 256=56 L.T. 208=35 W. R. 270.

(2) [1921] 48 Cal. 766=25 B.W.N. 80=61 I. C. 112=32 C.L.J. 433.

arising therefrom are taxable under the Act.

The assessee must have his costs in this case as certified not to exceed Rs. 200.

Reference answered,
in the affirmative.

1925 ALLAHABAD 288

SULAIMAN AND RYVES, JJ.

Badri Das—Decree-holder—Appellant.

v

Hoshiar Singh—Judgment-debtor—Respondent,

E. Second Appeal No. 316 of 1924, Decided on 7th January 1925, from the decision of the Add. Dt, J. Meerut.

(*a*) *Civil P. C., O. 41 R. 27—Evidence discovered after first Court's decree is admissible.*

To admit or to refuse to admit fresh evidence in appeal is a matter primarily in the discretion of the Court. Where the appellant was not aware of the existence of some evidence at the time when the case was disposed of by the first Court and he has discovered some new evidence subsequently and has preferred an appeal, the proper course open to him is to apply to the appellate Court which is in possession of the case to admit the additional evidence either under the general principles of law or under the specific provisions of O. 41 R. 27, Civil P. C. which lays down that an appellate Court may for "any other substantial cause" allow such evidence or document to be produced or witness to be examined. 1923 P. C. 128 Foll. [P. 289, C. 1.]

(*b*) *Civil P. C. S. 100—Additional evidence rejected not in exercise of discretion but due to supposed insuperable difficulty—Second appeal lies.*

If an appellate Court before whom an application for admitting fresh evidence is made, exercises its discretion and refuses to admit fresh evidence, the propriety of that order would not be a good ground for entertaining a second appeal. If however the lower appellate Court does not apply its mind to the question properly before it at all and feels that it is unable to admit fresh evidence because of some supposed insuperable difficulty in its way which, in fact, does not exist, then it cannot be said that the Court in the exercise of its discretion, has refused to admit fresh evidence and second appeal will lie.

[P. 289, C. 1.]

A. P. Bagchi—for Appellant.

K. C. Mital—for Respondent.

Judgment.—This is a decree-holder's appeal arising out of an application for execution. A decree on the basis of a promissory note of the year 1919 was obtained by the decree-holder against the father of the present respondents. After the death of the judgment-debtor the decree was sought to be executed by attachment of certain properties in the hands of the sons as persons in possession of the assets of the deceased. The sons filed objections in the execution Court pleading that they had been separate from their deceased father and that the property in their hands was their exclusive and separate property and was not liable to be attached in execution of the decree.

In their objections they referred to an award of 1914 followed by a decree of the Civil Court under which the family estate had been partitioned between the father and the sons. The Court of first instance relying on that award and decree allowed the objections. The decree-holder appealed from that order.

Before the appellate Court he filed an application supported by an affidavit to the effect that there was a subsequent Civil Court decree of 1920 under which previous decree based on the award had been declared to be fraudulent and fictitious. In his affidavit he stated that he was not aware of the existence of the later decree at the time the order of the Court of first instance was passed and that he came to know of it subsequently. The appellate Court did not pass any formal order finally disposing of the application in which it was prayed that a copy of the previous judgment should be admitted. It however in its judgment dismissing the appeal referred to the argument urged on behalf of the appellant that fresh evidence ought to be admitted. It remarked that the decree-holder should have raised that question in the first Court and should have proved there that the award was fictitious. It thought that as the decree-holder had not done so the appellate Court could not take additional evidence in the Court of appeal. The appeal was accordingly dismissed on the merits.

A second appeal has been preferred by the decree-holders. First of all, a preliminary objection was raised on behalf of the judgment-debtor that no second appeal lies. This contention is based on the argument that the grounds taken in the memorandum of appeal do not form good grounds for second appeal. This strictly speaking is not a preliminary objection. We shall therefore have to consider the appeal on its merits.

It cannot be disputed that to admit or to refuse to admit fresh evidence in appeal is a matter primarily in the discretion of

the lower appellate Court. Where the appellant was not aware of the existence of some evidence at the time when the case was disposed of by the first Court and he has discovered some new evidence subsequently and has preferred an appeal, the proper course open to him is to apply to the appellate Court which is in possession of the case to admit the additional evidence either under the general principles of law or under the specific provisions of O. 41 R. 27, Civil Procedure Code which lays down that an appellate Court may for "any other substantial cause" allow evidence or document to be produced or witness to be examined. This was pointed out by their Lordships of the Privy Council in *Indrajit Bahadur Sahai* v. *Amar Singh* (1).

If an appellate Court before whom an application for admitting fresh evidence is made exercises its descretion and refuses to admit fresh evidence it cannot be disputed that the propriety of that order would not be good ground for entertaining a second appeal. If however the lower appellate Court does not apply its mind to the question properly before it at all and feels that it is unable to admit fresh evidence because of some supposed insuperable difficulty in its way which, in fact. does not exist, then it cannot be said that the Court in the exercise of its discretion. has refused to admit fresh evidence. In the present case the lower appellate Court thought that because the point had not been raised by the decree-holder in the Court of first instance the lower appellate Court was helpless and could not admit fresh evidence. This, of course, was an impossiple position to take up. If the decree-holder had not been aware of existence of the decree of 1920 it is inconceivable how he could have raised the point that the decree passed on the award of 1914 had been declared fraudulent and fictitious. The other difficulty conceived by the lower appellate Court was that if evidence was admitted the whole case would have to be re-opened. This also was not necessarily an insuperable difficulty; such a contingency is likely to asrise in many cases where fresh evidence is admitted.

We have therefore come to the conclusion in this case that the Court of appeal did not exercise its discretion at all. There is no remark in the judgment as to whether it believed the affidavit of the decree-holder that he was not aware of the judgment at the time the decision of the Court of first instance was passed, nor is there any formal order dismissing the application for admitting fresh evidence.

If it is a fact that this judgment of 1920 having regard to the pleadings of parties did finally decide that the decree based on the award was a fictitious and fraudulent decree and that, in fact, no real partition had ever been effected between the father and the sons then a very strong case had been made out for admitting this fresh evidence provided the decree-holder was not aware of its existence and had not been guilty of any gross negligence.

We, however, do not wish to express any opinion as to whether even if the judgment is admitted it will conclude the matter. The Court will, of course, consider as to whether, if this judgment is admitted, the opposite party should be given an opportunity of producing rebutting evidence.

We are of opinion that the matter has not been tried properly. We, therefore. allow this appeal and setting aside the decree of the lower appellate Court send the case back to that Court for disposal of the application for the admission of fresh evidence and the disposal of the appeal according to law as provided under rules 27 and 28 of Order 41, Civil Procedure Code. The costs of this appeal will abide the event including in this Court fees on the higher scale.

Appeal accepted.

(1) 1923 P. C. 128=2 Pat. 676=50 I. R. 183=21 A. L. J. 554=18 M. L. W. 728=4 P.L.T. 447=1 Pat. L. R. 345=25 Bom.L.R. 1259=28 C. W. N. 277=4 L. R. P. C. 123=45 M. L. J. 578=33 M. L. T. 233=39 C. L. J. 318. (P. C.)

✱ 1925 ALLAHABAD 289

MUKERJI, J.

Muzaffar Husain and another—Applicants.

v.

Muhammad Yaqub—Opposite Party.

Criminal Mis. No. 279 of 1924, Decided on 8th January, 1925,

✱ *Criminal P. C., S. 526—Magistrate trying to effect compromise—Transfer is proper.*

Where a Magistrate has interested himself in a case pending before him in the

of both the parties and it is but fair to the Magistrate himself that he should not hear the case. [P 290, C 1]

Saila Nath Mukerji—for Applicants.

Lalit Mohan Banerji and Uma Shankar Bajpai—for Opposite Party.

Judgment:—This is an application for the transfer of a certain criminal prosecution under S. 298 of the Indian Penal Code pending in the court of Maulvi Sharafat-ullah Khan, Sub Divisional Magistrate, to the court of some other Magistrate in the district. The prosecutor is a Sunni Muhammedan and the applicants are of Shia persuasion. It appears that an application was made to the District Magistrate himself for a transfer of the case, but it did not succed. Several grounds have been taken for transfer, but I confine myself to one point which I think is a strong one in favour of the applicants.In paragraph 9 of the affidavit the applicants state that there was a talk of compromise between the parties and the learned Magistrate sent for the Ulemas of both sides and tried to arbitrate in the matter which arbitration subsequently fell through. On this point the learned Magistrate says, in the statement supplied to the learned Government Advocate—

"In order to make the parties compromise the case I had no doubt made an attempt in that way etc. etc."

Reliance is placed on behealf of the applicants on the case of *Gobinda Chandra Roy* v. *Gopal Chandra Pandit* (1). In that case two learned Judges of the Calcutta High Court were of opinion that where a Magistrate had interested himself in a case pending before him in the way of obtaining a settlement by the parties, it was to the interest of both the parties and it was but fair to the Magistrate himself that he should not hear the case. I think that this principle, with which I agree, applies with full force to the present case.

I order that the case be transferred from the court of Maulvi Sharafat-ullah Khan to the court of some such other Magistrate as the District Magistrate may choose. Of course it would be open to the District Magistrate to hear the case himself.

Application allowed.

---

(1) [1912] 18 C. L. J. 150—21 I. C. 417—14 Cr. L. J. 602.

1925 ALLAHABAD 290

MUKERJI, J.

Raghunandan Prasad and others—Applicants.

v.

King Emperor—Opposite Party.

Criminal Rev. No. 332 of 1924, Decided on 29th August, 1924, against the order of the S. J., Cawnpore, D/-8th March, 1924.

Criminal P. C., II schedule—Penal Code S. 427—Complainant's statement determines jurisdiction.

The jurisdiction of the Court to hear a case depends on the allegations with which its help is sought. It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant has to be accepted for the purposes of jurisdiction. [P 291, C 1]

Where the complainant in a case of mischief, alleged the damage to be Rs. 250 and a third class Magistrate tried the offence and found the damage to be Rs. 140 and awarded Rs. 40 as compensation to the complainant.

Held: that the third class Magistrate had no jurisdiction to try the offence. [P 291, C 1]

M. A. Aziz—for Applicants.

The Assistant Government Advocate and *Vishnu Nath*—for Opposite Party.

Judgment.—In this revision a question of jurisdiction has been raised, and it is unfortunate that at this late stage I have no alternative but to allow the contention.

A woman, Mt. Sheorania, an agriculturist, brought a charge against the applicants on the allegation that they with a large number of cattle got her field damaged and that crops to the value of Rs. 250 were destroyed. The offence alleged was one of mischief; but the law makes a distinction between mischief of a minor kind and a mischief of a graver sort. S. 426 of the Indian Penal Code makes an ordinary case of mischief punishable with imprisonment to the extent of three months and with fine; but where the amount of damage or loss caused is Rs. 50 or upwards, the maximum punishment awardable is under S. 427 of the Indian Penal Code two years' imprisonment and fine. A case of the graver kind of mischief is not triable by a Magistrate of the third class. In this particular case a learned Magistrate of the third class took cognizance of the offence, and hav-

ing estimated the damage or loss to the complainant at Rs. 140 ordered that, out of the fine to be relized, a sum of Rs. 40 should be awarded to the complainant.

An appeal was taken to the learned District Magistrate and the question of jurisdiction was raised. He however got over the difficulty by coming to the finding that the amount of damage was less than Rs. 50. An application in revision was made to the learned Sessions Judge but without success.

In my opinion the jurisdiction of the Court to hear a case depends on the allegations with which its help is sought. It may be that after a trial it is found that the case has been materially exaggerated ; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress, the statement of the complainant, in a criminal case and the statement of the plaintiff in a civil case, has to be accepted for the purpose of jurisdiction. This is however a much strong case. Not only did the complainant allege that the amount of damage was much more than the sum of Rs 50, but the learned Magistrate also found that the damage amounted to Rs. 140. The Court of first instance therefore had no jurisdiction to hear the case.

I set aside all the proceedings in the case and order that the case be heard by a Magistrate having jurisdiction to hear it.

Proceedings set aside.

1925 ALLAHABAD 291 (1)

MUKERJI, J.

Kalka—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 342 of 1924, Decided on 19th August 1924, from an order of the S. J., Cawnpore,

Penal Code, S. 426 — Bona fide dispute obviates offence,

Where a *bona fide* contest exists as to the title of the property, no offence is committed.

[P. 291, C. 2]

Sailanath Mukerji—for Applicant.

The Asstt. Govt. Advocate—for Opposite Party.

Judgment.—This is one of the cases in which, in my opinion, the Criminal Court ought not to have assumed jurisdiction. The applicant was charged with an offence under S. 426 of the Indian Penal Code on the allegation that he cut certain trees which belonged to the zemindar and to cut which the applicant had no right. The applicant met the case with the plea that the trees stood on his own land and that he had a right to cut them. I have carefully read the judgment of the learned Magistrate. The whole judgment is based on the question whether the tree has been proved to be the property of the zemindar or that of the tenant. It is clear from this judgment that what the applicant did he did openly and deliberately. He not only claimed the trees as his own, but he sold them to a third party who has evidently acted in good faith and has not been prosecuted. A good deal of evidence was adduced on either side and the patwari who was examined for the landholder supported the applicant. The learned Magistrate found that there was some custom in the village by which a tenant could cut a tree. But he finds that the custom did not extend to a sale of the timber cut. This may be so or may not be so. But it appears to me the title to the tree was a matter of *bona fide* contest on the part of the applicant and the complainant should have been referred for his relief to the Civil Court. I find that it has not been proved that the trees were sold and cut with the intention of causing loss to the zemindar, but in pursuance of a *bona fide* claim to the trees and therefore no offence of mischief has been committed.

I set aside the conviction and sentence and order that the fine, if paid shall be refunded.

Application allowed.

1925 ALLAHABAD 291 (2)

MUKERJI, J.

Fazal Husain—Judgment-debtor — Applicant.

v.

Fazaluddin—Decree-holder — Opposite Party.

Civil Rev. No. 171 of 1924, Decided on 14th January 1925, from an order of Munsiff of Allahabad West.

Civil P. C., S. 2 (2)—No appeal—Expiry of time for appeal makes decree final.

Where there is a decree but there is no appeal, the decree becomes final on the date on which time for filing an appeal expires. (1908) A. W. N. 13 Ref. to. [P. 292, C. 1]

Zamirul Haq—for Applicant.

Kailas Nath Katju—for Opposite Party.

Judgment.—Nobody has appeared to oppose this application in revision. The suit out of which this application has arisen was a pre-emption suit and the decree was made by a Munsif on the 7th of May 1924 in favour of the plaintff. The order was that the purchase-money, a sum of Rs. 50 was to be paid within two months of the decision of the Court becoming final. The purchase-money was not paid till the 26th of July 1924. The plaintiff apprehended that he had come after the expiry of the period fixed and he made an application for extension of the time of payment. The learned Munsif held that the decree became final at the earliest on the 7th of June 1924, when one month's time allowed for appeal expired and that, therefore, (reckoning two months from the 7th of June 1924) the deposit was in time. On behalf of the vendee the present petition has been made and it is urged that as there was no appeal whatsoever, the decree became final at the date it was passed and that the two months' time should have been reckoned from the 7th of May 1924, and not from the 6th of June 1924. No authority has been produced in support of the applicant's contention. On a simple construction of the language of the decree the plaintiff could wait to see whether an appeal was filed or not and after seeing that no appeal was filed he could set about to procure the money for payment. In the case of *Gopal Das* v. *Mamman Kunwar* (1), it was held that where there was an appellate decree but there was no second appeal, the decree became final on the expiry of time for filing the second appeal. The principle applies in this case and the payment was within time. The petition is rejected but without costs as there is nobody to contest the petition.

Application rejected.

(1) [1908] 5 A.L.J. 136=(1908) A.W.N. 13.

1925 ALLAHABAD 292

BOYS, J.

Emperor.

v.

Ram Din—Accused.

Criminal Ref. No. 396 of 1924, Decided on 6th August 1924, Ref. made by the Dt. Mag. Jalaun, D/- 11th July 1924.

Criminal P. C., S. 438 — Fresh evidence relevant as to sentence discovered by Crown—Retrial will not be granted.

The High Court will not set aside a conviction and order retrial at the instance of the Crown on the ground that the Crown has since discovered fresh evidence which would require the infliction of a severer sentence on the accused. [P. 292, C. 2]

Lalit Mohan Banerjee—for the Crown.

The Opposite party was not represented.

Judgment.—This is a reference by the District Magistrate of Jalaun asking this Court to set aside the conviction of one Ram Din under S. 379 of the Indian Penal Code and ordering his retrial solely with the idea that he may be given a more severe sentence, the desirability of which is indicated by the fact that it has since been discovered that the accused has no less than six previous convictions. This in effect amounts to asking this Court to set aside the conviction because the Crown has since discovered further evidence which would be relevant on the question of sentence. It is certain that, ordinarily speaking, I do not say never, this Court would not set aside a conviction at the instance of the accused on the ground that he had not led evidence in his defence which it was possible for him to have led if he had exercised proper diligence. How much more so would it be improper under similar circumstances to set aside a conviction at the instance of the Crown. The police reported on the 15th of June 1924, that the antecedents of the accused had not been traced and if they wanted more time they could have asked the Magistrate for it. He was, however, allowed to proceed to a conviction on the 19th of June 1923. In effect this Court is asked to remedy, to the prejudice of the accused, the consequences of neglect by the Executive to make proper enquiries and I do not think that this Court should interfere. The same opinion was expressed by Mr. Justice Knox in *Queen Empress* v. *Kunjal* I therefore decline to interfere. Let the record be returned.

(1) [1891] A.W.N. 80.

1925 ALLAHABAD 293 (1)

MEARS, C. J., and PIGGOT, J.

Sheobodh Ram Teli—Applicant.

v.

Shiva Prasad and others — Opposite Party.

Mis. Case No. 408 of 1924, Decided on 28th November 1924.

Jurisdiction — High Court — Applications from Benares State submitted to Maharaja and decided by him—High Court cannot express opinion on.

High Court has no jurisdiction to entertain reference or give opinion on applications submitted to his Highness the Maharaja of Benares, in civil cases, from that State, and decided by his Highness. [P 293 C 2]

Iqbal Ahmad—for Applicant.

B. E. O'Conor and Ram Nama Prasad--for Opposite Party.

Mears, C. J.—To-day's list contains under miscellaneous matters cases numbered 408/1, 408/3 and 408/4 of 1924. On the papers being presented to us, they proved to be references submitted by the Political Agent of the Benares State for the opinion of the High Court. They have been put into the list by virtue of certain correspondence which appears to have begun on the 20th of June, 1922, whereby the High Court were asked whether they would agree to applications which had been submitted to his Highness the Maharaja in civil cases from the Benares State Court being laid before a Judge of the High Court. The matter was put to the High Court as a reasonable thing to do and as a matter which would be of advantage to the subjects of the Maharaja of Benares and generally of benefit to the people also in this province; it might tend to keep the law uniform. A reply was sent in which it was pointed out that the High Court could have no jurisdiction to determine any points in the Benares State unless there was a change in the Letters Patent, or unless the Governor-General in-Council passed a legislative enactment conferring jurisdiction under S. 35 of the Letters Patent, and the letter concluded by saying that, if the Governor-in-Council (which was of course a reference to the Governor of the United Provinces) desires that the High Court should proffer an opinion in such matters, the High Court were ready to express their willingness to do so. That, indeed, is all that the reference asks us to do; merely to give an opinion as to whether the decision that has already been made in the matter in the Benares State is a decision which meets with our approval. Mr. Iqbal Ahmad has taken just the point which the Judges took in their letter, that we have no power to give decisions in these matters, and, indeed, he has gone further and has taken the point that the time of this Court ought not to be occupied by any other matter except a matter put into our hands by the force of a Statute, that is, by the Letters Patent, by the order of the Governor-General-in-Council, or by such Statutes as give us authority in regard to districts such as Kumaun and Ajmer. We think he is right in this matter, and that, therefore, we cannot to-day entertain the applications, but we desire to show a courtesy to the Maharaja of Benares, and we feel that we cannot merely return these documents with a bare announcement that we have no jurisdiction in the matter, and, therefore, MR. Justice Piggott and my self will sit to-morrow, in my chambers, to give opinions on these matters, and any body who has any interest in any of the cases may attend at half past ten. We will take the cases in the order in which they are in the printed list, and if nobody appears on either side, we shall discuss the matters between ourselves and arrive at what we believe to be the proper opinion to be sent informally to His Highness the Maharaja. The cases will be removed from the list of the Court. The other two references received along with these which are not on to-day's list will similarly be laid before us to-morrow morning.

✱ 1925 ALLAHABAD 293 (2)

KANHAIYA LAL AND MUKERJI, JJ.

Kharak Singh — Judgment-debtor — Applicant.

v.

Laccham Singh — Decree-holder — Opposite Party.

Mis. Case No. 415 of 1924, Decided on 12th November, 1924.

—(a) Civil P. C. O. 20, R. 1—Parties absent—No notice to parties—Judgment is not validly pronounced.

A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced. [P 294 C 2]

✱ (b) *Civil P. C. O.* 20, *R.* 1—*Invalid pronouncement-Decree following—Decree should not be violated.*

Where a decree follows a judgment which was not validly pronounced, the decree cannot be violated so long as it stands. [P 295, C 1]

Peary Lal Banerjee—for Applicant.

Kailas Nath Katju—for Opposite party.

Kanhaiya Lal, J.—This is a reference under rule 17 of the Kumaun Rules, arising out of a suit for pre emption brought by the plaintiff in the Court of an Assistant Commissioner in Kumaun. The Assistant Commissioner heard the suit on the 24th August, 1921 and reserved his judgment. On the 14th of February, 1922 the Assistant Commissioner signed, dated and delivered his judgment in the absence of the parties or their pleaders and without previous notice to them and he directed that the order passed should be communicated to the parties through the patwari. The judgment directed the plaintiff to deposit the pre-emption money within three months of that date, but the plaintiff was not served with a notice of its delivery till the 25th of February, 1922. He filed an appeal from the decree about the amount of the consideration money made payable by him, and about his costs, but his appeal was dismissed except about costs on the 10th May, 1922. On the 25th of May, 1922 he deposited the money required, but the judgment-debtor contended that that payment was not made within the time allowed by the decree. The Assistant Commissioner repelled that contention. His order was upheld by the Deputy Commissioner on appeal. But on a further appeal the Commissioner of the Kumaun Division held that the plaintiff had failed to comply with the condition imposed by the decree and that his failure to do so had converted the decree into one in favour of the vendees.

The first question referred for our opinion is whether the judgment of the Assistant Commissioner dated the 14th of February, 1922 was validly pronounced within the meaning of Order 20, rules 1 and 3 of schedule 1 of the Code of Civil Procedure. S 33 of the Code of Civil Procedure requires that the judgment shall be pronounced in open Court; and Order 20, rule 1 provides that after the case has been heard, the Court shall pronounce the judgment in open Court either at once or at some future date, of which due notice shall be given to the parties or to their pleaders. S. 140 of the Code requires that all orders or notices served on or given to any person under the provisions of this Code shall be in writing. No such notice was given in this case to the parties or their pleaders. The judgment was signed and dated in the absence of the parties without any such notice having been previously given; and we do not consider that such a delivery amounts in law to a pronouncement within the meaning of the clear and mandatory provisions of Order 20, rule 1 of the Code. There was in effect no pronouncement of the judgment in law; and the plaintiff had no notice of it until the 25th of February, 1922 when the delivery of the judgment was formally communicated to him.

The second point submitted for our opinion is whether the period of three months should be calculated from the date the judgment was signed in the absence of the parties and without previous notice to them, or whether it should be computed from the 25th of February, 1922, the date when the parties were informed of the pronouncement of the judgment through the patwari. In view of the clear provisions of the Code above referred to, a judgment signed and dated by the Presiding Judge in the absence of the parties or without previous notice to them does not stand on a higher footing than a judgment so signed and dated and kept by him in his pocket or sent by him for delivery to his successor in office. The date of the delivery of the judgment must in either case be the date when the judgment is pronounced in open Court in the presence of the parties or after previous notice to them.

The notice, intimating the delivery of the judgment in this case, was dated the 14th February, 1922 and asked the plaintiff to deposit the money within three months without any specification as to the date from which the period was to be computed. But the decree, which followed the judgment, expressly directed the payment of the money within three months from its date, that is from the 14th February, 1922. The plaintiff obtained copies of the judgment and the decree, and he filed them with his appeal; but his appeal was unsuccessful except about his costs, and in other respects that decree was affirmed.

The law of this country only contemplates the giving of a notice of an intended pronouncement of a judgment. It does not contemplate the giving of a notice after such pronouncement has been effected. The pronouncement was, therefore, irregular. But as the decree explicitly required the payment of the money within three months from the 14th of February, 1922, and the plaintiff had notice of it, the time of payment must be computed from the 14th of February, 1922, as directed by it ; and the failure to make such payment must attract the consequences which the decree describes. The plaintiff is bound by the decree and cannot, as long as long as that decree stands, be allowed to go behind or question its terms.

With the above expression of opinion the record will be returned. The costs of the reference in this Court will be assessed at Rs. 32 and ought to be allowed to the defendants-vendees from the plaintiff,

Mukerji, J.,—I entirely agree. I lay particular stress on the fact that the decree of the first Court was affirmed on appeal.

Record returned.

1925 ALLAHABAD 295 (1)

MUKERJI, J.

Mohammad Husain—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev. No. 444 of 1924, Decided on 25th September 1924, against an order of the Addl. S. J., Benares.

Penal Code, S. 363—Boy under 14 kept in charge of applicant for teaching koran—Applicant running away with the boy—Offence under S. 363, is committed.

A boy under 14 years of age was kept in charge of the applicant who was to teach him Qoran and feed him with the money of the boy's father. The applicant ran away with the boy to a distant place with the object of teaching him painting scenes ;

Held, that the applicant was guilty under S. 363. [P. 295, C. 2]

Zahur Ahmad—for Applicant.

R. Malcomson—for the Crown.

Mukerji, J.—The applicant was put in charge of a boy, below the age of 14, by his father, for the purpose of being taught the Holy Qoran. The father, the boy and the applicant were then at Jaunpur. The father took leave and went away from Jaunpur, where he was serving under the Court of Wards ; and the boy remained under the temporary guardianship of the applicant. The applicant, during the absence of the father, took away the boy with him ; and the father heard nothing of the boy for several months. At last he made a report to the police. Later on the father got a letter from the boy addressed from Dehra Dun. He went up and found the boy and the applicant in the same house. The applicant ran away. The boy was brought away by the father. On these facts, the applicant has been convicted under S. 363 of the Indian Penal Code and has been sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 5.

The learned counsel for the applicant has argued that the applicant himself was the guardian of the boy, and, therefore, there was no taking of the boy out of the keeping of the lawful guardian. I cannot agree with this contention. The guardianship of the applicant was temporary and limited. He was to teach the boy and feed him at his place, with the money supplied by the father. The father never permitted him to take away the boy to Delhi and Dehra Dun without his knowledge. In the circumstances the removal of the boy from Jaunpur amounted to taking the boy out of the keeping of the lawful guardian. I hold that the conviction is right.

As regards the sentence I am not disposed to consider it as too severe. The father did not hear of the boy for several months. The boy was left to be taught the Holy Qoran. Instead, he was taken to Delhi to be taught how to paint scenes so that he might join a theatrical company. This must have been a matter hateful to a Muhammedan father who would like his son to know the Qoran.

The application is rejected.

Application rejected.

1925 ALLAHABAD 295 (2)

MEARS, C. J. AND PIGGOT, J.

Ram Rehka and others — Defendant — Appellants.

v.

Ram Sunder Dube—Plaintiff—Respondent.

First Appeal No. 424 of 1924, Decided on 13th November, 1924, from a decree of the Sub. J., Ghazipore.

Hindu Law — Alienation — Father — Account stated may support alienation — But offer of other evidence by defendant justifies going behind the account.

An account stated between the father and the alienee may be a good support for the alienation. But if the defendants rely upon other documents they may be entered into and the alienation disapproved if the debt stated in the account is found to be suspicious in the light of the documents. [P. 296, C. 2]

B. E, O'Conor, M. L. Agarwala, Janki Prasad and *Harnandan Prasad*—for Appellants.

Uma Shankar Bajpai, Kapil Deo Duvedi, Brijmohan Lal and *Balmukunda* —for Respondent.

Judgment.—This is an appeal from the judgment of the Subordinate Judge of Ghazipur. The only matter that he had to try in the action was with reference to a sale-deed for Rs. 8,500, which had been entered into by the father of the plaintiff on several grounds. The plaintiff, the son, made the usual regrettable charges against his father, which seem to be a feature in many of these actions. Whatever attempt he made to prove the drinking and other alleged disgraceful and improvident acts of the father, were disbelieved by the Court. He comes before us as a plaintiff-appellant entitled to a very little sympathy, especially when one considers the fact that at the time of the action the father was residing apparently on terms of complete harmony with his family. The father did not go into the witness-box. The plaintiff denied at first any indebtedness at all of the father, but eventually admitted that there was an indebtedness of Rs. 6,500. That left in dispute two items only, one of Rs. 1,500 and the other of Rs. 500. The discussion on this Rs. 1,500 has opened up a rather curious state of things. When one turns to the sale-deed one finds that this item of Rs. 1,500 is an indebtedness alleged to have arisen "under slips for a long time. On adjustment of the accounts to-day, a sum of Rs. 1,500. besides the amount of *sarkhat*, has been found due by me under slips to Janki Teli and others aforesaid." The original has been referred to, because on the translation as it stands the ordinary meaning would be that there was a sum of Rs. 1,500 evidenced by slips and there was a further sum evidenced under a *sarkhat*. On a reference to the original, the word '*alawa*' is put immediately before '*sarkhat*'; but that does not throw any light upon the difficulty and it has been suggested that the deed was so framed as to permit of a claim for Rs. 1,500 under slips and a further claim of an indefinite amount under *sarkhat*. For the purpose of this case we undoubtedly have to deal with one sum only, and it is the sum claimed under the *sarkhat* A 3. Now the *sarkhat* A 3 is in form an account stated, and on the face of it gives rise to no suspicion, and is in every way an apparently regular document. If the defendants had simply based their case on an account stated and nothing else, and had brought no other document into the case to raise elements of suspicion, the defendants might have succeeded. It is always open to a debtor or creditor to go through accounts whether mutual or one side only, to adjust those accounts, and to agree that there is a balance due from one to the other, and that very agreement that there is a balance due from one to the other is in itself a perfectly good cause of action, and does away with the necessity of going into the antecedent accounts and if the account stated is satisfactorily proved, judgment must be given, notwithstanding that the party who has signed the account as correct wishes to re-open the account. It may of course be re opened on certain allegations such as fraud, but that does not alter the general rule that an account stated is itself an agreement which can be sued upon. In this case however the defendants have relied upon other documents and in support of A 3 they have produced before the lower Court A 4. That is a document antecedent in date to A 3, and was regarded by the Judge as being of a suspicious character. He gives in his judgment in detail the matters which in his view make the document one on which it is unsafe to act. The Court is asked to give weight to it by the defendants themselves who bring it in as evidence supporting A-3. We ourselves have looked at the document. It has manifestly been altered in one or two places, and in our opinion a group of four items, though purporting to be widely apart in date must have been written at one and the same time. That being so that document far from assisting the case of the defendants, goes a long way to destroy it. Another element of suspicion undoubtedly is in the sale-deed, which *prima facie* put two kinds of indebtedness upon the borrower, namely an indebtedness under slips and an indebtedness under

a *sarkhat*. The defendants presumably keep books. A 4 is certainly not the only record in their business. They produced no other documents whatever in support of their claim. This is one of those cases in which the Subordinate Judge having heard the witnesses, having applied his mind to the case, has come to a conclusion adverse to the defendants, and has disallowed the whole of the item of Rs, 1,500. If the matter had come before us in original trial and an opportunity had been given to ask one or two questions to the witnesses, it is conceivable we might have allowed that item to go through. But we are not prepared to overrule the learned Subordinate Judge on this matter of Rs. 1,500; and we agree that the item of Rs, 500 must go out because there was no attempt whatever made to prove that the deeds in question were for legal necessity. The result of this is that we affirm the decision of the learned Subordinate Judge; but we leave each party to bear their own costs of this appeal.

Decision affirmed.

1925 ALLAHABAD 297

RYVES AND DANIELS, JJ.

Mahfuz Ali Khan—Objector—Appellant.

v,

Seth Radha Kishen—Decree-holder—Respondent.

Execution Second Appeal No. 437 of 1924, Decided on 17th November, 1924, from a decree of the Dt. J. Shahjahanpur.

Deed—Construction—Manager of property to pay annuities to owners—Manager's interest was held more than a right to future maintenance.

Where under an arbitration award a man's property was to be construed the property of two other persons, but at the same time the owner was allowed to remain in possession of the property and to manage it and collect income and out of the income he was to pay a certain sum yearly to each of the other two persons,

Held: Construing the award as a whole, that what was reserved to the owner was something more than a right of future maintenance and that his interest in the property was attachable in execution, [P. 298, C. 1.]

Harnandan Prasad—for Appellant.

Baleshwari Prasad for *Kailas Nath Katju*—for Respondent.

Ryves, J.—The facts that give rise to this appeal are as follows:—

One Mahfuz Ali Khan was the owner of certain zamindary property. He married first Musammat Sharifan and then Musammat Ijari. Musammat Sharifan died leaving her surviving a son, Mashuq Ali. On behalf of Mashuq Ali, who is a minor, a demand was made for the dower debt due to his mother from Mohfuz Ali Khan. As this dower debt was far more than the property was worth, it appears that Musammat Ijari also put in a claim for dower on her own account, The matter was referred to arbitration and the arbitrators after reciting the circumstances under which they were called upon to make their award, came to the conclusion that both Mashuq Ali and Musammat Ijari were entitled to dower; but that, if their claims were satisfied, the property will be wholly insufficint to satisfy their claims. They, therefore, decided that the best thing to do was to agree that the property should from the date of the award be construed the property of Mashuq Ali and Musammat Ijari. At the same time Mahfuz Ali Khan was allowed to remain in possession of the property and to manage it and to collect the income. Out of this income he was to pay Rs. 150 a year in cash and nine maunds of wheat to Mashuq Ali and R. 300 and eighteen maunds annually to Musammat Ijari, the balance of the income he was to retain himself and it is said that, out of it, he could pay his debts. This arrangement is described in the award as having been come to to enable Mahfuz Ali Khan to maintain himself. It appears that this arrangement was carried out. Although Mahfuz Ali Khan remained in possession of the property, he was not allowed to charge it for the payment of any debts and was forbidden to transfer it by sale or mortgage or otherwise. Similarly, Mashuq Ali and Musammat Ijari had no right to deal with the property as owners during his life-time except, of course, with his express consent. In 1922, Seth Radha Kishen obtained a simple money decree against Mahfuz Ali Khan for a debt incurred in 1919 and in execution of his decree sought to attach and sell Mahfuz Ali Khan's right of possession as a life tenant in the property in suit, which was described as having been acquired by him under the award above-mentioned. Mahfuz Ali Khan objected on the ground that what he had acquired under the award

was a right to future maintenance and that as such it was not liable to attachment under S. 60 (n) of the Code of Civil Procedure. Both the courts have overruled this plea and he comes here in second appeal.

It is argued on his behalf that under this arrangement he ceased to be owner of the property and became entitled to the balance of the income for his maintenance and thus came within clause (n) of S. 60. On the other hand, it is argued that he remained a restricted owner of the property and was entitled to a great deal more than maintenance, that, subject to the payment of the amounts mentioned in the award, he was entitled to possession for his life and could dispose of the balance of the profits in any way he pleased, and that this was a great deal more than a right of future maintenance as contemplated in the section. The words in the section are 'a right of future maintenance'. It seems to us that construing the award as a whole, what was reserved to Mahfuz Ali Khan was certainly something more than a right of future maintenance, and, that being so, we think that the decision arrived at by the court below was correct. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal rejected,

1925 ALLAHABAD 298 (1)

PIGGOTT AND WALSH, JJ.

Makhan Lal Ram Sarup—In the matter of.

Civil Mis. No. 435 of 1924, Decided on 2nd December, 1924.

Income Tax Act, S. 66—Question whether assessee is a member of joint family is one of fact.

The question whether an assessee is a member of a joint family sharing in the funds, or whether he is separate, is a pure question of fact.

[P 298 C 1]

Gopi Nath Kunzru—for Applicant.

Walsh, J.—We are clearly of opinion that the Commissioner was right in this case in holding that no question of law arises. The question whether an assessee is a member of a joint family sharing in the funds, or whether he is separate, is a pure question of fact which must be tried according to law like every other question of fact. It is desirable to point out that S. 66 under the new Act does not give a right of appeal. Persons assessed to income tax should clearly understand that this Court is not a Court of appeal to which resort may be had if they happen to be dissatisfied with the decision against them. There is no such thing as a memorandum of appeal. If the Commissioner is satisfied that there is a point of law on which he requires the opinion of this Court, he seeks the opinion by stating a case. If, as in this case, he holds that there is no point of law, the assessee has to satisfy two Judges of this Court that a distinct point of law was raised before the Commissioner, and treated by the Commissioner as a mere question of fact. It must also clearly be understood that this Court cannot listen to suggested points of law, which were not first taken in the original proceedings before the Income-Tax Officer, and also submitted clearly and definitely to the Commissioner by way of appeals, so as to enable him to pass a decision upon them, and to set out the facts in stating the case, which raise the law point. We are clearly of opinion that no question of law arises. The application is dismissed.

Application dismissed.

1925 ALLAHABAD 298 (2)

MUKERJI, J.

Daya Nand and others—Applicants,

v.

Emperor—Opposite Party.

Criminal Rev. No. 462 of 1924, Decided on 25th September, 1924 against an order of the S. J., Aligrah.

Criminal P.C, S. 436—Further enquiry—Competent on the same facts.

Further enquiry can be ordered by the Session Judge on the same facts as have been considered by the trial Court. (9 All. 52 Ref.) Where a Magistrate was very much influenced by the fact that a civil suit was pending and he regarded the complaint as a sort of forestalling the Civil suit,

Held that the Sessions Judge's order directing further enquiry was a good order. [P 299 C 1]

Saila Nath Mukerji—for Applicants.

The Opposite party was not represented.

Mukerji, J. — The applicants were charged before a learned Magistrate with the offence of house trespass under S. 448 of the Indian Penal Code, and were discharged by that Magistrate. The complainant went to the Sessions Judge and that learned Judge has ordered a further enquiry into the facts

This revis on has been filed against the orde r of the learned Sessions Judge.

It was urged by the learned counsel, holding the brief for the counsel of the applicants, that it was not competent for the Sessions Judge to order a further enquiry on the facts, because the learned Magistrate had taken all the evidence that had been adduced on behalf of the complainant. Several cases were cited in support of this proposition of law. I have examined those cases, and I have also examined the Full Bench case of *Queen Empress* v. *Chotu* (1). I think, to say that a further enquiry cannot be ordered by the Sessions Judge on the same facts as have been considered by the learned Magistrate is to put the law too wide and contrary to the opinion expressed in the Full Bench ca se. I have found that in each and every one of the cases relied on by the learned counsel for the applicants, the learned Judges took into consideration the facts of the particular case before them, and did not pro'ess to lay down a rule which w ould really stultify the language of the section itself. Under clause (1) of S. 253 of the Code of Criminal Procedure, a Magis rate is authorized to discharge an accused person if he finds that no case against the accused person has been made out, which, if unrebutted, would warrant his conviction. There may be cases in which the Sessions Judge or any other revisional court, may find that on the facts before the Magistrate there was enough material to warrant a conviction of the accused person, and there was enough there to call upon the accused person to enter on his defence, and an order for further enquiry in the circumstances would be justifie d.

Let us now look into the facts of this case. This really means that I have to compare the two ju lgments, one delivered by the learned Magistra e and the other by the learned Sessions Judge. I have compared the two and I am clearly of opinion that the learned Magistrate was very much influenced by the fact that a civil suit was pending and he regarded the complaint as a sort of forestalling the civil suit. In the circumstances of the case I consider that the learned Sessions Judge's order was a good order, and ought to stand. The application is dismissed.

Application rejected.

(1) [1886] 9 All. 52=1886 A. W. N. 281 (F. B.)

1925 ALLAHABAD 299

MUKERJI, J.

Ram Sukh and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Rev. Nos. 470 and 471 of 1924, Decided on 25th September 1924, against an order of the S. J., Muttra.

(a) Criminal P. C., S. 367 –Judgment written by Magistrate himself but delivered unsigned—Irregularity is curable by S. 537.

Where the judg ment was entirely in the handwriting of the Magistrate,

Held: in the circumstances the case irregularity of the judgment not being signed, was covered by S. 537. P 300, C 1]

(b) Criminal P. C., S. 403—Conviction for affray is no bar to subsequent conviction for causing hurt in the affray.

Where two people fight in a public street to the disturbance of the public peace, they commit affray. The police are the guardians of the peace and they may make up a case of affray and prosecute the parties concerned. If in the course of the affray one party causes hurt to the other, it will be for the party who received the hurt, to decide whether he will proceed against the party who caused the hurt so that the offences of affray and causing hurt are distinct and separate. The offence of affray is committed not alone by the party causing the hurt but by both parties, namely the p rty causing the hurt and the party receiving the hurt. The offences being distinct from each other, the case falls within paragraph 1 and not para 2 of S. 235 of the Criminal P. C. ar d therefore, the conviction of the accused under S. 160 of the I.P.C., is no bar to their trial and conviction again under, S. 323. [P 300, C 2]

Ram Nama Prasad—for Applicants.

R. Malcomson—for the Crown.

Mukerji, J.—It appears that two parties fought at a public place, and in the course of the fight, the applicants caused hurt to certain persons. Two cases were started, one under S. 160 of the Indian Penal Code against eleven persons at the instance of the police. The other case was started at the complaint of private parties who received injuries. There were separate trials, as has been already observed, and the applicants were separately convicted as the result of the two trials. In revision No. 470 the judgment was pronounced earlier, for we find in the Magistrate's judgment, in the hurt case, that he refers to his earlier judgment. The two judgments were pronounced on the same day.

In revision No. 470 of 1924, which arises out of the charge under S. 160, the

only point urged is one of sentence. The sentence passed is one of rather a heavy fine. So far as Ram Sukh and Brikbhan are concerned, they were fined in the sum of Rs. 100 each. In view of what I am going to say in the other case, I reduce the sentence of fine against each of Ram Sukh and Brikbhan to the sum of Rs. 50 only. The sentence of fine against Ganeshi and Beni will stand. Otherwise revision No. 470 is rejected.

In revision No. 471 of 1924 two points have been raised. First, it has been urged that the judgment of the learned Magistrate being unsigned, did not operate as a judgment at all, and, therefore, the conviction should be treated as illegal. The judgment is entirely in the hand-writing of the learned Magistrate. In the circumstances I should agree with the learned Sessions Judge that the irregularity of the judgment not being signed, is covered by S. 537 of the Cr. P. Code. It will be deplorable if after a trial the judgment has to be set aside and a retrial has to be ordered simply because the learned Magistrate forgot to sign the judgment and date it. The irregularity does not affect the merits of the case, and, therefore, this point fails.

The second point urged is somewhat interesting, though, to my mind, not difficult to answer. The argument is that the applicants having once been convicted of the offence of an affray, they could not be again convicted of the offence under S. 323 of the Indian Penal Code, having regard to the provisions of S 403 of the Criminal Procedure Code. The argument is this. The offence of causing hurt was committed in the course of one and the same transaction, namely fighting in a public place. It is urged that, if the applicants fought in a public place and caused hurt to the complainants, they committed one single act, and although it may be true that their act fell within the purview of two distinct offences under the Indian Penal Code, they could be tried for the two offences jointly under S. 235 of the Criminal Procedure Code; and therefore, a conviction for one of the offences should operate as a bar to conviction under the other section.

This argument overlooks the fact that the two offences committed are distinct and separate. There may be an affray without causing any hurt to any body. When two people fought in a public street to the disturbance of the public peace, they commit an affray. The police are the guardians of the peace and they may take up a case of affray and prosecute the parties concerned. If in the course of the affray one party causes hurt to the other, it will be for the party who received the hurt, to decide whether he will proceed against the party who caused the hurt. Are the police to wait indefinitely to find out whether the party who received the hurt is going to prosecute the other party or not? The police would prosecute both the parties. This is very important. The offence is committed not alone by the party causing the hurt but by both parties, namely the party causing the hurt and the party receiving the hurt. It will thus be seen without further argument, that the offences are distinct from each other. The case, therefore, falls within paragraph 1 of S. 235 of the Cr. P. Code. It is true that there might be a joint trial, but that is because it is convenient under the circumstances to have a joint trial. But for the application of the rule of bar, we have to see whether the case does not fall within clause (2) of S. 403 of the Code. This clause 2 of S. 403 distinctly lays down that, when a person is acquitted or convicted of any offence, he may afterwards be tried for any distinct offence for which a separate charge might have been made against him in a former tria under S. 235 (1). I am clear that this is a case which does not fall under clause (2) of S. 235 of the Code. A reference to the illustration given under S. 235 will make this matter clear. In my opinion the conviction of the applicants under S. 160 of the Indian Penal Code was no bar to their trial and conviction again under S. 323 of the same Code.

In the revision case No. 471 the punishment awarded is one of fine of Rs. 50 each. If S. 71 of the Indian Penal Code applies, the maximum punishment which could be awarded is the punishment which is dictated by S. 323 of the Indian Penal Code, under which the amount of the fine may be more than Rs. 100. Even if the maximum punishment under S. 160 be awarded, which is a fine of Rs. 100, the fact that I have reduced the sentence in the case of two of the applicants would go to ensure that the maximum awardable under this section has not been exceeded.

But S. 71 of the Indian Penal Code has no application whatsoever to this case as the offences are distinct.

The revision No. 471 is rejected.

Revision rejected.

1925 ALLAHABAD 301(1)

MUKERJI, J.

Nanhe Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev, No. 480 of 1924, Decided on 24th October, 1924, from an order of the S. J., Farrukhabad.

(a) *Public Gambling Act* (3 *of* 1867), *S.* 5—*Asstt. Superintendent of Police cannot search without warrant.*

An Assistant Superintendent of Police is not authorised under S. 5 of the Public Gambling Act to search a place without a warrant. [P. 301, C. 1]

(b) *Public Gambling Act* (3 *of* 1867), *S.* 6—*Illegal search—Presumption under S.* 6 *does not arise.*

Where it is found that the search was illegal, the presumption under S. 6 of the Gambling Act does not arise. [P. 301, C. 2]

In such a case, the presence of the dice and the board and the pot by itself does not raise any presumption that the premises were being used as a common gaming house. [P. 301, C. 2]

(c) *Public Gambling Act* (3 *of* 186), *S.* 10—*Person illegally arrested cannot be examined.*

A person arrested during the raid could be rightly examined on oath only in case the premises were entered into under provisions of the Act. Where they were entered into contrary to the provisions of the Act the Magistrate is not authorised to call upon one of the persons arrested to take oath and give evidence in the case. [P. 301, C. 2]

A. Sanyal—for Applicant,

R. Malcomson—for the Crown.

Mukerji, J.—This is an application by one Nanhe Lal to obtain a reversal of his conviction under S. 4 of the Public Gambling Act (Act No III of 1867).

It appears that an Assistant Superintendent of Police, who is not authorised under S. 5 of the Public Gambling Act to search a place without a warrant, raided certain premises and arrested certain people in it, as to whom it is said that they were gambling in the house. Nanhe Lal was convicted by the Magistrate who heard the case under S. 3 and under S. 4 of the Gambling Act. The learned Sessions Judge on appeal set aside his conviction under S. 3 on the ground that it had not been proved that Nanhe had taken part in organising the gaming,

In this Court it is contended that the only evidence on which it has been found that the place was a public gaming place consists of the statement of one Bulaqi and the fact that certain dice and other instruments of gaming were found at the place. It is urged that the circumstances and the evidence relied upon are both inadmissible in evidence. It having been found that the search was illegal, the presumption under S. 6 of tne Gambling Act does not arise. It follows, therefore, that the presence of dice and the board and the pot by itself does not raise any presumption that the premises were being used as a common gaming house. As to the evidence of Bulaqi it appears that he was one of the persons arrested during the raid. He could be rightly examined on oath, as had been done, only in case the premises were entered into under the provisions of the Act (*vide* S. 10 of the Act). As it has happened, the premises were not entered into under the provisions of Act III of 1867. They were entered into contrary to the provisions of the Act, and, therefore, the Magistrate was not authorised to call upon one of the persons arrested to take oath and give evidence in the case. Thus the presumption and the direct evidence both go. The result is that the conviction of Nanhe Lal cannot be upheld.

I allow the application, set aside the conviction of Nanne Lal under S. 4 of the Gambling Act and order that the fine, if paid, be refunded.

Application accepted.

1925 ALLAHABAD 301(2)

MUKERJI, J,

Tufail Ahmad and others—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 502 of 1924, Decided on 25th September, 1924. Ref. made by Sub-J., Meerut.

(a) *Criminal Trial—Pleader—Private prosecution—Parties may engage one to represent their case.*

In a criminal case started at the instance of private persons the persons may engage a counsel to represent their view of the case where there is no representation on behalf of the Crown

(*b*) *Criminal P. C., S. 239—Injury caused by firing fireworks in public road—Persons causing injury cannot be tried together.*

A festival was being celebrated along a public road. An agreement had been previously arrived at amongst certain members of the community to the effect that the firing of fire-works should be stopped till the procession of *Dulendi* passed off but the accused along with some others fired off fireworks at random thereby causing injury to passers by. They were all tried together and convicted.

Held; that the joint trial was illegal. [P.303,C.1]

Syed Mnhammad Husain—for Applicants.

G. P. Boys—for Opposite Party.

Mukerji, J.—This is a reference by the learned Sessions Judge of Meerut, recommending that the conviction of seven persons, Tufail Ahmad and others, may be set aside and the fine inflicted upon them may be remitted, on the ground of misjoinder of parties in the trial.

It appears that at Ghaziabad the two festivals of *Shabbarat* and *Dulendi* fell on the same day and the same evening. A sort of arrangement was agreed upon, to the effect that the firing of fire-works should be stopped till the procession of *Dulendi* passed off. It appears, however, that this arrangement was not adhered to, and some people, fired off fire-works, and thereby caused more or less damage and injury to the person and property of the public. On a complaint being made by one Babu Har Saran Das and others, a report was called for, and, in the result the learned District Magistrate tried the case against thirteen persons, some of whom were acquitted by him He convicted ten persons of an offence under S. 286 of the Indian Penal Code, seven of whom are before this Court. The applicants went to the Court of the learned Sessions Judge and the plea was taken that the trial was vitiated by the fact that different people committing the offence were tried together. The learned Sessions Judge having decided to send up the case to this Court for the setting aside of the conviction, called upon the District Magistrate to submit an explanation, if any. The District Magistrate, on reconsideration, accepted the view taken by the learned Sessions Judge and expressed the opinion that he was wrong in having tried the case summarily. He suggested, however, that the case might be sent back for retrial, so that all the convicted persons might be sent up for trial to the Court of session on charges of rioting and arson.

In support of the conviction Mr. Boys appeared. An exception was taken to his appearance, on the ground that as this was a criminal case and as there was no appearance on behalf of the Crown, Mr. Boys had no right to appear.

As I have already stated, the case appears to have been started at the instance of some private persons who said that they had suffered an injury. There seems therefore, to be no reason why those persons might not engage a counsel to represent their view of the case. It will be noticed that the learned Sessions Judge and the learned District Magistrate are not agreed entirely, although both are agreed that the conviction should be quashed. The learned District Magistrate was clearly of opinion that the convicted persons should be retried and for more severe offences than they have been convicted of. In these circumstances, I think Mr. Boys should be heard by this Court, and I have heard him accordingly.

Coming to the merits of the case, the sole question is whether the trial can be said to be regular having regard to the provisions contained in clauses (*a*) and (*d*) of S. 239 of the Code of Criminal Procedure. The learned Magistrate's judgment does not show that there was any common intent of the persons charged and convicted for the commission of the offence under S. 286 of the Indian Penal Code. The finding seems to be that the convicted persons, and other persons, interested in the enjoyment of the festival of *Shabbarat*, were already there, and these persons, and others, did not accept the arrangement made by others and threw squibs and other fire-works at random and on the passers-by. In the circumstances, each individual person must be taken to have committed an offence for himself and not on behalf of others. It is true that the learned District Magistrate says in his judgment, as regards some of the convicted persons, that they were identified with the mob that committed this offence. But this statement of fact does not amount to a finding that there was a common object and every party who joined the mob with that object was guilty.

Coming to the provisions of S. 239 of the Criminal Procedure Code, it appears to me that neither clause (*a*) nor clause (*d*)

is applicable to the circumstances of this case. It cannot be said that the seven persons committed the same offence in the course of the same transaction. The offences committed by them were different although similar. Coming to clause (*d*), there can be no doubt that different offences were committed , but it cannot be said that they were committed in the course of the same transaction. The expression 'same transaction' would imply oneness of purpose, which is wanting here. If, in the course of some quarrel, arising accidentally, among persons, who have collected to witness a festival, there happens to be a fight, and if some people inflict injury on others, without any common object, they would be committing different offences of hurt. But if they do not act with any common intention, it cannot be said that they have caused hurt in the course of the 'same transaction', although all the persons committing the offences are there at one and the same place and at the same time. I, therefore, agree with the learned Sessions Judge and the learned District Magistrate that the trial is contrary to the provisions of S. 239 of the Code of Criminal Procedure. It has not been contended before me that S. 537 of the Code of Criminal Procedure cures the irregularity or illegality in the trial. It is true that the objection should have been taken at the trial, and it is possible that it was not taken intentionaly. But the fact remains that, if several people are tried together for committing different offences, all committed on their own account, justice cannot be assured.

The reference, therefore, must be accepted.

Now the question is whether I should order a retrial. The smallness of the sentence inflicted by the learned Magistrate himself shows that he never took a serious view of the matter. But he was surely of the opinion that some sentence was necessary in order that the people might behave better in future. The convicted persons have, however, been sufficiently punished in pocket by the proceedings, and I do not think a retrial is necessary in the ends of justice.

I set aside the convictions and sentences, and order that the fines, if paid be refunded. There will be no retrial.

Convictions set aside.

1925 ALLAHABAD 303

SULAIMAN, J.

Chittar Singh

v.

Emperor

Criminal App. No. 502 of 1924, Decided on 19th September 1924, from an order of the S. J., Farrukhabad.

Criminal P. C., S. 154 — First information — Statement of witness during investigation is not one —First information report is useful for contradiction or corroboration only.

A statement made by a witness during investigation after the police officer has actually arrived on the scene and himself seen what has happened, is not first information. The first information report is not a substantive piece of evidence ; it can be used merely by way of corroboration or as a contradiction and not any further. [P. 304, C. 2]

Sankaran Saran—for the Crown.

Facts.—Kindar Singh, who was an old man of seventy years of age, was murderously attacked early on the morning of the 3rd of February 1924, in his cattle-shed in the village Birra Nagla. He received several serious injuries on the head but fortunately recovered. The accused Chittar Singh was the own brother of Kindar Singh who had another brother named Sundar Singh. The three brothers were separate from each other and occupied separate houses. Kindar Singh had two daughters but no son; and the accused had three sons.

The case for the prosecution was that the accused was in debt and that he was angry with Kindar Singh because the latter had refused to bequeath his zemindari to the sons of the accused. The prosecution evidence was that the accused was seen striking Kindar Singh by two young boys, Ram Singh and Havildar, who had gone to Bachan, son of the accused, early in the morning to call him to take his cock for fighting with the cock of Munshi Singh. The two boys ran away to Dhanpal Singh, father of the boy Ram Singh, who happened to be sitting on the chaupal of Munshi Singh and where two constables. Ram Datt and Bisal, were also sitting. They gave information of the murderous attack. The constables sent Mithu, chaukidar to inform the Sub-Inspector who was in a neighbouring village. The constables accompanied by Dhanpal Singh went to Birra Nagla, where many other people were also gathered. They saw Kindar Singh lying seriously wounded. Bachan Singh, the accused's son, was said to have given them all the facts and told them that he had locked up his

father. At the request of the constables he brought out the accused from inside the house and also gave up a chopper stained with blood. The constables arrested Chittar Singh and kept him bound. About half an hour after this, Gobardhan Sub-Inspector arrived. He examined Kindar Singh who could not then speak and went inside the cattle-shed and saw blood lying on the earth. He found the accused under arrest and examined the chopper. He took possession of the blood-stained *kurta* and *dhoti* of the accused. He prepared a recovery note and got it signed by witnesses. He also took possession of other articles which had blood stains on them. He took also down the statement of Musammat Mohan Kuar, the wife of Kindar Singh, on plain paper as he had no forms with him. He took her thumb-impression on it and got some witnesses to attest it. He treated the statement of Musammat Mohan Kuar as the first information report.

Sulaiman, J.—[His Lordship after discussing facts and evidence, proceeded :—]

The first piece of evidence which requires consideration is the so-called first information report. There are two fatal objections to its admissibility. In the first place, it was by no means a first information report. Ram Datt and Bisal constables had received information from Ram Singh and Havildar and had deputed Mithu chaukidar to inform the Sub-Inspector. The Sub-Inspector who was the officer-in-charge of the police station received the first information from Mithu chaukidar even though that information was a second-hand one. As the offence complained of was a cognizable one, the officer should have treated that information as the first information S. 154 of the Code of Criminal Procedure clearly contemplates the first information received to be recorded, and not a statement made by a witness during investigation after the Sub Inspector has actually arrived on the scene and himself seen what has happened. In this connection I may refer to the case of *King-Emperor* v. *Daulat Kunjra*.

In the next place, it seems to me that even if the statement made by Musammat Mohan Kuar be treated as the first information report, such a report by itself is no evidence of the existence of the facts which it mentions. Technically speaking it may be conceded that a first information report taken down by a police officer amounts to an entry in an official record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty and in the performance of a duty especially enjoined by law, under which such record is kept, and therefore falls within the scope of section 35. But that would simply make it a relevant fact ; and all that it would prove would be that Musammat Mohan Kuar made a statement at that early date, implicating the accused and that therefore the present mention of his name is not an afterthought. But the first information report is not a substantive piece of evidence ; it can be used merely by way of corroboration or as a contradiction and not any further. Had Musammat Mohan Kuar made a similar statement on oath in Court, the report made by her previously would have been used in evidence to corroborate her. Or if she had made any contradictory statement, the defence might have used the report to contradict her. But when Musammat Mohan Kuar has altogether denied that she made any such report and denied that it was the accused who struck Kindar Singh, any previous statement made by her cannot be admitted in evidence at all. Ss. 157 and 158 of the Evidence Act would be altogether inapplicable. This was the view clearly expressed in the case of *Queen-Empress* v. *Ramsukh* (2) where it was held that a report of the commission of an offence made at a *thana* or even the deposition of a witness previously made would be admissible for the purpose of corroborating him or of throwing doubt on his statement in Court, but would be inadmissible for the purpose of proving that the facts stated in it are correct. The same view has been expressed by the Calcutta High Court. *Vide* the case of *Asfar Sheikh* v. *King-Emperor* (3) and *Autar Singh* v. *King-Emperor* (4).

The so-called first information report must, therefore, be altogether rejected.

[His Lordship further discussed the evidence and finally set aside the conviction and sentence passed on the accused.]

Appeal allowed.

(1) [1902] 6 C.W.N. 921.

(2) [1897] A.W.N. 47.

(3) [1910] 15 C.W.N. 198=8 I.C. 52=11 Cr. L. J. 557.

(4) [1913] 17 C.W.N. 1213=21 I.C. 882=14 Cr. L.J. 642,

1925 ALLAHABAD 305

SULAIMAN, J.

Dulli and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 553 of 1924, Decided on 6th August 1924, from an order of the Addl. S. J., Saharanpur,. D/- 15th May 1924.

(a) *Penal Code, S. 397—Conviction merely under S. 397 is bad—Section does not deal with substantial offence.*

S. 397 of the Indian Penal Code does not contain any substantive offence, but merely prescribes the minimum punishment which can be passed if robbery or dacoity is attended with certain circumstances mentioned therein. Therefore, a conviction merely under S. 397 has no meaning. The conviction in the case of a dacoity should be under S. 395 read with S. 397 of the Penal Code. [P 305 C 1]

(b) *Criminal P. C., S. 35 (1)—Sentences in different trials cannot be ordered to run concurrently.*

Court can order two or more sentences to run concurrently only when they are passed in the same trial. [P 306 C 2]

The Government Pleader—for the Crown.

Judgment.—This is an appeal filed by four appellants. The first three have been convicted under S. 397 of the Indian Penal Code and sentenced to seven years rigorous imprisonment each, and the fourth under Ss. 397 and 75 of the Indian Penal Code and sentenced to eight years rigorous imprisonment. It has also been ordered that the sentences of the first two appellants should run concurrently with previous sentences passed on them in other dacoity cases.

Quite irrespective of the question of fact involved, the order on the face of it is defective in several particulars. In the first place, S. 397 of the Indian Penal Code does not contain any substantive offence, but merely prescribes the minimum punishment which can be passed if robbery or dacoity is attended with certain circumstances mentioned therein. It follows that a conviction merely under S. 397 has no meaning. The conviction in the case of a dacoity should be under S. 395 read with S. 397 of the Indian Penal Code.

The second defect in the judgment is that it nowhere shows that the appellants either used any deadly weapon or caused grievous hurt to any person, or attempted to cause death or grievous hurt to any person at the time when the alleged dacoity was committed. What the judgment merely shows is that some of the dacoits had a pistol, a sword and big knives and that a pistol was actually fired. It does not however show that either of the appellants himself used any such deadly weapon. In order to satisfy myself whether the evidence establishes this fact or not, I have read the entire prosecution evidence and I find that there is no satisfactory evidence that either of these appellants did any of the three acts mentioned in S. 397. Their convictions under S. 395 read with the S. 397 cannot be justified.

Before S. 397 of the Indian Penal Code can be made applicable it is necessary that each of the accused is proved to have been the offender doing the acts mentioned therein. When S. 397 does not refer to any substantive offence S. 34 of the Indian Penal Code would be inapplicable. For purposes of S. 397 all the persons participating in the dacoity would not be held responsible for the acts of the others. It is true that in the case of *Queen Empress* v. *Mahabir Tewari* (1) Sir Arthur Strachey, C. J. did hold that "Any person taking part in the dacoity though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of S. 34 of the Code". But this case was dissented from by Knox, A. C. J., and Banerji, J., in the case of *Queen Empress* v. *Senta* (2), where it was laid down that S 397 applies only to those persons taking part in a dacoity who themselves use deadly weapons or themselves cause grievous hurt or attempt to cause death or grievous hurt, and that it does not apply to such persons taking part in a dacoity who may be liable for substantive offences committed by some of the parties only in virtue of S. 34 of the Code. The same view was followed by Aikman, J., in the case of *King-Emperor* v. *Nageshwar* (3).

On the facts of this case therefore it is impossible to uphold the convictions under S. 397 even if read with S. 395 of the Indian Penal Code.

Another mistake committed by the learned Additional Sessions Judge is in his ordering that the sentences of the first two accused should run concurrently with previous sentences passed on them in other dacoities. Under S. 35 (1) Criminal Procedure Code a Criminal Court has

(1) [1899] 21 All. 263=(1899) A.W.N. 76.
(2) [1899] 26 All. 404 (N.)=(1899) A.W.N. 180.
(3) [1906] 28 All. 404=3 Cr.L.J. 322=(1906) A.W.N. 61.

power to direct that punishment should run concurrently, but this is only when the accused is convicted at one trial of two or more distinct offences. The court has no power to order sentences to run concurrently with the sentences passed in other trials. This was the view expressed by Tudball, J., in the case of *Maqbal Husain* v. *King Emperor* (4) and in that view I fully concur.

Coming to the merits of the appeal I am fully satisfied that the charge of dacoity has been brought home to all the four appellants. Latif admitted his guilt and pointed out some 18 utensils buried in a heap which are proved to be part of the stolen properties. The other three appellants have been identified by a number of witnesses and there is absolutely no reason to doubt the genuineness of the identification proceedings. Dulli jumped from the roof of his house and attempted to run away as soon as he saw the Sub-Inspector but was caught in the market. Zafar and Latif live in a joint house and a stolen article was recovered from that house. Another stolen property was recovered from the house of Aijaz.

As I am agreeing with the learned Additional Sessions Judge on the question of the complexity of the appellants in this dacoity it is not necessary for me to discuss the evidence in greater detail. The evidence discloses that it was a daring dacoity. The dacoits were about 12 or 13 in number. They seized and beat Durga. They were also armed with deadly weapons—swords and big knives besides lathis—and a pistol was actually fired in order to frighten the inmates. The dacoits made light by burning straw and by lighting a small lamp and the loot lasted for about an hour and a half. They decamped with properties like utensils, clothes or cash and also ornaments taken off from the persons of females.

I am therefore satisfied that both the accused were guilty of the offence of dacoity within the meaning of S. 395 of the Indian Penal Code. Sentences of seven years passed by the Court below are by no mean severe.

It is of course open to me to take into consideration the sentences passed on Dulli and Aijaz in other trials and impose a lesser sentence in this case instead of ordering that the sentences should run concurrently. I however see absolutely no ground why I should pass a lesser sentence in view of the fact that these two accused have been found guilty of committing other dacoities and have been previously sentenced particularly when those dacoities were quite distinct and independent. I am unable to discover any ground for leniency. When persons commit different dacoities in different villages they are liable to be punished for all those dacoities separately. Latif had a previous conviction of one year under S. 457 of the Indian Penal Code.

I accordingly find Dulli, Aijaz Ahmad and Zafar guilty of the offence of dacoity under S. 395 of the Indian Penal Code and convict them of that offence and sentence them to seven years' rigorous imprisonment each. I find Latif guilty under S. 395 read with S. 75 of the Indian Penal Code and sentence him to eight years' rigorous imprisonment. Their convictions under S. 397 are set aside. The order directing that the sentences passed on Dulli and Aijaz should run concurrently with the previous sentences passed on them is also set aside. In other respects their appeals are dismissed.

Appeal dismissed.

(4) [1913] 11 A.L.J. 263=19 I.C. 336=14 Cr. L. J. 240.

1925 ALLAHABAD 306

MUKERJI, J.

Ameraj Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev. No. 529 of 1924, Decided on 2nd December, 1924, from an order of the S. J., Azamgarh.

Criminal P. C. (1923) *S.* 195—*Sanction granted before the new Code came in force—Prosecution after its coming in force in invalid.*

A prosecution for perjury started after the amended Code came into force, on the strength of sanction granted before its so coming in force is illegal. [P. 307, C. 1]

A. P. Bagchi—for Applicant.

R. Malcomson—for the Crown.

Mukerji, J.—This is an application in revision against the conviction of one Ameraj under S. 193 of the Indian Penal Code. He has been ordered to undergo 18 months' rigorous imprisonment and to pay a fine of Rs. 300.

Several points have been urged in revision, but none of them except one appears to carry any weight. The single point that does carry weight is this.

The applicant, on the 9th of November, 1922, made a statement on oath that a certain person bearing the name of Radhe Mohan was his father's brother. This statement is supposed to be false, nay, it has been established clearly that this statement was false. Sanction to prosecute the applicant for having made this false statement was obtained on the 1st of June, 1923. The proceedings, however, were not started against the applicant till the 31st of October, 1923. In the meantime, Act 18 of 1923 had come into force on the 1st of September, 1923. The change that was effected in S. 195 of the Criminal Procedure Code was this. The procedure of grant of sanction to private parties to prosecute was abrogated. Instead, it was enacted that no Court should take cognizance of a certain class of offences except on the complaint in writing of a public servant. It is contended, therefore, that a prosecution which was launched on the 31st of October, 1923 was launched in the teeth of the provision of S. 195, as it came into force on the 1st of September, 1923 and that, therefore, the learned Magistrate had no jurisdiction to entertain the prosecution.

It appears to me that this contention is perfectly correct and legitimate. The previous law was that the Courts were debarred from taking cognizance of a certain class of offences except when a public servant or a Court concerned themselves moved in the matter or permitted certain private parties to move the Court to take up the matter. The old law further provided that a private person to whom sanction to prosecute was granted could file a complaint within six months of the grant of the sanction. The new law not only did away with the rule of granting permission to private parties to prosecute but also did not allow the old procedure to survive in those cases in which sanction had already been granted before coming into force of the amended Code. The result was that the law, as it was enacted by S. 47 of Act 18 of 1923, applied with full force. By that law, as I have already stated, no Court is allowed to take cognizance of any offence except on the complaint of a public servant or a Court. No such complaint in writing was produced before the learned Magistrate to enable him to take cognizance of the case. The result is that the Court took cognizance of the case without any jurisdiction and the conviction cannot stand.

It is worth mentioning that under the unamended S. 537, want of a sanction or any irregularity in the matter of a sanction or in a proceeding under S. 476 of the Criminal Procedure Code did not stand in the way of a conviction if it was otherwise sound. This provision was contained in clause (*b*) of S. 537 before it was amended. This clause (*b*) does not any longer find its place in the new section. The inference is that want of a regular complaint by a public servant or a Court must be fatal to a prosecution.

I accept the application in revision, although with regret, and set aside the conviction of the applicant under S. 193 of the Indian Penal Code. The sentence is also set aside. The fine, if paid, will be refunded. The applicant will be released forthwith.

Application allowed.

1925 ALLAHABAD 307

MUKERJI. J.

Azimuddin—Applicant.

v

King-Emperor—Opposite Party.

Criminal Ref. No. 553 of 1924 Decided on 20th October 1924, from the S. J Allahabad.

U.P. Excise Act, (1910) *Ss.* 64 *and* 71—*Accused's servant selling toddy after prescribed hours not at shop but at palm-grove—Accused is not liable.*

Where the accused's servant was found selling toddy after the prescribed hours, not at the shop of the accused but in a palm-grove.

Held: that the object of the servant being allowed to stay in the grove was to watch the trees and the juice, and not to sell toddy, and that if servant took it into his head to keep some toddy for himself and to sell it after the prescribed hours, no amount of precaution on the part of the master could prevent this. [P 308, C 1]

Zahur Ahmad—for Applicant.

The Crown was not represented.

Mukerji, J.—Without discussing the law on the point at length, it seems to be clear that in this case there should have been no conviction of Azimuddin under S. 64 of the Excise Act (Local Act, 1910) read with S. 71 of the same Act.

Azimuddin's servant was found selling toddy after the prescribed hours, not at the shop of Azimuddin but in a palm-grove. The learned Sessions Judge, who has made the reference, presumes, and very correctly that the object of the servant being allowed to stay in the grove was to watch the trees and the juice, and not to sell toddy. If the servant took it into his head to keep some toddy for himself and to sell it after the prescribed hours, no amount of precaution on the part of the master could prevent this. The object of the enactment as contained in S. 71 of the Excise Act seems to have been this. Where, however, innocently, the holder of a license puts his servant in a position in which he would have an opportunity of contravening the law, the master is as much guilty as the servant. In this particular case it has not been stated what were the precautions which the master, Azimuddin could have or should have taken, in order to prevent his servant from selling toddy at his own hut.

Accepting the reference made by the learned Sessions Judge of Allahabad, I set aside the conviction of Azimuddin under S. 64 of the Excise Act of 1910, and also the sentence. The fine, if paid, will be refunded, Azimuddin is represented in this Court by learned counsel.

Reference accepted.

✱ 1925 ALLAHABAD 308

DANIELS, J.

Lalji and others—Applicants.

v

Emperor—Opposite Party.

Criminal Rev. No. 522 of 1924, Decided on 26th November 1924.

✱ *Penal Code, Ss. 224 and 225—Formation of Crowd at a distance—Police desisting from arresting through fear—No illegal obstruction caused.*

Where when a sub-inspector of police was about to arrest an accused, a crowd carrying lathis began to assemble and the Sub-Inspector considered their appearance so formidable that he desisted from his intention of arresting the accused.

Held: that the persons forming the crowd cannot be said to have caused illegal obstruction within the meaning of 224 or S. 225 nor was the person to be arrested guilty under S. 224.

[P 308 C 2]

Shiva Prasad Sinha and *Mustaq Ahmad*—for Applicants

R. Malcomson—for the Crown.

Daniels, J.—The applicant, Newaz Rai, has been convicted under Ss. 147 and 224 of the Indian Penal Code and the other applicants under Ss. 147 and 225 of the Indian Penal Code. On the findings of the learned Sessions Judge whichhave not been impugned before me on either side, it is difficult to see how the conviction can be sustained against any of the accused except Newaz Rai. He has been sentenced to fine only. The facts alleged by the prosecution are that the Sub-Inspector came to the village to arrest Newaz Rai. He did arrest him and took him to the Mukhia's house to be handcuffed The arrest was a lawful arrest. Newaz Rai, however, struggled, got free and ran away. His reason for doing so seems to have been that he was performing funeral ceremonies of his deceased father and did not want to be arrested till the ceremonies were over. He came back of himself to the Sub-Inspector next day and asked that the arrest might be postponed. After accused got away, the Sub-Inspector was thinking of re-arresting him when some fifty or sixty persons carrying *lathis* and including the applicants assembled. It is said in the evidence that they pushed the police officers but this has been disbelieved by the learned Sessions Judge. All that really happened according to the finding of the learned Judge was that a crowd carrying *lathis* began to assemble and the Sub-Inspector considered their appearance so formidable that he desisted from his intention of re-arresting the accused. It is difficult to say that this amounts to illegal obstruction within the meaning of S. 224 or S. 225. According to the finding of the Court below no force was used and therefore, the offence could not be one of rioting. If the intention of the villagers in assembling was to prevent the re-arrest of Newaz Rai, they would no doubt constitute an unlawful assembly and might have been convicted under S. 143 of the Indian Penal Code but seeing how much exaggeration has been introduced into the evidence, it seems at least possible that they merely assembled, as they naturally would, to see what was going on and without any deliberate intention of preventing the police officers from doing their duty.

I dismiss the application of Newaz Rai but allow the applications of the other applicants and set aside their convictions and sentences. In the case of those applicants whose applications have been allowed, the fines, if paid, will be refunded.

Revision allowed in part.

1925 ALLAHABAD 309

MUKERJI, J.

Nathu Mal—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev. Nos. 616 to 627 of 1924, Decided on 7th January 1925, from an order of the S. J., Agra.

Public Gambling Act, (186) *S.* 3—*Chance of loss to booth-keeper extremely rare—Offence is complete.*

Where from the method of business carried on, the chance of loss by a booth-keeper is extremely rare and almost nil, the offence of keeping common gaming house is complete. 1924 All. 338 Foll. [P. 309, C. 2 ; P. 310, C. 1]

A. P. Dube—for Applicant.

Sankar Saran—for Opposite Party.

Judgment.—These are twelve applications in revision against the applicants' conviction under S. 3 of the Public Gambling Act of 1867.

The whole question to be determined in these petitions is whether the applicants were keeping what may be styled as a 'common gaming house'.

The facts found are these. There is an enclosure or 'barah' belonging to a firm Piru Mal Radha Raman. It was let out to three persons, Gopal Das, Mul Chand and Nathu Mal who are among the applicants. They, in their turn, sub-let the premises to other people so that there were 31 compartments in all. In all these 31 compartments gambling was going on when the police made a raid. The following method was pursued in this particular gambling. The person occupying a booth had some receipt books and sheets of papers. These were undoubtedly instruments of gambling in these cases. A customer came and he said that he would bet so much against so much, if a particular figure formed one of the two last digits of the average price at which opium was sold by auction in Calcutta. The gambling was held on the day the auction sale was held in Calcutta and on this particular occasion the figures were 1 and 4. A telegram conveying the information was received from Calcutta, at the time the police were on the premises. Now on a sheet of paper would be put down the figures 1 to 10. On the same sheet of paper would again be put down the figures 1 to 100. A customer would bet, say Re. 1, against the figure 5. The booth-keeper would agree to pay him Rs. 10 if the figure 5 formed the last digit of the average sale price of opium. Similarly if a customer bet on the figure 15, something like this would be arranged. The customer would bet Rs. 5 and the booth-keeper would agree to pay Rs. 150, if the last two digits of the average sale price of opium came to be 15. A receipt would be granted to the customer and at once a note would be made on the sheet of paper containing all the numbers against the figure 15. Such sheets are before this Court and show that against some of the figures on which a betting took place the amounts which the booth-keeper had agreed to pay were noted. It has been found on evidence that it would be open to the booth-keeper to stop further betting on any particular figure. For example, if, on the figures 1 and 4 which actually were the last two digits of the sale price of opium, the booth-keeper found that he had too many bets against him, he would be at liberty to stop further betting on those figures.

It will be noticed that the booth-keeper stood the chance of losing only when the betting became too heavy on one digit or on two digits containing the former digit. Thus out of altogether 110 figures the booth-keeper would lose, in this particular case, on the figure 4 and on the figure 14. He would gain on all the bettings that took place on the remaining 108 figures. Of course there would be no betting at all on some of the figures. Further, it has been found that the booth-keeper had an opportunity of minimising his probable loss by transferring some of his responsibility to other booth-keepers just as in the case of a heavy insurance on a particular life one insurance company re-assures the life with another company. In such cases if there is a loss the loss is shared by one or more booth-keepers.

On these facts, it is clear that a booth-keeper has always before him the sheet of paper on which all the bettings are noted. Even without much intelligence, he would be able to see whether in the case of a particular figure or figures coming out as the last two digits of opium sale he has a chance of losing or gaining. If he finds that the sum-total of the bettings on other figures is more than the betting on any two particular figures, he need have no apprehension of losing. Under the circumstances it must be taken as a fact that from the method of business carried on,

the chance of loss by a booth-keeper is extremely rare and almost nil.

Now the question is whether in the circumstances of this case the applicants may rightly be held as maintaining a "common gaming house". The leading case on the point, so far as this Court is concerned, is still the case of *Lachchi Ram* v. *Emperor* (1). In this case it was laid down by Stuart, J. with the concurrence of Gokul Prasad, J. that 'it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming or, at the outside, that he manipulates the conditions in such a manner that he cannot possibly lose', in order that a man may be convicted of keeping a common gaming house. This case was considered by a Full Bench of this Court as recently as in January last year and it was held that in the circumstances of that case the applicant was rightly convicted of the offence of keeping a common gaming house. In that case, *Atma Ram* v. *King-Emperor* (2), no commission was charged by Atma Ram. But he transacted his business so cleverly that although he might lose on a certain figure, he was sure to gain on most of the other figures and the ultimate result would in all probability be a gain. Their Lordships, who composed the Full Bench, did not express any dissent from *Lachchi Ram's* case, but thought that the case before them did come within the purview of that case. I am of opinion that the present cases came within the ruling of *Atma Ram* v. *King-Emperor* (2), and the applicants are all guilty of keeping a common gaming house.

It has been pointed out to me that the Bombay High Court in *Emperor* v. *Dattatraya Shankar Paranjpe* (3) dissented from *Lachchi Ram's* (1) case. It is not necessary for me to consider whether the Bombay case was rightly decided or not; because I find that the authorities in this Court are not in conflict and the latest Full Bench case does govern the cases before me.

The result is that all these applications fail and they are hereby rejected.

Applications rejected.

(1) 1922 All. 61=20 A.L.J. 218=23 Cr. L.J. 196.
(2) 1924 All. 338=46 All. 447=22 A.L.J. 249 =5 L.R.A. Cr. 33.
(3) 1924 Bom. 184=47 Bom. 960=25 Bom. L.R. 1089=25 Cr. L.J. 531.

1925 ALLAHABAD 310

MUKERJI, J.

Jhau Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 637 of 1924, Decided on 3rd December 1924, reference made by the Addl. S. J., Cawnpore.

Criminal P. C., S. 133—Initial order if vague may be modified.

S. 133 clearly contemplates that in suitable cases the order initially made may be modified and the modified order may be allowed to stand. [P 310 C 1]

S. Saran—for Applicant.

A. P. Dube—for Opposite Party.

Mukerji, J.—This is a reference by the learned Sessions Judge of Cawnpore recommending that a certain order of 6th September 1924, passed by a Magistrate of the first class, making an order, under S. 133 of the Criminal Procedure Code, absolute, may be set aside.

It appears that one Bachchu Lal complained that the opposite party, Jhau Lal, had constructed a platform on a public thoroughfare and had thereby obstructed it. The learned Magistrate issued a notice and on Jhau Lal appearing to show cause, took evidence and took into consideration the report made by a certain Deputy Magistrate and ordered that such portion of the platform as might be obstructing the highway should be removed. The learned Sessions Judge is of opinion that this order cannot stand, first because it is too vague and, secondly, because the learned Magistrate placed reliance mainly on the report of the Deputy Magistrate, Mr. Smart, who was not examined. I have heard the learned counsel for the parties and have gone through the record. There can be no doubt that the order of the learned Magistrate was vague. He ought to have definitely pointed out and marked off how much of the platform should be removed. I note that the Magistrate did not proceed only on the report of Mr. Smart, but he had some evidence to guide him.

As it appeared to me that the complaint as to obstruction of a public thoroughfare was a matter that should be enquired into, I asked the learned counsel for the opposite party, Jhau Lal, to state if he had any and what objection against the case being re-heard by a competent Magistrate

other than the Magistrate who had made the rule absolute. The learned counsel argued relying on the case of *Rai Mohan* v. *Emperor* (1) and *Kali Mohan Kar* v. *Nakari Chandra Das* (2), that the initial order was vague and that therefore there should be no further enquiry into the matter.

Those rulings, in my opinion, have no application. The initial order in this case was perfectly good and called upon Jhau Lal to remove the entire platform. S. 133 of the Criminal Procedure Code does clearly contemplate that in suitable cases the order initially made may be modified and the modified order may be allowed to stand. In the circumstances it would not be desirable to set aside the order of the learned Magistrate without ordering a fresh enquiry.

I set aside the order of Mr. Browne dated the 6th of September 1924, and send back the case to the learned District Magistrate with the direction that either he himself will take it up or transfer it to some Magistrate, other than Mr. Browne, competent to hear it. If Mr. Smart's report is to be taken into consideration, he should be examined as a witness. The parties should be allowed to adduce any further evidence that they may be advised.

Order set aside.

(1) [1916] 44 Cal. 61=35 I.C. 969=20 C.W.N. 1171=17 Cr.L.J. 409.
(2) [1909] 11 C.L.J. 114=5 I.C. 722.

1925 ALLAHABAD 311 (1)

PIGGOTT, J.

Raghunath Upadia and others—Petisioners.

v.

Emperor—Opposite Party,

Criminal Ref. No. 773 of 1924, Decided on 7th January, 1925, from the S. J., Ghazipur.

Criminal P. C. (1923) *S.* 133—*Closing of public drain—Accused denying drain to be public—S.* 139-*A disregarded—Trial is vitiated.*

Where the dispute was as to the closing of an old drain, and the accused definitely asserted that the drain was not a public one but the Magistrate instead of proceeding under S. 139 (A) at once took evidence under S. 137 and where the Magistrate also did not find in clear words that the drain was a public one,

Held: that the trial was vitiated by wrong procedure.

The parties were not represented.

Facts.—In this case, an old drain was closed and a new drain was opened. The accused definitely asserted that the drain was not a public one. The Court instead of proceeding under S. 139 (A) of the new Criminal P. C. atonce took evidence under S. 137 of the Criminal Procedure Code from the complainant. The Court did not also find in clear words that the drain was a public one. The matter came to the High Court on a reference by the Sessions Judge who held that the trial was wrong in procedure.

Piggott, J.—I agree with the learned Sessions Judge. I set aside the Magistrate's order under S. 133 of the Code of Criminal Procedure. If the District Magistrate thinks that further proceedings ought to be taken in the matter, he is at liberty to take such proceedings himself, or to send the case to any Magistrate of the first class subordinate to him, other than the Magistrate who passed the order now set aside. The proceedings may be taken up at the stage at which the present applicant filed their written statement of the 16th August, 1924.

Order set aside.

1925 ALLAHABAD 311 (2)

MUKERJI, J.

Gokul Prasad and another—Applicants.

v.

Debi Prasad—Opposite Party.

Criminal Ref. No. 612 of 1924, Decided on 11th November, 1924, reference by Second Add. S. J., Cawnpore.

★(a) *Criminal P C, S.* 435—*Charge framed where none necessary—Interference is proper—Criminal* P. C. (1923) *S.* 561 *A.*

If a charge is framed where none should have been framed the proceeding of the Magistrate becomes irregular and the High Court has power to interfere, under S. 435 as well as under S. 561A to prevent abuse of the process of any Court or as necessary to secure the ends of justice.

[P. 312, C. 1, 2.]

(b) *Penal Code, S.* 379—*Intention to cause wrongful loss absent—Charge under S.* 379 *not framed—Charge under S.* 427 *is not sustainable—Penal Code, S.* 427.

Where a Magistrate came to the conclusion that no charge could be framed under S. 379, there being no intention of causing wrongful gain to one person or wrongful loss to another person.

Held: that a charge under S. 427 cannot be sustained

[P. 313, C. 1.]

G. P. Boys—for Applicants.

S. B. Johri—for Opposite Party.

Mukerji, J.—This is a reference by the learned Additional Sessions Judge of Cawnpore, sitting at Fatehpur, recommending that a certain order dated the 10th of August, 1924 by which a Magistrate framed a charge under S. 437 of the Indian Penal Code against Gokul Prasad and another may be set aside.

As already indicated, the case is still pending in the Court of the Magistrate and a preliminary objection has been taken as to the jurisdiction of this Court to interfere at this stage. The learned Sessions Judge anticipated the objection and has referred to two authorities, *viz:* "In *Re: S. Kuppuswami Aiyar* (1) and *Hari Charan Gorait* v. *Girish Chandra Sadhukhan* (2), as establishing the proposition that the High Court may interfere where its interference is necessary at any stage of the proceedings before a Magistrate. I have examined these authorities and I have also examined the Criminal Procedure Code itself. Mr. Boys has also referred me to a case decided by Knox, J. and reported in the case of *Queen-Empress* v. *Jagan Singh* (3).

It appears to me that both under S. 435 of the Criminal Procedure Code and the newly added: S. 561 A of the Code, this Court has ample jurisdiction to interfere, provided the case be a suitable one for interference. The point being rather important, I will briefly state my reading of the Code. S. 435 of the Criminal Procedure Code enables the High Court to call for the record of any proceeding before any inferior criminal Court and to satisfy itself as to the "regularity of any proceeding". There can be no doubt that the framing of a charge was a proceeding. The question is, if an inferior Court framed a charge, where no charge should have been framed, can it be said that the error committed by it was not an 'irregularity' simply because the Court was authorised to frame a charge in hearing a case? The word 'irregularity' has the same meanings as the adjective 'regular' itself. The word 'regular' has got many meanings and one of these is "Having all the essential attributes, qualities or parts", "normal"; *vide* Murray's English Dictionary. There can be no doubt that if a charge is framed, where none should have been framed, it may be said without any violence to the language of the Code, that the proceeding of the Magistrate is 'irregular'. If the proceeding be irregular, it follows that the High Court has power to interfere. It seems quite clear to me that if the High Court has power to call for a record and to satisfy itself as to the regularity of any proceeding, it has also power to interfere, where interference is called for. This view has all along been taken by all the High Courts, so far as I am aware. This view is supported by the two cases quoted by the learned Sessions Judge. Coming to S. 561A, which has been newly added, it has been stated as the law that the High Court may make such orders as are necessary to prevent abuse of the process of any Court or as are necessary to secure the ends of justice. Now, if it be the case that a charge has been framed by a Magistrate where no charge should have been framed, to allow the trial to proceed would amount to allowing a mock trial to proceed, with the inevitable result that the trial would end in an acquittal. Even if the Magistrate convicts, the conviction coming before the High Court is bound to be quashed. If such be the case, there can be no doubt that the High Court would be entitled to interfere under S. 561 A of the Criminal Procedure Code.

There being no doubt as to the jurisdiction of the Court, let us examine the facts. The Magistrate by his order dated the 10th of August, 1924 came to the conclusion that no charge of theft could be established against the accused persons before him. It appears that one of the accused persons is a zamindar and he has ordered that good many trees out of a grove should be cut down. Good many trees have been cut according to the finding of the Magistrate in the course of no less than two months and in open day light. It has been found by the Magistrate and it has been clearly shown by the learned Judge that possession was with the zamindar who had ordered the trees to be cut. In the circumstances, the learned Magistrate came to the conclusion that he could not possibly frame a charge under S. 379 of the Indian Penal Code against the accused persons. He distinctly says that there was no 'dishonest' motive in the cutting of the trees. According to the definition in the Indian Penal Code, a thing is said to

(1) [1915] 39 Mad. 561—16 Cr. L. J. 477—28 M. L. J. 505—2 L. W. 463—17 M.L.T. 398—29 I. C. 109—(1915) M.W.N. 365.
(2) [1910] 38 Cal. 68=13 C. L. J. 43—7 I. C. 747—11 Cr. L. J. 525.
(3) [1892] A.W.N. 102.

be done dishonestly when it is done with the intention of causing wrongful gain to one person or wrongful loss to another person'. In spite of having come to this conclusion, the learned Magistrate is of opinion that the accused persons before him committed the offence of mischief. Now, mischief involves an intention of causing wrongful loss to some person. If according to the finding of the learned Magistrate there was no dishonest intention and therefore no intention to cause wrongful loss it is difficult to see how a charge under S. 427 may be sustained. In the circumstance, to allow the case to proceed would be to allow a mock trial to proceed, with no purpose.

I accept the reference of the learned Sessions Judge and order that the charge framed by the learned Magistrate on the 10th of August 1924 be quashed, that the entire proceedings before the learned Magistrate be quashed and the accused be discharged.

Reference accepted.

✱ 1925 ALLAHABAD 313 (1)

WALSH AND SULAIMAN, JJ.

Emperor—Appellant.

v.

Sital Prasad—Accused.

Criminal Appeal No. 930 of 1924, Decided on 18th December 1924, from an order of S. J. Saharanpur.

U. P. Excise Act (4 of 1910) S. 71—Sale of adulterated liquor by the son of licence holder—No proof of reasonable care by him—Conviction is proper.

Where a licence holder was convicted on the ground that his son, in his absence, sold adulterated liquor. [P 313 C 2]

Held: that the conviction was proper in absence of proof that he took all due and reasonable precaution to prevent the commisison of the offence.

Lalit Mohan Banerji—for the Crown.

C. Ross Alston—for Accused.

Walsh, J.—We must allow this appeal on the ground that the provisions of of S. 71 of the Excise Act, have been entirely ignored. The charge was one of adulteration under S. 64 for having committed a breach of one of the conditions of the license namely the condition that prohibits the sale of adulterated liquor. The charge was established by showing that the son had done it, and that the licensee was absent at the time. But the Magistrate convicted on the ground that the father was aware of the conduct of his son. The learned Sessions Judge has acquitted the licensee following the decision in the case of *Ram Das* v. *Emperor* (1) on the word "wilfully" used in S. 64. That case contains no reference to S. 71, and S. 71 places the burden upon the license-holder, for any offence wilfully committed by any person in his employ and acting on his behalf of establishing that he took all due and reasonable precaution to prevent the commission of the offence. Unless he establishes that, he is liable to conviction as though he had done it himself. No attempt of that kind was made by the defence, and, therefore, the ground upon which the learned Judge has allowed the appeal is not established and the appeal must be allowed and the order of the Magistrate restored.

There was a further charge with regard to selling in breach of his license by charging an excessive price. We think the Magistrate was right about this. The learned Judge does not appear to have said much about this. For the reasons given in the case of *King-Emperor* v. *Kishen Chand*, Government Appeal No. 929 of 1924 decided to-day, we think that the Magistrate was right in this case also. But in restoring his order we reduce the penalty for selling at an excessive price. We fine him Re. 1 and reduce the fine for breach of rule 6 to Rs. 149, the result being that he will pay Rs. 150 in all.

Appeal accepted.

(1) [1918] 40 All. 563=16 A. L. J. 474=19 Cr. L. J. 718=46 I. C. 302.

✱ 1925 ALLAHABAD 313 (2)

MUKERJI, J.

Ram Sewak—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 642 of 1924, Decided on 21st October, 1924, from an order of the Second Addl. S. J., Cawnpore.

✱ *Penal Code, Ss. 96 and 100—Accused first hitting—Then running away from attack with lathis—Accused striking in self defence—Death—Accused is justified.*

Where the accused had picked the quarrel and tried to hit another but ran for his safety from the subsequent attack with *lathis* and after running some distance, the accused found that he could not very well make his escape and turned round and hit a blow,

Held: that it must be held that he hit in self-defence. [P 314 C

Held: further, that an attack with *lathis* was likely to create reasonable fear of grievous hurt being caused to the accused and he would be justified in striking with a *lathi* in self-defence to the extent of causing grievous hurt or even death. [P 314 C 2]

N. C. Vaish—for Appellant.

Sankar Saran—for Opposite Party.

Facts.—The appellant Ram Sewak was convicted by the Additional Sessions Judge of Cawnpore, sitting at Fatehpur, of the offence under S. 304 of the Indian Penal Code, inasmuch as he caused the death of one Kalka Singh, and of the offence under S. 323 of the Indian Penal Code, on the ground that he caused hurt to Baij Nath.

The case for the prosecution was this. Baij Nath was purchasing some sugar at the shop of one Bhagwandin. Ram Sewak arrived and asked Baij Nath how it was that he had taken his own labourers (Ram Sewak's labourers) to do his (Baij Nath's) work while his (Ram Sewak's) work was suffering. Baij Nath replied that he had done the act already and proposed that the labourers should work for Ram Sewak on the following day. Ram Sewak was not satisfied with this reply and he tried to strike a blow with a lathi on Baij Nath. The lathi struck partially the roof under which Baij Nath was and it partially struck Baij Nath also. Kalka Singh, a relation of Baij Nath, arrived at this moment; and some helpers of Ram Sewak, namely Ram Raj and Gayadin, also arrived on the scene. The three last mentioned beat Kalka Singh and Baij Nath and Kalka Singh fell unconscious on the ground. Two days later Kalka Singh died.

Judgment. — [After stating facts as above the judgment proceeded:—] This story for the prosecution has not been believed by the learned Additional Sessions Judge, in the main portion of it. Gayadin was never sent up, and the learned Sessions Judge has acquitted Ramraj. The learned Judge has found that human blood was found at or near the platform of Gayadin, a relation of Ram Sewak, and he has believed the defence story in so far as it states that Kalka Singh received his injuries near the platform of Gayadin. To reconcile the fact that blood was found near the platform of Gayadin, and the alleged fact that a part of the tiled roof of Bhagwandin's shop was found damaged, the learned Judge came to the conclusion that the fight must have started at the shop of Bhagwandin and must have continued till the parties arrived at the platform of Gayadin. Indeed the Judge's finding is that Ram Sewak, the appellant, drew the quarrel upon himself by hitting, or trying to hit, Baij Nath, that he was thereupon attacked by Baij Nath and Kalka Singh, that Ram Sewak ran away for his safety to the house of Gayadin but, there instead of taking shelter in the house, he turned back and used his lathi against Baij Nath and Kalka Singh. It has been urged by the learned counsel, appearing for the appellant, that even if we accept his story, as found by the learned Sessions Judge, the appellant was striking in self-defence and he committed no offence. The learned Judge has got over this argument by stating that Ram Sewak drew the quarrel upon himself by trying to hit Baij Nath and that, therefore, he had no subsequent right of self-defence. I have already indicated that the learned Judge was of opinion that Ram Sewak's duty was to have taken shelter in the house of Gayadin.

Taking the findings of the learned Sessions Judge, I am not sure that his conclusion in law is correct. Assuming that Ram Sewak picked the quarrel and tried to hit Baij Nath, he ran for his safety from the subsequent attack made on him by Baij Nath and Kalka Singh. If, after running some distance, Ram Sewak found that he could not very well make his escape, and if he turned round and hit a blow, it must be said that he hit in self-defence. Ram Sewak might be punished for having struck the first blow at the shop of Bhagwandin. But Kalka Singh and Baij Nath Singh had no right to take the law into their own hands and chastise Ram Sewak by trying to hit him with lathis. As a matter of law, therefore, Ram Sewak would be, in my opinion, justified in turning back and defending himself against an attack with lathis. I would also mention that an attack with lathis was likely to create a reasonable fear of grievous hurt being caused to Ram Sewak and Ram Sewak would be justified in striking with a lathi in self-defence to the extent of causing grievous hurt, or even death, *vide* S. 100 of the Indian Penal Code.

[His Lordship then examined the evidence and concluded by setting aside the conviction].

Conviction set aside.

1925 ALLAHABAD 315

WALSH AND SULAIMAN, JJ.

Emperor—Appellant.

v.

Autar—Accused.

Criminal Appeal No. 814 of 1924, Decided on 20th November, 1924, from an order of the Add. S. J., Gorakhpur.

(a) Penal Code S. 94—Accused helping removal of dead body from his master's house—Master threatening to kill accused if help refused—Accused is guilty under S. 201 but is protected by S. 94.

The accused, an illiterate man, was called in by his masters, who had committed a murder in their house, to assist them in removing the corpse. He refused and they ran at him using language threatening to kill him. Thereupon he submitted and assisted them in removing the corpse from the house to an adjoining field.

Held that he was guilty under S. 201 but that he was protected by S. 94 I. P. C. [P. 316 C.1.]

(b) Criminal P. C. S. 417—Appeal by Government—Acquittal on the ground of giving benefit of doubt—Onus is heavy to succeed in appeal.

An appeal by Government must be considered on its merits just as any other appeal always must be. The onus is on the appellant and this onus is all the heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mindof the Judge. [P. 316, C. 2; P. 316 C. 1.]

(c) Penal Code S. 201—Removal of dead body from house to field—Offence committed—'Disappear' explained.

Removal of dead body from the house to a distant place does amount to causing an evidence of the commission of the offence to disappear. S. 201 cannot be confined to the destruction of the evidence of the murder itself. The words 'any evidence of the commission of that offence' clearly include any evidence of the commission by the offender of that offence. [P. 316, C. 2.]

Lalit Mohan Banerji—for the Crown.

Kamla Kanta Verma—for Accused

Walsh, J.—This is an appeal by Government from a judgment of the Additional Sessions Judge of Gorakhpur, who clearly had a very difficult case to deal with. Ganesh was undoubtedly murdered. Suspicions arose that he had been murdered at night on the premises, if not actually in the house, of his masters under circumstances which made the murder not very surprising. The investigation was highly unsatisfactory and another appeal is pending in regard to it which makes it undesirable to say anything more about it.

The present accused named Autar, a chamar and ploughman and quite illiterate, made a statement under section 164 of the Code of Criminal Procedure before a Deputy Magistrate, which has been treated as a confession. According to that statement his masters murdered this man inside the house by strangling him with a *lathi* under strong provocation. He himself was called in and was ordered to assist them in removing the corpse. He refused and they ran at him using language, which the Judge has interpreted as meaning, either that they were threatening to kill him, or that they were threatening to beat him,—the difference in the accused's mind at the moment probably not being very great. Thereupon he submitted and assisted them in removing the corpse from the house, to the deceased's own field where it was found the next morning by the widow. The learned Judge believed this statement or confession to be true. We are inclined to agree with him. We summoned the accused and put various questions to him with the view of seeing whether he was not prepared to confirm this statement which he has since obstinately and without any very convincing statement to support him denied altogether. His attitude rather tended to make one doubt his denial, but in the view we take of the case, it is not necessary that we should decide this question. The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing at any rate the true evidence about the locality in which the murder took place to disappear, and in most cases with the object of screening the occupier of the house, and on this point we agree with the view submitted to us by the Government Advocate. We doubt whether the section can be limited to the mere act of causing the body, for example in a case of death, to disappear, but rather whether it was not intended to apply to the disappearance of any sort of evidence leading to establish the truth about the commission of the offence, the removal of such particular piece of evidence being done with the intention of screening some particular person. Taking a broad view of this matter we need only say that an appeal by Government must be considered on its merits just as any other appeal always must be. The onus is on the appellant and this onus is all the

heavier if the judgment appealed from is one which approaches the consideration of the question from a correct point of view and gives the accused the benefit of a reasonable doubt which exists in the mind of the Judge. In this case we cannot say that the judgment does not correctly weigh the matter from the correct legal standpoint. The Judge was right in following the case of *Empress of India* v. *Kishna* (1) and also in saying that it had not been dissented from, at any rate, in Allahabad. On this point that case, it is true, consists really of mere dicta, but if these are to be taken as having decided that removal of the corpse from the place where it is originally found, to another place, is not within the section, we definitely hold that that is not the law. But on the question of the intention to screen the offender, the Judge has reasonably held that taking the confession as a whole and as the sole test of guilt, he entertains a real doubt whether the accused did not do what he did out of fear of instant death. The accused had just seen a fellow creature done to death quietly and expeditiously—according to his own statement—and his own death, unless he complied with his masters' order, was not unlikely to follow. We, therefore, hold that while what he did would have been an offence under S. 201 of the Indian Penal Code if he had acted without over-powering compulsion, he is entitled to the benefit of the doubt whether within the meaning of S. 94 of the Indian Penal Code he was not compelled by threats which reasonably caused his apprehension of instant death. The appeal must be dismissed

Sulaiman, J.—I should like to add that in order to see whether an offence under S. 201 of the Indian Penal Code has been committed it is necessary to find that (1) the accused knowing or having reason to believe that an offence has been committed, (2) causes any evidence of the commission of that offence to disappear, (3) with the intention of screening the offender from legal punishment.

Believing his confession there can be no doubt that he was fully aware of the offence of murder having been committed by his masters. When a dead body is discovered in a house there is a strong circumstantial evidence connecting the owners of the house with the murder. Removal of the body from the house to a distant place does in my opinion amount to causing an evidence of the commission of that offence to disappear. I agree that that section cannot be confined to the destruction of the evidence of the murder itself. The words 'any evidence of the commission of that offence' clearly include any evidence of the commission by the offender of that offence.

When help is offered in removing a body from a house, it must be presumed that the intention is to screen the murderer from punishment.

I agree that the learned Judge in the case of *Empress of India* v. *Krishna* (1) rather stated the law too broadly. That case, however, should be distinguished on two grounds. In the first place, the accused persons had actually been convicted of the offence of culpable homicide. The learned Judge took the view that under those circumstances they could not again be convicted under S. 201 of the Indian Penal Code inasmuch as they had tried to screen themselves from punishment and not other offenders. In the second place, in that case the body had been removed from one field to another. The discovery of it in the field of the accused was a very remote piece of evidence to connect them with the guilt. That fact may well have influenced the learned Judge in thinking that the act did not come within S. 201 of the Indian Penal Code.

In this case I agree there must have been a reasonable apprehension in the mind of the accused Autar that instant death to him be caused if he did not carry out the orders of his masters. The case, therefore, does fall under S. 94 of the Indian Penal Code and the conviction cannot be justified.

Conviction set aside

(1) [1818] 2 All. 713.

✱ 1925 ALLAHABAD 316

MUKERJI, J.

Nanhe Mal and others—Applicants.

v.

Jamil ur-Rahman and others—Opposite Parties.

Criminal Rev. No. 636 of 1924, Decided on 1st December, 1924, from an order of the First Class Mag. Bijnore.

✱ *Criminal P. C., S. 145—Communal dispute—Representatives of each Community—Magistrate may choose.*

In Criminal P. C., there is no rule of procedure like the one contained in O. 1 R. 8 of the Civil

P. C. by which a representative suit may be brought or a representative defence may be set up in a case under S. 145, and therefore, in a dispute between two communities the Magistrate would be justified in choosing out who should be the right people to represent each community and after hearing whom he should either permit a community to do a certain thing or to prevent it from doing it till a Civil Court has decided upon the rights of parties. [P. 317, C. 1, 2]

Baleshwari Prasad—for Applicants.

S. A. Haider—for Opposite parties.

Mukerji, J.—In this case the question is whether S. 45 of the Criminal Procedure Code or S. 147 of the same Code was the proper rule of law under which the Court below should have proceeded.

It appears that there is a well in Najibabad from which the Hindus draw water, but they object to the Mohammedans drawing it. A petition of complaint was filed on behalf of certain Mohammedans before the Court of a Magistrate complaining that the Hindus had been so using the well as to make it impossible for the Mohammedans to use the same. They complained, among other matters, that the Hindus were bathing at the well and defiling the well water.

The learned Magistrate issued notice to some of the Hindus and some of the Mohammedans and started a case under S. 145 of the Criminal Procedure Code. After taking evidence he came to the conclusion that he was not satisfied as to the exclusive possession of either party and thereupon he ordered the well to be attached under S. 146 of the Criminal Procedure Code.

In this Court several points have been taken and one of them is that the learned Magistrate ought to have proceeded under S. 147 of the Criminal Procedure Code. The argument is this. On the admission of both sides the Hindus have been using the well and that the only contention before the Court was whether the Mohammedans also had the right to use the well. There is also a contention that the learned Magistrate ought not to have chosen the parties who were to represent either side before him. It is said that if the learned Magistrate passed an order, that order should bind only those whom he has chosen and not a whole community.

I will take the last point first. The learned counsel for the applicants has not been able to point out to me any rule of procedure like the one contained in Order 1, rule 8 of the Civil Procedure Code by which a representative suit may be brought or a representative defence may be set up. An order under Chapter 12 of the Criminal Procedure Code is more or less an executive order and it is designed to avoid a breach of the peace. In the circumstances the Magistrate would be, in my opinion, justified in choosing out who should be the right people to represent each community and after hearing whom he should either permit a community to do a certain thing or to prevent it from doing it till a Civil Court has decided upon the rights of the parties. The second argument, therefore, does not hold good.

As regards the first point, I am of opinion that it has got great force. The well is not such a property as can be said to be in the exclusive possession of any one particular person so long as the public or a part of it is allowed access to it. So far it being common ground that the Hindus had been using the well, the real question for decision before the learned Magistrate was whether the Mohammedans also had a right to use the same. In this view S. 147 of the Criminal Procedure Code applied and there was no justification for preventing the Hindus from using the well.

In my opinion the learned Magistrate has to come to a definite conclusion as to whether the Mohammedans have a right to use the well or not. It may be that they have failed to establish conclusively to the mind of the Magistrate that the right exists. In that case the magistrate will be bound to say that the right does not exist. But the learned Magistrate has not at all approached the case from this point of view and I am not prepared to accept his finding that he is unable to decide which party is in possession as amounting to a finding that the Mohammedans' right to use the well has not been established.

I set aside the order dated the 18th of August, 1924 and direct the learned Magistrate to proceed according to law. He will take such fresh evidence as may be adduced and come to a definite finding as to whether the right claimed on behalf of the Mohammedans exists or not and then pass an order agreeable with S. 147 of the Criminal Procedure Code. I make no order as to costs in this Court.

Revision allowed.

1925 ALLAHABAD 318 (1)

WALSH, J.

Bhagwan Das—Applicant.

v.

Saddiq Ahmad—Opposite Party.

Criminal Ref. No. 568 of 1924, Decided on 19th December, 1924, by the S. J., Meerut.

(a) *Penal Code, S. 504—Pulling a Mahomedan's beard in public is an offence.*

Whatever the previous provocation may be, a man who pulls the beard of a Mahomedan in the public street, intentionally insults him and thereby causes him provocation, knowing that such provocation is likely to cause the victim to break the public peace. [P. 318, C. 1.]

(b) *Criminal Trial—Accused wishing to examine certain witness for defence—Non-examination—Conviction is bad.*

Where the accused wanted to examine a witness in his own defence but the witness was not examined.

Held: that the accused was deprived of a right which he had by law and that his conviction was bad. [P. 318, C. 2.]

Lalit Mohan Banerji and *A. Sanyal*—for Applicant.

S. Raza Ali and *Mushtaq Ahmad*—for Opposite party.

Judgment.—In this case I am unable to accept the view of the Sessions Judge. One important point of law arises. The Sessions Judge definitely holds that the evidence does not constitute an offence under S. 504, Indian Penal Code and he refers the case to the High Court for the conviction to be set aside on this ground. It is on this ground that I disagree with him. The Government Advocate was quite right in pointing out that it raises an important question. In my opinion whatever the previous provocation may be, a man who pulls the beard of a Mohammedan in the public street, intentionally insults him and thereby causes him provocation, knowing that such provocation is likely to cause the victim to break the public peace. Human nature being what it is, nothing is more likely than that a self-respecting person, who has his beard pulled, or his nose pulled, or is submitted to any other painful and humiliating treatment in public, should lose his temper and attempt to strike his assailant or retaliate. Indeed the accused in this case admitted to me during the argument in answer to my question that it was very likely to happen.

This would be sufficient to dispose of the case; but the learned Judge has written an order in which he points out that the applicant, Bhagwan Das, may have some real grievance. I do not propose to discuss these matters in detail. But it does happen that he wanted to examine the District Magistrate of Meerut as a witness in his own defence in order to establish an *alibi*, and that some effort was made to examine him by commission. Somehow or other he has not been examined and the accused has been deprived of a right which he had by law. On this ground I am bound to quash the conviction. In a case of any public importance I should direct a retrial, but, in my opinion, no public interest will be served by allowing the case to be tried again.

My order, therefore, is that the conviction be set aside, and the fine, if paid, repaid to the accused, and that all further proceedings be stayed.

Conviction set aside.

1925 ALLAHABAD 318 (2)

PIGGOTT, J.

Emperor

v.

Madho Singh

Criminal Ref. No. 774 of 1924, Decided on 7th January 1925, from the District Judge, Agra.

(a) *Criminal P. C., S. 438—Penal Code S. 255 B—Prosecution irregularly instituted—No revision lies against acquittal.*

The High Court will not interfere in revision with an order of acquittal, passed by a Magistrate of competent jurisdiction, on a prosecution for an alleged offence under S. 225 B of the Penal Code, irregularly instituted on a report sent in by a Munsif which was treated as a complaint. [P. 319, C. 1.]

(b) *Penal Code, S. 225 B—Judgment debtor granted time for paying—Keeping him in custody of peon is "Unlawful."*

A Civil Court is not empowered to leave a judgment-debtor in custody of a peon after giving him time to pay up a decretal amount and such detention is not lawful custody within the meaning of the Penal Code. [P. 319, C. 1, 2.]

(c) *Criminal P. C., S. 438—Sessions Court not dissenting from decision of Lower Court—Reference with object of obtaining ruling on law point is improper.*

When the sessions Court does not really dissent from the actual decision arrived at, a reference merely with the object of obtaining a ruling on a question of law ought not to be made. [P. 319, C. 2.]

(d) *Criminal P. C. S. 476—Accused escaping from custody of peon of Civil Court—Procedure is that servant should file complaint in ordinary way.*

When a person has escaped from the lawful custody of a servant of a Civil Court, the proper procedure is that the "servant of the Court" should file a complaint in the ordinary way.

[P 319 C 2]

The parties were not represented.

Facts.—A person was arrested in execution of a decree of a Munsif. When he was brought before the Munsif he made an application for two days' time. The Munsif made him over to the custody of a peon and the judgment-debtor paid his own diet money for two days. Subsequently he escaped from the custody of the peon. The Munsif passed an order purporting to be under S. 476 of the Criminal P. C. and sent the case to the District Magistrate for trial, who made the case over to a Magistrate of the second class. The latter acquitted the accused on the ground that the Munsif could not take action under S. 476 of the Criminal P. C. and that, as the accused was not in lawful custody, no offence was committed.

The Sessions Judge was himself doubtful whether a conviction would be good in law and submitted the case to the High Court with a special request for the opinion of the High Court on the following question.—

What is the correct procedure to be adopted by a Civil Court desirous of prosecuting a person who has escaped from the lawful custody of a servant of the Court?

Is a Civil Court empowered to leave a judgment-debtor in custody of a peon after giving him time to pay up a decretal amount, and if so is such detention lawful custody within the meaning of the Indian Penal Code?

The High Court expressed the following:—

Piggott, J.—The real question raised by this reference is whether this Court will interefere in revision with an order of acquittal passed by a Magistrate of competent jurisdiction, on a prosecution for an alleged offence under S. 225 B of the Indian Penal Code, irregularly instituted on a report sent in by the Munsif of Fatehabad which was treated as a complaint. This question I answer in the negative; the Magistrate was substantially right in his view of the law and is to be congratulated on his handling of the case. The learned Sessions Judge has referred the matter to this Court in order to obtain a ruling on two questions of law. I would not encourage the submission of references with this object in view when the sessions Court does not really dissent from the actual decision arrived at. In this instance, however, I am prepared to answer the questions as stated in the referring order. To the first question the answer is that the "servant of the Court" should file a complaint in the ordinary way. To both parts of the second question the answer is "no." Let the record be returned.

Reference answered.

✱ 1925 ALLAHABAD 319

WALSH AND SULAIMAN, JJ.

Ramzani and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 976 of 1924, Decided on 19th December, 1924, from an order of the Add. S. J., Bareilly,

✱ (a) *Penal Code, S. 147—Armed party escorting ladies wishing to be so escorted—Obstruction—Fight in self-defence—No riot takes place.*

Where a large party of armed men went to escort certain ladies who wanted to go with them,

Held: that the party was not an unlawful assembly. When they were resisted or obstructed they were entitled to fight in self-defence and did not, by so doing become a body of rioters.

(b) *Penal Code, S 100—Fight in self-defence—Gun levelled against accused—Accused stabbing—No offence is committed.*

Where the accused was one of a party escorting ladies according to the latters' wish and where there was a fight due to the party being obstructed in its progress and where the accused stabbed the person obstructing, who had levelled a gun against the accused.

Held: the accused was not guilty of murder.

Nehal Chand and *Shabd Saran* — for Appellants.

Lalit Mohan Banerji — for Opposite Party.

Judgment.—In this case two men appeal, one Ramzani against a conviction for murder and one Shafiq Ahmad against a conviction for rioting, he having been found to have been the ring leader in an undoubted fight. Seven other persons were put upon their trial. Six of them

were convicted and sentenced and have not appealed and one Bashir was acquitted. But in the view which we take of this case, it is not necessary to go into the question of differentiating between the cases of the various accused. We propose to take a broader view of the matter a great deal of which is fatally clear. In a group of villages or hamlets in which there are rival zamindars and apparently rival factions, Mt. Mango was a tenant of two brothers, Usman and Sultan, who lived at a village named Malpur, a mile away. Sultan was the man who was killed. Mt. Mango is the woman over whom the trouble began. She was living with the wife of her nephew who had been sent to jail, and there is no doubt that for some reasons, which it is unnecessary to pursue further, these two women had made up their minds to leave the house where they were living and give up their tenancy under the zamindar. For this purpose they made arrangements with Ramzani, the man who has been convicted of murder and who lives in another village about the same distance away and in another zamindari, and he collected two carts and a large body of men carrying lathis to go to Mt. Mango's village to remove the women and their goods. There is no doubt that in going as they did, they showed that they anticipated the possibility of an attack which might compel them to defend not only the women but themselves. The party, as it proceeded on its journey might to a stranger have presented the appearance of a small armed force, but in itself there would be no harm in that. The learned Judge says that the party was admittedly quite beyond the necessity of the occasion if it had gone on a peaceful mission or no resistance was apprehended. This is not quite a correct statement of the position. It was beyond what was necessary unless it had reason to fear interruption or attack. The event showed that it had good reason to fear interruption or attack, but it was engaged in a perfectly lawful purpose and was a lawful assembly. Ramzani had a perfect right to go with as many men as he pleased to take the women away. Neither Sultan nor his brother had any right to prevent it nor any reason to be present there, and if they had not interfered, the party would have gone to the village and back and quietly removed the woman and their goods. We, therefore, start with this fact established that they were a lawful assembly engaged in a lawful purpose. On a careful examination of the evidence for the defence we have come to the conclusion that the account of the matter given by them and their witnesses is much more trustworthy than that of the prosecution witnesses. We are fortified in this view by the opinion of the learned Judge formed about the place where the fight ultimately took place. Except for the purpose of testing the credibility of the witnesses, the place is quite immaterial. The Judge thinks that the witnesses for the defence were telling the truth about this, and it is obvious that there was no motive for them to state an untruth about the place; while the Judge has pointed out that the prosecution had a motive for altering the place, which they did. There is no doubt that Sultan appeared upon the scene either with or without his brother and with an appreciable number of companions. The first report made by his brother subsequently is a very disingenuous document, in which, reading between the lines, it is easy to see that the author of the report is carefully avoiding awkward circumstances from the point of view of his brother and preparing the way of meeting the case which he knows is going to be raised by the defence. He goes so far as to start by saying that the police were at the bottom of the whole thing, that he does not trust the police to make an honest investigation and that the other persons from the other side who had reached the thana before him were on familiar terms with the police and that was why they were there, thereby carefully laying the ground for an attack upon what he knew was coming from the other side. The learned Judge has also laid great stress upon the fact that several of the prosecution witnesses brought into play a new story on the vital question of what Sultan was doing when he was stabbed, which they had not told before the Magistrate and which by an obvious concert they had omitted before the Magistrate and introduced at the trial. There are other circumstances which it is unnecessary to mention in a long and complicated case of this kind which are only too common when two parties are engaged in a fight and which shake one's faith in the prosecution witnesses, It is sufficient to say that they are by the two circumstances

already mentioned very much discredited. But as to whether the accused and their ring-leader, Shafiq Ahmad, ever became an unlawful assembly, the question of the credibility or otherwise of the evidence is of very little importance, because on the admitted circumstances we think that the learned Judge has gone wrong in misunderstanding the true rule about self-defence. The outstanding feature of this part of the case is that Sultan carried a loaded gun. The fact that it was loaded is placed beyond controversy. The only man who tried to say that it was not gave a futile reason for his belief and obviously did not want to say much about it, but one of the prosecution witnesses admits that Sultan had a belt of cratridges round his shoulder and that it remained in that position after he had been felled to the ground. That gun was seized by the accused party and taken to the thana and contained one catridge which had not been fired and an empty barrel from which a cartridge had been fired. Those catridges could only have got into the gun while it was in the possession of Sultan. But whether it was loaded or whether it was not, for the purpose of this question, it is quite sufficient that the party protecting the ladies thought it might be. Their very conduct in going with a large body of men when two would have been ordinarily sufficient, as the learned Judge says is the strongest evidence of the existence of danger, and having gone there under circumstances which might threaten danger, the appearance of the zamindar on the scene with a gun which they believed to be loaded, and supporters with him would justify prompt action. Under such circumstances it must be remembered that if the men had run away, they would have left the women and their goods at the mercy of the zamindar and the whole object of the expedition would have been defeated. Men who have reason to fear that a man is going to attack them with a loaded weapon are entitled to attack him first and use force in order to destroy his power of attack or take the weapon from him. This is not a case such as that well-known authority in *Queen-Empress* v. *Prag Dut* (1) in which two bodies of men are determined to vindicate their rights by unlawful force and go out to meet one another with the intention of enforcing their rights or suppposed rights by show of criminal force, in which case the question of self-defence does not arise. This is a case of men who went out on a perfectly peaceful and lawful mission with the fear that they might be interfered with and confronted with the certainty that they were going to be interfered with and with imminent risk to themselves from a person with a loaded weapon. Under such circumstances we think that they were never rioters at all and all that they did was acting reasonably in defence of themselves and the women who formed part of their party. Whether Sultan ever intended to shoot any one of them is another matter which is relevant to the appeal of Ramzani, but so far as the appeal of Shafiq Ahmad is concerned, we hold that he has clearly established the right of self-defence, even if he was there, on the showing of the prosecution evidence itself, and that the same must apply to all the accused who were convicted of rioting, and under S. 439 of the Code of Criminal Procedure, acting in revision, we deal with their cases to avoid the necessity of any further delay or appeal and direct that they all be acquitted and discharged.

With regard to the case of Ramzani it stands on an entirely different footing, and it is this. If after Sultan had been legitimately attacked and felled to the ground he was wilfully and maliciously stabbed to death by Ramzani, it would be a clear case of murder. If, on the other hand, the stabbing took place in the circumstances described by the witnesses for the accused, he equally was acting, although in a separate and isolated transaction, in defence of his own person. His case was admirably presented to us by Mr. Shabd Saran who dwelt appropriately upon the really astonishing clearness with which the accused himself and five witnesses for the defence described what Sultan was doing at the time he was stabbed. Ramzani is perfectly clear and it is unusual to find an accused person unless in an honest case of self-defence, stating what would otherwise be sufficient for convicting him of murder. He says that Sultan had fired a shot. We are satisfied that this is proved. One barrel had been fired when the gun reached the police station. The evidence of Ismail Jan, who may possibly be friendly with the accused but whose evidence appears to be straightforward, gave a description which leads us

(1) [1898] 20 All. 459=(1898) A.W.N. 117.

to think that the hurt on Kamua might have been due to a glancing shot grazing the top of his head as the buck-shot separated from the mouth of the barrel, Kamua being at that time at a distance of some 10 to 15 paces from the gun. The learned Judge has failed to appreciate the strength of the circumstantial evidence that this wound was caused from a shot of a gun. It is difficult to conceive, and it has not been seriously suggested, that Kamua was able to produce the abrasion, which was upon his head and which the doctor subsequently saw although he thought it was not due to a gun-shot wound, on his way to the thana. It is of course possible, but it is far from being established, and it does corroborate the view which we are inclined to take and which the learned Judge does not seem to have appreciated that if the attack by Sultan took place away from the abadi when the carts were moving, Sultan fired the gun in the direction of the party without intending to hit anybody, in the hope of frightening them off and taking possession of the carts and the women. It is a very common mode of attack both by dacoits and also by other persons who are concerned in removing an obstacle of unarmed men to fire a gun in the air or in their direction without hitting them in order to frighten them off. It is absurd to suppose that Sultan who was an expert could not have hit anybody if he so wanted but it happened that a particular shot grazed the head of one of the men. We are satisfied that the prosecution witnesses who say that no shot was fired are telling a deliberate falsehood. The fact that one shot had been fired is a matter of vital importance in the consideration of Ramzani's case. When we come to examine the defence witnesses, as Mr. Shabd Saran asked us to do, we find that they tell a plain and apparently unvarnished tale which differs in just those small details with regard to which variations must arise, when people see the same thing from a different angle and at different moments of time, but which dispose of the suggestion that they are repeating a lesson which has been carefully coached and they present a picture which to our mind is probably very near the truth, that the party instead of being driven off on the firing of the gun divided itself up leaving some of the men to go off with the carts and the women and the others running back to dispose of the assailant with the gun which they effectually did. They all say that while the lathi fight was going on, Sultan stepped back 5 or 6 paces. He was then, if this is true, in a somewhat hot corner and, according to the evidence which seems to us very natural, he raised his gun and took aim again, this time no doubt appearing to be even more threatening than he was before. He may not have intended to fire. If the evidence is true, he had time to shoot Ramzani through the head, but he did point what they knew then was a loaded gun which had once been fired, direct at Ramzani. We say nothing by way of justification in general of the use of a knife, but if under the circumstances we come to the conclusion that Ramzani was entitled to do anything that was open to him at the moment to save his own life, we are not prepared to say, even if he had hold of the knife and stabbed it at the abdomen as he admits having done, that he was not acting reasonably in his own defence. One ought not to weigh the mentality of a man in a crisis of that sort with golden scales. Whether an expert would try to strike away the gun with a lathi, or kick the fellow in the stomach before he could shoot, or adopt other alternatives, it is difficult to say ; but taking a broad view, we are unable to say that the act done by Ramzani on that occasion was not one legitimately and reasonably done in his own defence. His appeal, therefore, must succeed and he is entitled to be discharged.

The result is that the appeals of Ramzani and Shafiq Ahmad are allowed, their convictions and sentences are set aside and they are acquitted and discharged. Their bail bonds are also discharged.

Padna, Kamua, Roshan, Kallan, Bahadur and Fatua, who have not appealed, are also entitled to an acquittal and must be discharged.

Appeals accepted.

1925 ALLAHABAD 322

MUKERJI, J.

Debigir Tapdhari

v.

Emperor

Criminal Ref. No. 708 of 1924, Decided on 22nd December 1924, made by the Sessions Judge, Bulandshahr.

Penal Code, S. 173—Refusing to take summons is no offence.

Where a police constable took a summons to the accused for the purpose of serving it on him and the accused refused to take the summons and sign an acknowledgment,

Held, that this is not enough to constitute an offence under S. 173. [P. 323, C. 1]

The parties were not represented.

Judgment.—This is a reference by the learned Sessions Judge of Bulandshahr with the recommendation that the conviction of one Debigir Tapdhari under S. 173 of the Indian Penal Code may be set aside and the fine inflicted may be remitted.

It appears that a police constable took a summons to Debigir Tapdhari for the purpose of serving it on him. Debigir refused to take the summons and sign an acknowledgment. This is all that has been proved in the case The learned Magistrate thinks that this is enough to constitute an offence under S. 173 of the Indian Penal Code and the learned Sessions Judge thinks that something more is necessary than a refusal to accept a summons for a conviction under the said section. I agree with the learned Sessions Judge.

I accept the reference, set aside the conviction and sentence and order that the fine, if paid, be refunded.

Conviction set aside.

1925 ALLAHABAD 323

SULAIMAN, J.

(*Raja*) *Surjpal Singh*—Plaintiff—Appellant.

v.

Saheb Singh—Defendant—Respondent.

Second Appeal No. 1120 of 1924, Decided on 31st July, 1924, against the decree of the Dt. J., Aligarh.

Mortgage — Redemption suit—Decree terminates mortgage—Execution barred by limitation — No redemption is possible afterwards.

If in a suit for redemption the Court finds that the mortgage had been satisfied and that a surplus amount was due to the plaintiff, the decree passed by the Court is really a decree for possession together with a decree for the surplus amount. After the passing of that decree the rights of the mortgagor and the mortgagee become merged in the decree, and the mortgage no longer subsists. The plaintiff's remedy is to take possession by execution of the decree and to realise the surplus by execution. If owing to his laches, he allows his remedy by way of execution to become barred by time it will no longer be open to him to evade the law of limitation and bring a new suit with a view to seek the same relief claiming that the right of redemption continued even after the decree. 18 A. L. J. 1001 Ref. to and 21 A. 44 Dist.

Narain Prasad Asthana—for Appellant.

The Respondent was not represented.

Judgment.—The only point in this case was a pure point of law, but in my opinion the view taken by the Courts below on that point is correct.

There was a usufructuary mortgage executed on the 7th April 1891, in favour of defendant's predecessor. In 1907, the plaintiff's predecessor brought a suit for redemption of the mortgage and for recovery of a certain amount as surplus on the allegation that the mortgage debt had been satisfied out of the usufruct and that there was a balance in his favour. The Court found that the mortgage debt had been fully satisfied and had in fact been overpaid. The suit was accordingly decreed not only for possession but also for a sum of Rs. 39 as surplus profits. The plaintiff's predecessor unfortunately died soon after and no steps were taken to execute that decree. The result was that the execution of that decree became barred by time and in fact more than 12 years have expired. The plaintiff then instituted a fresh suit for redemption alleging that the mortgage was still subsisting and that his equity of redemption was still intact. The Courts below however have dismissed the suit holding that his claim is not maintainable.

It is true that the previous suit originally was a suit for redemption but when the Court found that the mortgage had been satisfied and that in fact a surplus amount was due to the plaintiff's predecessor, the decree that was passed was really a decree for possession together with a decree for the surplus amount. The form in which the decree was prepared was the printed form under S. 92 of the Transfer of Property Act, but it had the second portion of it cut out, which would have become necessary only if any amount had to be paid by the plaintiff.

In my opinion therefore the decree was purely a decree for recovery of possession and recovery of money. After the passing of that decree the rights of the mortgagor and the mortgagee became merged in the

decree, and the mortgage was no longer subsisting. The plaintiff's remedy therefore was to take possession by execution, of that decree and to realise that surplus by execution. If owing to the laches of his predecessor or himself he has allowed his remedy by way of execution to become barred by time it is no longer open to him to evade the law of limitation and bring a new suit with a view to seek the same relief. The decree that was passed in the previous case was really a decree which would be passed under the new Code under Order 41, rule 11 though no such provision was expressly embodied in the Transfer of Property Act.

It has been laid down in *Ramanand* v. *Jairam* (1), that when a person obtains a decree for recovery of possession of property and allows it to be barred by time a separate suit on that decree cannot be maintained. The case of *Sita Ram* v. *Madho Lal* (2) is clearly distinguishable because in that case the plaintiff had to pay a certain amount of money and the decree provided that if payment was not made within the time fixed "the judgment should be deemed to be non-existent". The rule of law laid down in that case cannot be extended so as to apply to the facts of this case.

I therefore dismiss the appeal summarily.

Appeal rejected.

(1) [1920] 18 A. L. J. 1001—59 I. C. 632.
(2) [1901] 24 All. 44—(1901) A.W.N. 194 (F.B.)

1925 ALLAHABAD 324 (1)

LINDSAY AND KANHAIYA LAL, JJ.

Sheopujan Misra and another—Plaintiffs—Appellants.

v.

Mangu Rai and others—Defendants—Respondents.

Second Appeal No. 1515 of 1924, Decided on 23rd December 1924, from a decree of the Dt. J., Ghazipur.

Limitation Act, Art. 10 — *Place of registration different from place where major portion of property situate—After registration entry made by sub-registrar of latter place — Time runs from actual registration only.*

At the place where the sale deed was registered, only a very small portion of the property comprised in the deed was situated. The rest of the property was situated at a different place. After registration, the registration officer at the latter place was informed of the registration and an entry was made by him in his register.

Held, that time for a pre-emption suit ran from the date of actual registration and not from the date on which the entry referred to was made.

K. Varma—for Appellants.

Lindsay, J.—This case has been decided by both the Courts below on a question of limitation. The finding of both the Courts is that the suit was filed beyond time, that is to say, more than one year beyond the date of the registration of the sale-deed.

The sale-deed was registered at Ghazipur on the 6th of October 1921. Only a very small portion of the property comprised in the deed was situated in Ghazipur. The rest of the property is situated in Ballia.

After registration at Ghazipur, the registration office at Ballia was informed of the registration and an entry was made by the Sub-Registrar of Ballia in his register on the 24th of November 1921.

The plaintiffs-pre emptors argued that limitation ran only from the 24th of November 1921, that is to say, the date on which the entry was made in the Baillia register, but we think both the Courts below were quite right in holding that limitation began to run from the 6th of October 1921, That undoubtedly was the date on which the sale-deed was registered. The case may be one of great hardship to the plaintiffs-appellants but we have no doubt that the law has been correctly interpreted. We dismiss the appeal under Order 41, rule 11, Civil Procedure Code.

Appeal rejected.

1925 ALLAHABAD 324 (2)

RYVES AND DANIELS, JJ.

Daulat—Plaintiff—Appellant.

v.

Sankatha Prasad and others—Defendants—Respondents.

Second Appeal No. 1 of 1923, Decided on 11th December, 1924, from the decree of the Dt. J., Allahabad.

Hindu Law— Alienation— Widow — Necessity proved for a very large part of sale consideration— Sale was upheld.

Where out of the total sale consideration of Rs. 2,000 and odd only a small portion of Rs. 105 was found to be without necessity, the sale was upheld. [P 325, C 2]

G. W. Dillon and *A. Sanyal*—for Appellant.

Janaki Prasad—for Respondents.

Daniels, J.—This appeal is brought on a single point only. The suit was one to set aside an alienation made by a Hindu widow, namely the mother of the plaintiff, as having been made without legal necessity and to recover the property sold. The sale was effected for a sum of Rs. 2,142-12-6. The Court below has found that the whole of this sale consideration was obtained for purposes which constituted a valid necessity under the Hindu law with the exception of a small sum of Rs. 105. On these findings the Court below has upheld the sale transaction but has directed the defendants to repay to the plaintiff the sum of Rs. 105 which is found not to be covered by legal necessity. Against this decree the plaintiff appeals and contends that if any part of the sale consideration, however small, was found not to be for legal necessity, the whole sale must necessarily be set aside. This is not the view which has prevailed in this Court or indeed in other High Courts. There are two recent cases of this Court in which the same question has been discussed. In *Jai Narain Pande* v. *Bhagwan* (1), it was laid down that where a sale is found to be only in part for legal necessity, the criterion for deciding whether the sale should be upheld or set aside is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account. In *Sunmukh Pande* v. *Jagan Nath Pande* (2), another Bench of this Court has reiterated the same view, adding that whether the amount not for legal necessity is so insignificant that it can be ignored, is determined on the facts of each case. Obviously if the amount which the widow was entitled to raise for necessary purposes under the Hindu law could not have been raised without the sale of the entire property, the fact that she was able to obtain a price slightly in excess of the amount she required to raise would not justify the sale being set aside. This view has been taken also by the Privy Council in the case of *Medai Dalavoi Thirumalai Appa Mudaliar* v. *Narain Thevan* (3). In that case a widow required to raise a sum of Rs. 4,600 in order to discharge a mortgage decree which was binding on the estate. She could not have satisfied this decree without selling the property. Their Lordships of the Privy Council held that the validity of the sale was in no way affected by the fact that she was able to realise by the sale of the property a sum of Rs. 711 in excess of the amount which she required to raise. In this case the amount which was not for legal necessity is obviously insignificant in comparison with the total amount of the price. The decree of the Court below is in accordance with the rulings of this Court and of the decision of the Privy Council just referred to.

We, therefore, dismiss the appeal with costs. The cross objections are not pressed and are dismissed with costs.

Appeal rejected.

(1) 1922 All. 321—44 All. 683.
(2) 1924 All. 708—46 All. 531—22 A.L.J. 417—5 L. R, All. (civ) 289.
(3) 1922 P. C. 304—16 M.L.W. 478—31 M.L.T 149—(1922) M. W. N. 804—27 C. W. N 365 (P. C.)

✱ 1925 ALLAHABAD 325

MEARS, C. J. AND SULAIMAN, J.

Ram Ghulam alias *Faqir Chand* — Defendant—Appellant,

v.

Ram Chandra and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 25 of 1923, Decided on 3rd December, 1924, from a judgment of Gokul Prasad, J.

✱ *Registration Act, S. 50—Prior mortgage for Rs. 99 unregistered—Subsequent sale of that property—Vendee can ignore the mortgage.*

A vendee can ignore an unregistered mortgage for Rs. 99 of prior date on the property purchased though the mortgage is binding on the mortgagor. [P 326, C 2]

S. A. Haidar—for Appellant.

Panna Lal—for Respondents.

Mears, C. J.—This is an appeal in which there is a contest between a purchaser of certain property and a mortgagee. In the year 1897 Jwala Sahai and Behari Lal executed a usufructuary mortgage of two properties in favour of Ram

Ghulam for a sum of Rs. 333. The mortgagee entered into possession. The profits of the property were considered to be about equal to the interest on the Rs. 333, and there was a provision that this usufructuary mortgage could be redeemed in any month of Jeth after the expiration of six years. In the year 1901 a further sum of Rs. 99 was borrowed by the mortgagors upon the security of the same property from the same mortgagee, and in that document they bound themselves, as plainly as words could bind, that they should not be at liberty to redeem the property unless and until they paid up the Rs. 333 and Rs. 99. In 1919 one of the properties was sold to Ram Chander, the plaintiff, for a sum of Rs. 500. He registered his sale-deed which had contained a stipulation that he should pay over to the mortgagee the sum of Rs. 333. That sum was duly tendered by him and was refused by the mortgagee on the ground that the effect of the two documents was to entitle him (the mortgagee) to demand not the Rs. 333 alone but the Rs. 333 and the Rs. 99. To this the plaintiff answered that whilst he was bound to pay off the prior registered mortgage of 333, he was not bound to have any regard whatever to the mortgage of 1901 by virtue of S. 50 of the Registration Act. This matter went to trial. The plaintiff's contention was upheld in the Court of first instance, in the lower appellate Court, and before a single Judge of this Court, and now comes to us under the Letters Patent.

The question, therefore, is capable of being stated in a very narrow compass and is whether the undoubted right of the mortgagee to recover Rs, 432 as against the mortgagor also prevails as against the vendee, or whether the vendee may not put reliance upon S. 50 and plead that he comes within the protection of the very words of that section. S. 50 says that every document of a certain kind mentioned in various clauses, one of which is a sale "shall if duly registered take effect as regards the property comprised therein against every unregistered document relating to the same property." We, therefore, have the plaintiff coming forward and producing a registered sale-deed of 1919. The defendant comes forward and relies upon an unregistered mortgage of the year 1901. He couples to that unregistered mortgage of 1901 the mortgage of 1897 and says that the two must be regarded as one document. We do not assent to that. What we do assent to is that the two documents must be considered together and their joint effect is to create as between the parties to them a definite obligation, namely that redemption cannot take place as between the parties to these documents except on payment of the two sums mentioned. The question is : does that agreement between the mortgagor and mortgagee go to deprive a subsequent purchaser of his right to insist upon the protection given to him by S. 50. We are of opinion that it does not do so and we proceed very shortly to examine one or two cases that have been cited to us.

Reliance was placed upon the Full Bench ruling in *Har Prasad* v. *Ram Chander* (1). The facts of that case are undoubtedly very similar indeed to the one under discussion. There is, however, this vital difference. The report is silent on the question whether the sale-deed of Ram Chander was registered, and also whether the second document by which an advance of Rs. 50 was made, was registered or not. S. 50 of the Registration Act was not discussed nor any effect of registration alluded to, and we do not believe that this case in any way touches the authority of such decisions as *Ram Lal* v. *Buchha Singh* (2) and *Ishri Prasad* v. *Gopi Nath* (3) and the further case of *Sher Singh* v, *Durga Pal* (4). The Full Bench case makes no reference whatever to these cases and was obviously directing its attention to the question whether the two documents could be read together so to create one obligation, and whether the second transaction could be held to be a mortgage. They decided that it was a mortgage and that its terms were so precisely drafted as to make the second sum payable at the same time as the first whenever redemption was sought.

In this case the vendee has throughout insisted that under S. 50 of the Registration Act his sale-deed takes priority over the unregistered mortgage. We accept that view and dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

---

(1) [1921] 19 A.L.J. 807=63 I.C. 750.
(2) [1912] 10 A.L.J. 114=16 I.C. 625.
(3) [1912] 34 All. 631=17 I. C, 19=10 A. L. J. 222.
(4) [1913] 18 I.C. 724

✱ 1925 ALLAHABAD 327

MEARS, C. J. AND PIGGOTT, J.

Abdul Karim—Defendant—Appellant.

v.

Ram Kishore and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 42 of 1923, Decided on 8th January 1925, from a judgment of Gokul Prasad, J.

✱ *Hindu Law—Alienation—Attachment in execution of decree against Father—Sons' shares are liable unless debts are illegal or immoral.*

If the joint ancestral property of a Hindu family governed by the Mitakshara law is attached in execution of a personal decree obtained against the father of the family, his sons can only secure the exemption of their interest in the said property from attachment or sale by satisfying the Court that the debt in respect of which the decree was obtained was tainted with immorality, or was otherwise such a debt as it could not be the pious duty of the sons to satisfy. The sons' liability is not postponed till after the father's death. [P. 327, C. 2.]

Mukhtar Ahmad—for Appellant.

Peary Lal Banerji—for Respondents.

Judgment.—One Bahadur was the head of a joint undivided Hindu family consisting of himself and his three minor sons. Desiring to embark upon a certain business, Bahadur borrowed some money on his personal security. There is no question here of any alienation of the joint family estate in his hands. He found a creditor willing to advance the money on his personal security, and on those terms he had a perfect right to borrow. He failed to repay the money and the creditor bringing a suit obtained a simple money decree against him. In execution of this decree, the creditor attached a portion of the joint ancestral family property in the hands of Bahadur. Thereupon the suit out of which this appeal arises was filed by the three minor sons, who came into Court through their mother as their next friend. The relief sought was a declaration that the property attached in execution, to the extent of the shares which the plaintiffs would take on partition, amounting to three-fourths of the whole, was not saleable in execution of the decree obtained against Bahadur. The first Court decreed this claim. On appeal the learned District Judge, relying principally on the decision of their Lordships of the Privy Council in *Sripat Singh Dugar* v. *Maharajah Sir Prodyot Kumar Tagore* (1) reversed the decision of the first Court and dismissed the suit. There was a second appeal, which was heard and determined by a single Judge of this Court. His attention was drawn to the reported decision of a Division Bench of this Court in the case of *Sheodan* v. *Bhagwan Singh* (2). Feeling himself, apparently, constrained to follow this decision, the learned Judge reversed the decree of the lower appellate Court and restored that of the Court of first instance. The creditor has brought this matter before us by an appeal under the Letters Patent. We think the learned Judge of this Court was undoubtedly wrong. Ever since the case of *Karan Singh* v. *Bhup Singh* (3), decided by a Full Bench of this Court more than twenty years ago, it was regarded as settled law in this Court that, if the joint ancestral property of a Hindu family governed by the Mitakshara law is attached in execution of a personal decree obtained against the father of the family, his sons can only secure the exemption of their interest in the said property from attachment or sale by satisfying the Court that the debt in respect of which the decree was obtained was tainted with immorality, or was otherwise such a debt as it could not be the pious duty of the sons to satisfy. It is quite true that the authority of this decision was understood for a time to have been unsettled by a pronouncement incidentally made by their Lordships of the Privy Council, while deciding a different matter, in the case of *Sahu Ram Chandra* v. *Bhup Singh* (4), but as the learned District Judge remarked in the present case, it was never apparent that their Lordships intended by expressions used in their judgment in *Sahu Ram Chandra's* case to contravene any principle laid down by them in the case of *Sripat Singh* above referred to. Apart from this however, their Lordships have themselves cleared up the matter since, and we may

(1) [1917] 44 Cal. 524—44 I.A. 1—15 A.L.J 147—32 M.L.J. 133—(1917) M.W.N. 193—21 C.W.N. 442—25 C.L.J. 220—21 M.L.T. 222—39 I.C. 252—19 Bom.L.R. 290. (P.C.)

(2) [1921] 43 All. 496—64 I.C. 75—19 A.L.J. 431.

(3) [1904] 27 All. 16—1 A.L.J. 310—(1904) A.W.N. 151. (F.B.)

(4) [1917] 39 All. 437—44 I.A. 126—21 C.W.N. 698—15 A.L.J. 437—19 Bom.L.R. 498—1 P.L.W. 557—26 C.L.J. 1—33 M.L.J. 14—22 M.L.T. 22—6 L.W. 213—39 I.C. 280—(1917) M.W.N. 439. (P.C.)

take it that it is not to be regarded as a correct proposition of law that the question of the pious duty of Hindu sons to satisfy a debt incurred by their father, not tainted with illegality or immorality, only arises after the death of the father. An unfortunate feature of this case, in our opinion, is that, if the question in issue had been argued before the learned Judge of this Court as efficiently as it has been argued before us to-day, it is not likely, and it does not appear from his own judgment, that he would have arrived at the decision that he did pronounce. We think his attention might well have been invited to the fact that the decision in *Sheodan Singh's* case had already, by the date on which he pronounced his judgment, been expressly dissented from by another Bench of this Court : vide, *Mohan Lal* v. *Bala Prasad* (5) and was inconsistent with the decisions of Benches of this Court in at least two other cases : vide, *Bawan Das* v. *O. M. Chiene* (6) and *Kalyan Singh* v. *Dharam Singh* (7). We feel no hesitation in holding that the authority of the Full Bench case of *Karan Singh* v. *Bhup Singh* (3) must not be regarded as having been shaken by any subsequent decisions, and that we stand by the principle therein laid down. This appeal must, therefore, prevail. We set aside the decision of the learned Judge of this Court and restore that of the lower appellate Court.

As regards costs, the decree of the lower appellate Court will of course stand. With respect to costs in this Court, we allow the defendant, who is the appellant under the Letters Patent, one-half of his costs of both hearings in this Court, that is to say, one-half of the higher scale fee. We make this order for the reason already indicated, namely, that we think, if this appellant's case had been efficiently represented before the single Judge of this Court, he would probably have been spared the necessity of filing the present appeal.

Appeal allowed.

---

(5) 1922 All. 310—44 All. 649.
(6) 1922 All. 73—45 All. 316—20 A.L.J. 155.
(7) 1922 All. 489—20 A.L.J. 721.

1925 ALLAHABAD 328

SULAIMAN AND MUKERJI, JJ.

Jwala Prasad—Decree-holder—Appellant.

v

Sheikh Chuttan and another—Objectors—Respondents.

Letters Patent Appeal No. 113 of 1923, Decided on 24th July 1924, from a Judgment of Daniels, J., D/- 5th April 1923.

(a) *Civil P. C., S. 47—Exempted defendant suing for declaring property attached not to be J, D's.—Property entrusted to stranger* pendente lite—*He disposing of it on Trial Court's decree—Decree reversed on appeal—He being ordered to refund—No appeal lies.*

During the continuance of an attachment in execution, a suit was filed by a person, who had been a defendant in the suit but who had been exempted by the decree, for a declaration that the property did not belong to the judgment-debtor and during this suit the property was entrusted to a third person. On the suit being decreed by the Trial Court, that person sold the property and distributed the proceeds as directed by the decree. The decree was reversed in appeal. Then the person who had been entrusted with the property in question was ordered by the Court executing the decree under which the property was originally attached, to refund the proceeds.

Held : that inasmuch as he was not a party to the execution proceedings no appeal lay from the order. [P 329 C 2]

Held : further that even assuming the person to have been a receiver under O. 40, against whom an order was passed under O. 40, R. 4 no second appeal lay. [P 329 C 2]

(b) *Execution—Property under attachment, disposed of by officer appointed* pendente lite—*Officer and not party who asked for his appointment should refund.*

Where during the continuance of an attachment in execution, a person disposes of the property under the orders of a Court and the Court's orders are set aside in appeal, the proper person to make a refund is the person who has disposed of the property and not the party at whose instance that person was appointed by the Court to act as he did. [P 329 C 2]

(c) *Civil P. C., S. 47—Receiver appointed in suit by party to decree—Claim of refund against receiver—Separate suit is unnecessary,*

A suit was instituted by a defendant in a suit who had been exempted from the decree, for a declaration that certain property which had been attached in execution of the decree did not belong to the judgment-debtor. At the instance of the plaintiff, a receiver was appointed by the Court. The suit was decreed and under the decree, the Receiver disposed of the property. The decree was reversed in appeal.

Held : that the appointment of the Receiver must be deemed to have been only in the execution department and that in order to compel him to refund the value of the property no separate suit was necessary but that the executing Court itself had jurisdiction. [P 330 C 1]

Narain Prasad Asthana—for Appellant.

Uma Shankar Bajpai—for Respondents.

Sulaiman, J.—This is curious case in which much confusion has been caused owing to the circumstances that an execution case as well as a regular suit relating to the same crops were before the same officer.

Originally Jwala Prasad brought a suit against Sewa Singh and others impleading one Chuttan also. He obtained a decree against the other persons, but Chuttan was exempted. He put in an application for attachment of certain crops and the attachment was made and the crops thus came under the custody of the Court. Chuttan instead of taking objections in the execution department filed a regular suit in the same Court for a declaration that the crops did not belong to the judgment-debtor. While that suit was pending, an application was made by Chuttan praying that the crops being perishable property should be handed over to some other person for realisation of their price. It is not quite clear whether this application was made in the execution department or in the regular suit ; though it is obvious that it ought to have been made on the execution side. But from what can be gathered from the record it is possible that it was wrongly made in the regular suit. It has been assumed all along that the learned Munsif passed an order—that order itself is untenable—that Kalimuddin, the son of Chuttan, be entrusted with the crops ; and this fact is admitted by Kalimuddin. He sold the crops. By the time he had realised the amount it appears that Chuttan's suit was decreed by the first Court. On the strength of the first Court's decree he paid half the amount to Chuttan and the other half to the tenants. Subsequently the decree holder applied to the Court that Kalimuddin be called upon to refund this amount. The Court said that as matters then stood Chuttan had already obtained a decree in his favour and Kalimuddin could not be called upon to refund the amount.

After this Chuttan's suit was dismissed in appeal. Moved by the decree-holder the execution Court on the 1st of February 1920 ordered that Chuttan and Kalimuddin should pay the sum of Rs. 1000/- which it found to be the value of the crops entrusted to Kaljmuddin, in Court and in default the money to be recovered in the way in which execution of a decree takes place.

On appeal to the District Judge this order was affirmed. On second appeal to the High Court a learned Judge of this Court has allowed the appeal and set aside the order altogether directing that the appellant Jwala Prasad should seek his remedy by a separate suit,

It is necessary to consider the position of the two persons Kalimuddin and Chuttan separately.

So far as Kalimuddin is concerned he was no party to the execution proceedings nor was he a party to the regular suit. If he be treated as altogether a stranger no appeal lay from the order passed by the Munsif directing him to refund the amount. It is possible, however, to treat Kalimuddin as a receiver appointed by the Court under Order 40 of the Code of Civil Procedure. In that case the order against him to pay back the amount would be an order under Order 40 rule 4 which would be appealable as an order, but even in that view no second appeal would lie to this Court. It is therefore quite clear that no appeal lay to the learned Judge of this Court on behalf of Kalimuddin.

As regards Chuttan, there is this thing to be said that he was both a party to the execution proceedings, though exempted from the decree, and also in the original suit, but when Kalimuddin was entrusted with the crops he became an officer of the Court. If Kalimuddin wrongly paid any part of the amount to Chuttan the proper person to make a refund of it is Kalimuddin and not Chuttan. I therefore think that the view of the learned Judge of this Court that there should have been no order against Chuttan is quite correct. But the order against Kalimuddin could not have been interfered with in second appeal.

Mukerji, J.—I entirely agree with what has fallen from my learned brother. I would point out only one matter and it is this. Chuttan was a party to the decree, although the decree passed was in his favour. Having been exempted from the decree he did not cease to be one of the parties whose remedy in the matter of execution lay in the execution department. His suit, therefore, which was brought in the same Court as was seized of the execution was virtually an application under S. 47 of the Civil Procedure Code. An appeal lay from the order of the Court in Chuttan's application or suit and the decision of the District Judge was quite with

in his jurisdiction. In this view it is really immaterial whether the order which appointed Kalimuddin the receiver of the property was on the original side or in the execution department. In the eye of the law the whole matter was before the Court in the execution department and the order must be treated as having been passed in the execution department. In this view the remarks of the learned Judge of this Court that a separate suit will be necessary to recover the value of the goods from Kalimuddin lose their force.

By the Court:—We accordingly allow the appeal and modify the decree passed by the learned Judge of this Court and uphold the order passed by the Munsif against Kalimuddin but set it aside so far as it affected Chuttan.

Having regard to the special circumstances of the case we direct that the parties should bear their own costs.

Appeal allowed.

✱ 1925 ALLAHABAD 330

SULAIMAN AND MUKERJI, JJ.

Bindraban—Defendant—Appellant.

v.

Ram Narain and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 131 of 1923, Decided on 25th July, 1924, against the judgment of Gokul Prasad, J.

✱ (*a*) *Adverse possession—Joint Hindu brothers—Death of one—Possession by widow of survivor is not adverse to reversioners.*

Two Hindu brothers were joint. One died shortly before the other and left a widow, surviving him. The two brothers together had owned certain property. On the death of one of them, with the consent of the other, the name of the widow was recorded with respect to half the share. On the death of the other brother the name of the widow was recorded in respect of the remaining share which stood in his name. The widow continued to be in possession of the entire share till her death. Before her death she made a transfer by way of sale of a half share in favour of another.

Held, that ordinarily a Hindu widow would claim to be in possession in the right of her husband. As there was absolutely nothing before the sale deed to show that there was any assertion of an adverse title by the widow in herself namely, title adverse to her husband's estate and to the estate that would go to the reversioners, her possession previous to the sale must be held to be permissive and not adverse to the reversioners.

[P. 330. C. 2; P. 331, C. 1]

N. C. Vaish—for Appellant.

S. N. Sen—for Respondents.

Judgment.—There were two brothers, Jawahir and Mazbut. It has been found that they were joint. Jawahir died shortly before Mazbut and left a widow, Bari Bahu surviving him. The two brothers together owned an 8 pies share. On the death of Jawahir, with the consent of Mazbut, the name of Bari Bahu was recorded with respect to a 4 pies share. On the death of Mazbut the name of Bari Bahu was recorded in respect of the 4 pies share which stood in his name. Bari Bahu continued to be in possession of the entire 8 pies share till her death which happened in 1917. Before her death, however, she, on 6th November 1906, made a transfer by way of sale of a 4 pies share in favour of the defendant-appellant. On 13th September 1918, that is to say within 12 years of the execution of the sale deed the respondents brought the suit out of which this appeal has arisen claiming, as the reversioners of Bari Bahu, for the recovery of the 4 pies share sold to the defendant-appellant. One of the pleas of the appellant was that Bari Bahu was in adverse possession of the property, and therefore, the plaintiffs' suit was barred by time. This plea found favour with the Court of first instance. On appeal the learned District Judge came to the conclusion that Bari Bahu's possession was not adverse but was permissive. On this finding the suit was decreed. A second appeal was filed to this Court, and the learned Judge of this Court remitted an issue specifically directed to the character of possession of Bari Bahu. The finding recorded by the learned District Judge on 16th May 1922 was that the possession of Bari Bahu was permissive and not adverse. On this finding the learned Judge who heard the second appeal dismissed the appeal brought by the defendant.

In this appeal it is contended that possession of Bari Bahu was really adverse and not permissive. The learned District Judge has made the following remark in his judgment:—

"It is not shown that her (Bari Bahu's) possession ever became adverse or was even alleged to be adverse before the sale-deed of November 6, 1906."

Assuming that Bari Bahu did not obtain possession until the death of Mazbut, it does not necessarily follow that she claimed title adversely to her husband's estate. Ordinarily a Hindu widow would claim to

be in possession in right of her husband. As the learned District Judge has remarked, there was absolutely nothing before him to show that she ever claimed a title in herself and a title adverse to her husband's estate, and therefore to the estate which would go on her death, to the reversioners to her husband's property.

Two cases of the Privy Council have been cited to us to show that in the circumstances of these cases their Lordships held that the possession of the widows, in those cases was adverse. But each case must be treated on its own facts. In the latest Privy Council case of *Lajwanti* v, *Safa Chand* (1), their Lordships found, in the circumstances of the case that, the two widows who were not entitled to the property (they being stepmothers to the last male owner of the property) were in possession as Hindu widows and they prescribed for the benefit of their husband's estate. This case, therefore, is entirely concluded by the finding of the learned District Judge, that there was no assertion of an adverse title by the widow in herself, namely, title adverse to her husband's estate and to the estate that would go to the reversioners. The first such assertion that did take place was on 6th November, 1906, and this suit is amply within time from that date. The appeal fails and is hereby dismissed with costs.

Appeal dismissed.

(1) 1924 P. C. 121—9 Lah. 192—51 I. A. 171—34 M.L,T. 87—22 A.L.J. 304—6 L. R. P. C. 94—20 M.L.W. 10—2 Pat.L.R. 245—(1924) M.W.N. 442—28 C.W.N. 960—26 Bom. L. R., 1117—6 P.L.T. 1—47 M.L.J. 935 (P. C)

1925 ALLAHABAD 331

SULAIMAN AND RYVES, JJ.

Makhan Lal—Plaintiff—Appellant.

v.

Sohan Lal and others—Defendants—Respondents.

Second Appeal No. 141 of 1923, Decided on 9th January 1925, from a decree of the Dt J., Agra.

Execution—Sale in Purchase by decree-holders in lieu of decretal amount—One judgment-debtor entitled to interest in decretal amount—Conduct of parties showing purchase was only for benefit of decree-holders—Judgment debtor is not entitled to any interest in the property—Evidence Act, S. 115.

It cannot be disputed that as a general proposition of law if only one of several decree-holders purchases the property at auction in lieu of the decretal amount, the purchase, in the absence of anything positive to the contrary, must be deemed to have been made on behalf of all the interested decree-holders. 37 *All.* 545 *Foll.* [P 332 C 2]

But where a judgment-debtor is interested in the decretal amount he need not necessarily be entitled to any interest in the property purchased by the decree-holders. Even if it be conceded that ordinarily if the purchase is made by the decree-holder in lieu of the decretal amount and the payment is merely set off against the decree, then it may be deemed that the purchase is made on behalf of all the persons interested in the decretal amount whether plaintiffs or defendants, the Court has to see whether that inference can be properly drawn in view of the conduct of both the parties throughout the proceedings in the particular case.

A co-mortgagee had refused to join in the mortgage suit brought by the other mortgagees and had not himself brought any suit within limitation on the basis of the original document which he retained in his possession and the suit had to be brought on the basis of a certified copy. Then he was made a defendant and was not allowed to be transposed as a plaintiff because he had some subsequent mortgages on the property and thus occupied a double capacity, namely of co-mortgagee as well as of subsequent mortgagee. When the decree was passed, permission was granted to the decree-holders to bid. The mortgagee in question made no attempt to bid himself. After the sale had taken place he applied to have the sale set aside. In his application he clearly stated that the property had been purchased for decree-holders. He never suggested that the purchase had also been made in his interest.

Held, that having regard to the attitude of both the parties it cannot be held that when the purchase was made it was made on behalf of Makhan Lal also. 37 *All.* 545 *Dist.* [P 333 C 2]

Gulzari Lal and Surendra Nath Sen—for Appellant.

Narain Prasad Asthana—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for recovery of possession of one-third share in certain properties. The Courts below have differed. The Court of first instance decreed the claim but the lower appellate Court has dismissed it so far as possession of the property is concerned but has awarded a decree for money instead.

In 1887 a mortgage was made by one Chhatta in favour of Makhan Lal and the defendants jointly for a sum of Rs. 2,700. About the last day of limitation a suit was instituted by the mortgagees other than Makhan Lal for sale on the strength of a certified copy, the original document being in possession of Makhan Lal who had himself neither instituted a suit nor

joined with the others. Makhan Lal also held certain subsequent mortgages and he was, therefore, impleaded in a dual capacity as a mortgagee and a subsequent mortgagee. It is true that Makhan Lal made some attempts after the institution of the suit to have his name transferred from the array of the defendants to that of the plaintiffs but that application was rejected presumably on the ground that he being also a subsequent mortgagee could not be impleaded as a plaintiff. The suit was decreed on the 13th of April 1911, and a final decree for a sum of Rs. 10,000 and odd was passed on the 21st of February, 1913. . In this decree Makhan Lal was shown among the defendants judgment-debtors although no doubt he was also a co-mortgagee. The decree-holders, namely the mortgagees other than Makhan Lal, applied for permission to bid at auction sale and permission was granted to them. On the 23rd of August 1916 the entire mortgaged property was up at auction and purchased by the decree-holders (namely the mortgagees other than Makhan Lal) for a sum of Rs. 5,800. As the personal remedy had become barred by time, it was impossible to realise the balance of the decretal amount.

Had the property fetched more than the decretal amount, Makhan Lal would have also received some money on account of his subsequent mortgages. As the property was sold for less amount than was due on the prior mortgage, his subsequent mortgages became useless to him. He applied to the Court of the Collector who had sold the property as an ancestral one for setting aside the sale. The first application was dated the 16th of September, 1916 and in this he complained that Piare Lal, one of the plaintiffs, had purchased the property *for the decree-holders* at an inadequate price and that the sale should be set aside. Before the Collector, Makhan Lal at one time expressed his readiness to pay up the purchase money and have the sale set aside. The case was postponed but no arrangement could be made and, therefore, ultimately he asked the Collector to finally set aside the sale.

On the 15th of June the Collector set aside the sale but on an appeal to the Commissioner preferred by the plaintiffs-decree holders the order of the Collector was set aside and the sale confirmed, it being held that the property had been sold for an adequate price. After this the decree-holders apparently certified payment of part of the decretal amount and obtained a sale certificate in their own names. In that Makhan Lal's name is shown as one of the judgment debtors. It is a fact that they did not pay any cash towards the purchase money but the sale consideration was set off as part payment of the decretal amount.

Makhan Lal has since instituted the present suit claiming as a co-mortgagee that he is entitled to get one-third of the property purchased by his other co-mortgagees.

The learned Subordinate Judge came to the conclusion that the conduct of Makhan Lal in the proceedings to set aside the sale did not preclude him from falling back on his rights as a co-mortgagee. He was of opinion that inasmuch as the property had been acquired out of the decretal amount which was due jointly to all the mortgagees, Makhan Lal was entitled to get a share in the property.

On appeal the learned District Judge has taken a contrary view. He came to the conclusion that the decree-holders did not use more than their share of the mortgage money when they subsequently set off the purchase price of Rs. 5,800. He also thought that the property purchased must be deemed to have been purchased by the decree-holders themselves and that Makhan Lal has no interest in it. He, however, granted Makhan Lal a decree for the sum of money representing his share in the sale proceeds.

The case came up before a single Judge of this Court who has referred it to a Bench of two Judges,

It cannot be disputed that as a general proposition of law if only one of several decree-holders purchases the property at auction in lieu of the decretal amount, the purchase, in the absence of anything positive to the contrary, must be deemed to have been made on behalf of all the interested decree-holders. This was the view clearly expressed in the Full Bench case of *Kesri* v. *Ganga Sahai* (1). The decision in that case was affirmed on appeal by their Lordships of the Privy Council in the case of *Ganga Sahai* v.

(1) [1911] 33 All. 563—11 I.C. 517—8 A.L.J. 616

Kesri (2). The learned Subordinate Judge, however, relied on the case of *Ram Jas Das* v. *Mohan Lal* (3) where the opinion was expressed that even though a mortgagee is not actually a decree-holder but a *pro forma* defendant and even though the property is purchased ostensibly in the name of the decree-holders, the mortgagee-respondent may be entitled to a share in it if the purchase is made in lieu of the decretal amount. On the other hand, the learned Advocate for the respondents has invited our attention to another judgment of a single Judge of this Court in Second Appeal No. 911 of 1921, decided on the 1st of December, 1922, which was affirmed in an appeal under the Letters Patent (No. 47 of 1923) on the 3rd of May, 1923, which seems to uphold a countrary view. Even if it be conceded that ordinarily if the purchase is made by the decree-holders in lieu of the decretal amount and the payment is merely set off against the decree, then it may be deemed that the purchase is made on behalf of all the persons interested in the decretal amount whether plaintiffs or defendants, we have to see whether that inference can be properly drawn in view of the conduct of both the parties throughout the proceedings in this case. We have noted that Makhan Lal, to start with had refused to join in the suit and had not himself brought any suit within limitation on the basis of the original document which he retained in his possession. Then he occupied a double capacity, namely of co-mortgagee as well as of subsequent mortgagee. When the decree was passed, permission was granted to the decree-holders to bid. Makhan Lal apparently made no attempt to bid himself. After the sale had taken place, Makhan Lal applied to have the sale set aside. In his application he clearly stated that Piare Lal had purchased the property *for the decree-holders*. He never suggested that the purchase had also been made in his interest. Throughout those proceedings his attitude was that the sale should be set aside and the property re-sold so that he himself may bid and purchase it at a higher figure thereby either getting a large share in the sale proceeds or also getting something towards his subsequent mortgages. At one stage he was even prepared to pay down the money and have the sale set aside but that he ultimately did not do. When the sale was set aside by the Collector, the other mortgagees appealed to the Commissioner and in spite of Makhan Lal's opposition the appeal was decreed. Later on the other decree-holders applied for the sale certificate and the sale certificate was granted to them only. Having regard to the attitude of both the parties, it is impossible to draw the inference that when the purchase was made it was made on behalf of Makhan Lal also. Their Lordships of the Privy Council in the case of *Ganga Sahai* v. *Kesri* (2) remarked that the Courts in India cannot refuse to allow one decree-holder to perpetrate a fraud against his co-decree-holders under cover of any of the provisions of the Civil Procedure Code. In this particular case it cannot be suggested that any fraud was attempted to be perpetrated or was, in fact, perpetrated on Makhan Lal, who knew full well what was happening. It is true that the property was purchased in lieu of the decretal amount. It is also true that the decree-holders did not pay down the money in cash nor deposit the share of Makhan Lal in Court but, in our opinion, these circumstances by themselves would not justify us in presuming that the sale was made for Makhan Lal also when the conduct of both the parties was such as to preclude any such presumption.

In this view of the matter we are of opinion that it is no longer possible to hold that Makhan Lal has actually an interest in the property which was purchased.

We accordingly uphold the decree of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(2) [1915] 37 All, 545—42 I.A. 177—19 C.W.N. 1175—18 M.L.T. 203—29 M.L.J. 329—2 L.W. 837—13 A.L.J.999—17 Bom. L. R. 998—22 C. L. J. 508—30 I.C. 265—(1915) M. W. N. 713 (P.C.)

(3) [1914] 25 I. C. 735.

1925 ALLAHABAD 333

MEARS, C. J. AND PIGGOTT, J.

Shankar Sahi and others—Defendants—Appellants.

v.

Baichu Ram and others — Plaintiffs — Respondents.

Letters Patent Appeal No. 143 of 1923, Decided on 8th January, 1925, from a judgment of Gokul Prasad, J.

✱ *Hindu Law — Alienation — Legal necessity must be a defensive act—Pre-emption is not legal necessity.*

Any act for which the character of 'legal necessity' or 'benefit to the estate' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property in possession and which may or may not be successful under the chances attending upon litigation. So, a Hindu father cannot encumber joint ancestral property to acquire the necessary funds to pre-empt other property. [P 334 C 2]

Shiva Prasad Sinha—for Appellants.

Haribans Sahai and Lakshmi Narain Tiwari—for Respondents.

Facts:—In this case, the plaintiffs sued for foreclosure of a mortgage of joint family property executed by a Hindu father and son. The mortgage had been executed for the purpose of raising money for payment under a pre-emption decree which had been obtained by the father. The foreclosure suit was resisted by the grandsons on the ground that their father and grandfather had not been entitled to create the encumbrance.

Judgment:—[After stating facts the judgment proceeded:—]

In the Munsif's court the Munsif freed the ancestral property from the obligation of the mortgage, but gave a decree by which the mortgage money was to be recovered from the pre-emptive property which by that time had passed into the possession of the family as joint family property. It is that decree which in appeal today the appellants ask us to restore.

The question, therefore, before us is whether in an ordinary case a Hindu father can encumber joint ancestral property to acquire the necessary funds to pre-empt other property. In our opinion he cannot do so. The first authority which was called to our notice by Mr. Sheo Prasad Sinha was the case of *Palaniappa Chetty* v. *Deivasikamony Pandara* (1). The passage on which reliance is placed is not an attempted definition of what is meant by "benefit to the estate" but is a passage giving illustrations of what in the ordinary course would be likely to be accepted by a Court as instances of " benefit to the estate ". Their Lordships of the Privy Council said: "The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits". Now all of those matters are rather in the nature of a shield ; that is an expense which arises and which has to be met in order to keep alive the whole of the ancestral property or some portion of it. There is nothing in either of those illustrations which supports the view that a Hindu father can voluntarily go forward and initiate litigation for the purposes of extending the boundaries of his property, and having succeeded in that litigation and having obtained a pre-emption decree, which gives him liberty to do something, can thereby raise money and encumber the ancestral joint family estate. This particular passage quoted above was referred to by a Bench of this Court in a case to be found in *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (2), where the learned Judges having quoted what already appears above in inverted commas, gave this intetpretation of their view of the passage. "There is nothing in these remarks to encourarge the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate, could properly be regarded as a 'benefit to the estate' or a 'legal necessity'. Their Lordships' observations rather import that any act for which the character of 'legal necessity' or 'benefit to the estate' can be claimed must necessarily be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property in possession and "which may or may not be successful under the chances attending upon litigation". We agree with the view taken by this Court, and the position on the 10th of June, 1915 was that the father was under no obligation whatever to raise any money at all. There is no evidence that it was required for any protection of his estate. It was a voluntary act of acquisition, which might or might not have been a good bargain had he had the ready money to acquire the property, but was, in our opinion, certainly an act which he could not be premitted by Hindu law to do, if it involved, as it did, the creation of a mortgage of the joint ancestral family property.

(1) [1917] 40 Mad. 709—44 .I A. 147—21 C. W. N. 729—15 A. L. J. 485—1 P, L. W 697—33 M. L. J. 1—19 Bom. L. R. 567—22 M. L. T. 1—26 C. L. J. 153—39 I. C. 722—6 I. W. 222—(1917) M. W. N. 507 (P.C.)

(2) 1923 All. 298=45 All. 360=21 A. L. J. 271—4 L. R. A. Civ. 156.

The nature of a pre-emption decree has recently been considered in the case of *Chatarbhuj* v. *Govind Ram* (3). In that case a decree for pre-emption had been obtained and a mortgage of joint family property executed, and the question arose whether the pre-emption decree constituted an antecedent debt. The Court in giving judgment pronounced against the view that it was an antecedent debt and added: "When all is said and done, the pre-emption decree merely gave Govind Ram the option of acquiring certain property at a certain price. He was laid under no obligation to acquire the property unless he chose. It seems to us that it would be very dangerous to hold that the money required to satisfy the pre-emption decree was an antecedent debt due from Govind Ram on the date on which each of these mortgages, respectively, was executed."

Mr. Haribans Sahai has brought to our attention the case of *Tula Ram* v. *Tulshi Ram* (4). The facts of that case were that the lender was endeavouring to recover his money from the mortgagor on the ground that the lender had made due and proper enquiries and had been told and believed that the money was being applied in the purchase of certain property. Unknown to the mortgagee the purchase money for the property had already been provided from some other source but he was not aware of that, and it was accepted that the purchase was a proper purchase and beneficial to the plaintiff. In our view what the Court was considering there was the consequences which were to follow from the enquiries made by the lender and the acts of the borrower in applying the money unknown to the lender for a different purpose from that for which he had professed to borrow. It seems to have been conceded that the Hindu father had a right to acquire fresh property and mortgage the ancestral property as a security for that loan. The 1917 case, *Palaniappa Chetty* v. *Deivasikamony Pandara* (1) which we have already referred to, was not brought to the attention of the Court and the transaction was not impeached by any one on the lines that the father had not the power to encumber the estate. We think that case does not controvert the general line of authority which is indicated in *Palaniappa Chetty* v. *Deivasikamony Pandara* (1), is continued in *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (2) and the reasoning and consideration of the nature of a pre-emption decree given in the case of *Chatarbhuj* v. *Govind Ram* (1). For these reasons we are of opinion that the appeal must be allowed and the decision of the Munsif restored; and inasmuch as we think that the respondents should have accepted that decision as the right decision when it was given, the costs here must be paid by the respondents.

Appeal allowed.

(3) 1923 All. 218—45 All. 407—4 L. R. A. Civ. 409—21 A. L. J. 348.
(4) [1920] 42 All. 559—18 A. L. J. 699—60 I. C. 3

✱ 1925 ALLAHABAD 335

SULAIMAN AND RYVES, JJ.

Nathu and another—Defendants—Appellants.

v.

Ram Sarup and others—Plaintiffs—Respondents.

Second Appeal No. 146 of 1923, Decided on 8th January, 1925, from a decree of the Add. Judge, Saharanpur.

✱ *Civil P. C., O. 34, R. 1—Mortgage by Hindu co-parceners—Mortgage suit—Mortgagors impleaded but minor co-parcener not impleaded—Suit is not bad but minor is not bound—Hindu Law—Alienation.*

Where a mortgage is executed by two Hindu co-parceners and the mortgagee sued them without impleading the minor son of one of the executants, the suit is not bad for non-joinder of parties but may be decreed as against the actual mortgagors. But the suit is not good on the ground that the major defendants represent the minor who has not been impleaded. The minor co-parcener can afterwards set aside the alienation on any legitimate grounds. 34 All. 549 and 1924 All. 908 Dist. [P 336 C 2]

M. L. Agarwala—for Appellants

Nehal Chand—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for sale on the basis of a mortgage deed executed on the 4th of July, 1911 by two brothers, Nathu and Faqira, the defendants.

The defendants *inter alia* pleaded that Nathu's son, Chhajju who is a minor and a member of a joint Hindu family, had not been impleaded. The plaintiffs did not choose to implead him in this case

and it is unfortunate that the Court of first instance also perhaps to avoid complications did not think it worth while to bring him on the record and thus dispose of all possible disputes.

The Court of first instance. however, dismissed the claim on the ground that Chhajju, the minor member of the family, had not been impleaded and the suit, therefore, was defective on the ground of non-joinder. In this, reliance was placed on the case of *Shium Sunder Lal* v, *Badhu Lal* (1).

The lower appellate Court has allowed the appeal and held that the suit could not fail on the ground of non-joinder but that the major members of the family actually represented the minor member also and that thus the suit was not defective. It has relied on the case of *Hori Lal* v. *Munman Kunwar* (2).

We are of opinion that the decree of the lower appellate Court must be upheld but we intentionally refrain from upholding it on the ground that the minor member is represented by the major members.

Our attention has been invited on behalf of the respondents to the case of *Chetan Singh* v. *Sartaj Singh* (3), and it is urged that it supports the view of the lower appellate Court.

We would like to point out one circumstance which has some times been overlooked and which clearly explains the rule of law laid down in the Full Bench case of *Hori Lal* v. *Munman Kunwar* (2). In that case the mortgagees were not suing the mortgagor, namely the executant himself, but were trying to follow the mortgaged property in the hands of the heirs of the transferee from the mortgagor. Some minor members of the family of the transferee from the mortgagor had not been impleaded. In that case it was obvious that no question of the right of a Hindu minor son to challenge an alienation by the major members for want of legal necessity at all arose. The only question was whether the suit as against the then defendants was maintainable. The full Bench held that, although the property had been acquired from the mortgagor by the defendants' father, it had been acquired by the entire joint family but nevertheless as the major members were impleaded, they had represented all the other members. In the same way it may perhaps be pointed out that in the case of *Chetan Singh* v. *Sartaj Singh* (3), the suit was against the heirs of the original mortgagor and not the mortgagor himself.

In the present case we have already noted that the plaintiffs are suing the actual parties to the mortgage deed, namely Nathu and Faqira. It is open to the plaintiffs to ask the Court to grant them a decree against the persons who borrowed the money from them and who had made the mortgage as executants, for they cannot be allowed to plead want of authority to make the mortgage. It is difficult to see how in these circumstances the defendants can be said to represent the minor son in the true sense of the word. It is on that ground that we refrain from saying that the suit is a good one because the major members represented the minor. We would like to make it clear that even after this decree it would remain open to Chhajju Singh to sue in a Civil Court to avoid the alienation on grounds which are ordinarily open to Hindu minor members. With this remark we dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) [1914] 12 A. L. J. 794—24 I. C. 252.
(2) [1912] 34 All. 549—15 I, C. 126—9 A. L. J. 819 (F. B,)
(3) 1924 All. 908—46 All. 709—22 A. L. J. 702—5 L. R. A. Civ. 480.

1925 ALLAHABAD 336

LINDSAY AND KANHAIYA LAL, JJ.

Mukha—Plaintiff—Appellant.

v.

Mitter Sen—Defendant—Respondent.

Second Appeal No. 336 of 1923, Decided on 10th November, 1924, from a decree of the Sub. J., Muzaffarnagar.

Pre-emption — Custom — Discrepancies between wajib-ul-arzes *of various dates—Custom was held not established.*

There were three *wajib-ul-arzes.* The first *waijb-ul-arz* did not purport specially to record a custom of pre-emption. The next one purported to record a custom of pre-emption. The last *wajib-ul-arz* merely said that the customs recorded in the first *wajib-ul-arz* will remain in force. No reference was made therein to the *wajib-ul-arz* of the intermediate settlement. There was in several respects a material variation between the first two *wajib-ul-arzes..*

Held: that an ancient and invariable custom of pre-emption was not proved to have existed in the village, the evidence adduced being ambiguous both as regards the incidents attaching to the

right of pre-emption and the circumstances in which that right came into existence.

Prakash Narain Sapru—for Appellant.

Gulzari Lal and *Kailas Nath Katju*—for Respondent.

Judgment.—This appeal arises out of a suit for pre-emption, and the main question for consideration is whether a custom of pre emption exists in the mahal in which the property in dispute is situated. The Courts below were of opinion that no such custom was established We have examined the *wajib-ul-arz* produced in the case and are not satisfied that the plaintiff has established by clear evidence that an invariable custom existed in the village of the kind set up. The *wajib-ul-arz* of 1863 does not purport specifically to record a custom of pre emption. All that it says is that in the case of a sale or mortgage by a co-sharer the pre-emptive right shall belong first to an own brother then to the uncle and near brothers, and in case of their refusal, to the other co-sharers in the patti and village. The *wajib-ul-arz* of 1297 F purports to record a custom of pre-emption, but gives the right of pre-emption first to near relations (*rishtedar nazdiki*) then to the co-sharers in the patti and khewat, and in case of their refusal, to the co-sharers of the other pattis. It does not give any right of pre-emption in the case of a mortgage; and while it lumps up the categories mentioned in the earlier *wajib-ul-arz* it extends the right of pre-emption to near relations who are not even co-sharers of the village. It moreover creates a new category in so far as it allows competition between co sharers in the patti and khewat and co sharers in the other pattis, whereas no such competition was recognized by the earlier *wajib-ul-arz*. The *wajib-ul-arz* prepared in the last settlement of 1325 F merely says that the customs recorded in the *wajib-ul-arz* of 1863 will remain in force. It is singular however that no reference is made therein to the *wajib-ul-arz* of the intermediate settlement namely that of 1297 F, and considering that there is in several respects a material variation between the *wajib-ul-arzes* of 1863 and 1297F it is difficult for us to say that an ancient and invariable custom of pre-emption has been proved to have existed in the village. At its best the evidence adduced is ambiguous both as regards the incidents attaching to the right of pre-emption and the circumstances in which that right comes into existence.

The learned counsel for the plaintiff-appellant has invited our attention to a decree for pre emption which was obtained in the year 1903. But a reference to the abstract of the plaint given in that decree shows that the suit in which that decree was passed was passed on contract. That decree is therefore no evidence of the existence of any custom in the village. We see no reason, in these circumstances, to take a view different from that at which the Court below has arrived. The appeal must therefore fail and it is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

✱ 1925 ALLAHABAD 337

MEARS, C. J AND SULAIMAN, J.

Ram Sarup—Defendant—Appellant.

v.

The Arya Samaj, Dhampur and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 175 of 1923, Decided on 5th December 1924 from the judgment of Gokul Prasad, J.,

✱ *Civil P. C., O. 29 R. 1—Unregistered body—All members must be impleaded.*

An unregistered body cannot sue or be sued as a corporation; all its members must be impleaded and therefore a partition of property belonging to an unregistered body without issuing notice to all its members is not binding on the members not served. [P. 338, C. 2.]

Peary Lal Banerji—for Appellant.

K. N. Kutju, Panna Lal and K. N. Malavaiya—for Respondents.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for a declaration of title and recovery of possession. The appeal under the Letters Patent is now confined to the property described as item No. 1 in the plaint which measures over 6 biswas. This property was acquired on the 19th of May, 1911 from one Chandi Prasad in the name of two persons Bishambhar Nath and Ram Saran Das. It now appears that Bishambhar Nath at that time was the Secretary and Ram Saran Das the treasurer of a society called the Arya Samaj of Dhampur. The names of these two persons were entered

in the revenue papers. On the 18th of August, 1913 Bishambhar Nath, his brother, Ram Sarup, and Ram Saran Das applied to the Revenue Court for the partition of the property purchased under the sale-deed of the 19th of May, 1911. It is stated on behalf of the appellant that Dr. Baldeo Sahai, who was acting as the manager of the Arya Samaj, also filed certain objections to the partition proceedings. We may note that there were some other shares which admittedly belonged to the Arya Samaj in the mahal in which item No. 1 property stood and against those shares the entry in the column of proprietors was " the Arya Samaj under the management of Baldeo Sahai Kayastha manager ". The Revenue Court ordered an imperfect partition under which separate patties were allotted to Ram Sarup, Bishambhar Nath, Ram Saran Das and the Arya Samaj under the managership of Baldeo Sahai.

The present suit had been instituted by the Arya Samaj to recover the property in patties allotted to Bishambhar Nath and Ram Saran Das, which property had been subsequently sold by them to Ram Sarup under a sale-deed dated the 13th of November, 1916.

The first Court decreed the claim and the lower appellate Court confirmed the decree. On appeal to this Court the appeal was partly allowed excluding certain items of property with which we are not now concerned, but the decree of the Court below was confirmed with respect to item No. 1.

Three main points have been urged before us. It is convenient to dispose of the last two points first. One of which is that the plaintiff Arya Samaj never acquired this property under the sale-deed of the 19th of May, 1911 inasmuch as it was not a registered body. This point was not taken specifically in the pleadings and no issue was framed, and though for some reasons it appears to be made the subject of debate in the trial Courts, there is no reference to it in the judgment. No mention was made in the grounds of appeal before the lower appellate Court. However an attempt was made to raise this point for the first time before the learned Judge who heard the second appeal. It was properly disallowed and we are of opinion that this new point cannot now be raised.

The second point was that the defendant was protected under S. 41 of the Transfer of Property Act. This contention has no force because the finding is that the defendant was fully aware, as appears from his own statement dated the 20th of April, 1916, that the property belonged to the Arya Samaj and the two persons in whose names it was acquired were mere *benamidars*.

The main point urged before us is that in view of the order of the partition Court allotting this property to Bishambhar Noth and Ram Saran Das as against the Arya Samaj, it was not open to the Civil Court to go into this question and decide whether in fact it belonged to the Arya Samaj or not. The plea is that the claim in the Civil Court is barred by S. 233 K of the Land Revenue Act.

It has been assumed by the Court of appeal that if the Arya Samaj had been properly represented before the partition Court, then S. 233 K would be applicable. This contention, however, has not been accepted on the ground that the Arya Samaj was not properly represented.

It is an admitted fact that the said Arya Samaj is not a registered corporation and it consists of members fluctuating in number. At the time when the application for partition was made, the entry in the revenue record showed that the Arya Samaj was the recorded proprietor but its manager was Dr. Baldeo Sahai, nevertheless it was Dr. Baldeo Sahai who was impleaded and notices were not issued to all the members of the association, nor were all the members represented in Court. The learned Judge has relied on two cases of this Court, namely the case of *Panchaiti Akhara* v. *Gauri Kuar* (1), *N W.P. Club through G.B. Goyder, Honorary Secretary* v. *Sadullah*(2), which lay down that an unregistered body cannot sue or be sued as a corporation, but that all its members must be impleaded. It is not disputed before us that there were 13 men who were members of the Arya Samaj of Dhampur in the year 1913 and that no one except Dr. Baldeo Sahai was served with notice or actually appeared in Court. It is clear, therefore, that in view of the rulings of this Court which have been followed in a subsequent case, *Ganesha Singh* v. *Mundi Forest*

(1) [1897] 20 All. 157—(1898) A. W. N. 7.
(2) [1898] 20 All. 497.

Compny (3) ; the Arya Samaj as such was not represented, and it follows, therefore, that all the other members are not bound by any order that was passed by the partition Court behind their back.

It is, therefore, clearly open to the Civil Court to go into the question of title. The finding is a finding of fact which cannot now be challenged. The result, therefore, is that this appeal must fail and is hereby dismissed with costs.

Appeal dismissed.

(3) [1889] 21 All. 345—(1899) A.W.N. 123.

✱ 1925 ALLAHABAD 339

WALSH AND SULAIMAN, JJ.

Sarju Prasad Rout—Defendant — Appellant.

v.

Mangal Singh — Plaintiff — Respondent.

F. A. F. O. No. 200 of 1923, Decided on 28th January 1925, from an order of the Addl. Sub. J., Basti.

✱ (a) *Hindu Law—Alienation— Co-parcener —Surviving co-parcener not challenging — Survivor's death—Reversioner can challenge.*

If an alienation is made by one member of a Joint Hindu family, which is really not binding on the estate and afterwards that member dies, and also the surviving members die, the reversioners would have the right to challenge the alienation. 8 *A. L. J. R.* 901 *Ref.* [P. 340, C. 1]

(b) *Hindu Law—Widow—Decree against widow binds reversioners.*

A Hindu widow represents the estate for the time being though her rights are to a certain extent qualified. If she fights a case against a third party she is representing the estate and is fighting the case in a representative character on behalf of all the subsequent reversioners. A decree fairly and properly obtained against her in the absence of any fraud or collusion, would be binding on the reversionary heirs. It is only when the decree relates to a matter personal to her, that it would not be binding on the reversioners. 37 *All.* 493 ; 40 *All.* 595 *Foll.* [P 340, C. 1]

✱ (c) *Hindu Law—Widow*—Ex parte *decree against widow binds reversioners.*

An *ex parte* decree unless there be anything special which would suggest that it was not fairly and properly obtained, would be binding on the reversioners. [P. 340, C. 2]

Harnandan Prasad—for Appellant.

Shiva Prasad Sinha—for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for a declaration that the mortgage deed, and a decree on the basis of it obtained by the contesting defendants, were collusive, null and void, and not binding on the plaintiff. The plaintiff is a separated brother of Kalap Nath Singh deceased. On Kalap Nath Singh's death, his son, Harbans Singh, survived him. On the death of Harbans, Kalap Nath Singh's widow, Mt. Acharja, succeeded to the estate as a Hindu mother. Kalap Nath in his life time had executed a simple mortgage deed on the 13th of May 1914, when his son, Harbans, was alive. After the death of Kalap Nath and Harbans, the defendant mortgagee instituted a suit on the basis of the deed, and obtained an *ex parte* decree on the 4th of November 1920, against Mt. Acharja. The plaintiff, as the next reversioner, has instituted a suit alleging that the original mortgage deed was without any legal necessity, and was, therefore, not binding on the joint Hindu family estate, and further that the decree obtained by the contesting defendants against the widow Mt. Acharja was a collusive one.

The Court of first instance came to the conclusion that it had not been established that the decree was either fraudulent or collusive. It did not go into the question of the mortgage having been for legal necessity, but it dismissed the suit on the ground that the plaintiff as reversioner had no right to challenge an alienation made by Kalap Nath. In the opinion of the Munsif the only person who could have challenged it was Harbans, the other co-parcener. On appeal to the lower appellate Court the learned Judge has come to the conclusion that the plaintiff has a right to call upon the mortgagee to prove legal necessity for the mortgage. He has not recorded any express finding as to whether the decree obtained against Mt. Acharja was or was not a collusive one. He has also omitted to decide himself whether the mortgage had been for legal necessity but has remanded the case for the diposal of the question of legal necessity.

In our opinion the view of the learned Judge that the plaintiff has a right to challenge the alienation in case the decree is not in his way, was quite correct. A co-parcener has no absolute right to transfer the family property without legal necessity. The transfer by Kalap Nath, if it was without legal necessity, was therefore, not binding on the estate, and was

liable to be challenged by Harbans. A full Bench of this Court in the case of *Muhammad Muzamilullah Khan* v. *Mithu Lal* (1) has laid down that the right to challenge an alienation is not only confined to the members of the family, but can also be availed of by subsequent transferees. It seems to us that that right must also be availed of by successors-at-law. If an alienation is made by one member of a joint Hindu family, which is really not binding on the estate, and afterwards that member dies, and also the surviving members die, the reversioners would have the right to challenge the alienation. We, are therefore, of opinion that if the decree passed against Mt. Acharja was not in the plaintiff's way, he would be entitled to challenge the alienation.

It is contended on behalf of the respondent that the decree against Mt. Acharja cannot bind the plaintiff-reversioner, because he has not claimed through her. This contention cannot be accepted. A Hindu widow represents the estate for the time being though her rights are to a certain extent qualified. If she fights a case against a third party, she is representing the estate and is fighting the case in a representative character on behalf of all the subsequent reversioners. A decree fairly and properly obtained against her in the absence of any fraud or collusion, would be binding on the reversionary heirs. It is only when the decree relates to a matter personal to her, that it would not be binding. This was the view clearly expressed by *Banerji*, J. in the Full Bench case of *Risal Singh* v. *Balwant Singh* (2), and that view has been approved of by their Lordships of the Privy Council in the case of *Risal Singh* v. *Balwant Singh* (3).

It is next contended on behalf of the respondent that inasmuch as the decree against Mt. Acharja was an *ex parte* decree, there was not a proper and fair fight. It is urged that this Court has held that a compromise decree between a Hindu widow and a third party would not necessarily bind a reversioner. A compromise decree is merely an embodiment of a private contract entered into by a widow and private persons. There is clearly in such a case no adjudication by the Court. An *ex parte* decree, however, stands on a different footing. There is no confession of judgment by her, and the plaintiff has to prove by evidence and satisfy the Court that he has got a good case. We, therefore, think that an *ex parte* decree, unless there be anything special which would suggest that it was not fairly and properly obtained, would be binding on the reversioners.

We are, therefore, of opinion that before the suit can be finally disposed of, it is not only necessary to find whether there was or was no legal necessity, but it is also necessary to determine whether the *ex parte* decree against Mt. Acharja had been fairly and properly obtained, and whether it was without any fraud or collusion.

As the Court of first instance has recorded a finding on the absense of fraud or collusion, it will be necessary for the appellate Court to decide the question itself. Under the circumstances a remand to the first Court with regard to the question of legal necessity was inconvenient. Both the issues should be disposed of by the lower appellate Court. We accordingly set aside the order of the lower Court, and remand this case to the lower appellate Court with the direction to readmit it to its original number and to dispose of it according to law. Costs in the Court below and this Court will abide the event.

Case remanded.

---

(1) [1910] 33 All. 783—11 I.C. 220—8 A.L.J. 901.
(2) [1915] 37 All. 496—30 I.C. 657—13 A.L.J. 594 (F.B.)
(3) [1918] 40 All. 593—45 I.A. 168—28 C.L.J. 519—24 M.L.T. 361—9 L.W. 52—23 C.W.N. 326—(1918) M.W.N. 155—36 M.L.J. 597—48 I.C. 553—21 Bom. L.R. 511 (P.C.)

1925 ALLAHABAD 340

RYVES AND MUKERJI, JJ.

Sant Lal and others — Defendants—Appellants.

v.

Beni Prasad and another—Plaintiffs—Respondents.

Second Appeal No. 272 of 1923, Decided on 21st January, 1925, from a decree of the Add. Dt. J. Saharanpur.

Limitation Act, S. 19—Promise to pay sums that may be found due on comparison of accounts, is "acknowledgment".

The writer admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due.

Held : that the words were a clear admission of liability within the meaning of S. 19. 31 *Cal.* 195 *Dist.* 33 *Cal.* 1047 *Foll.*

Nehal Chand—for Appellants.

The Respondents were not represented.

Ryves, J.—In this appeal the short point is whether the letter sent by the defendants on the 20th of January, 1917 is an admission of liability within the meaning of S. 19 of the Indian Limitation Act. The suit was one for balance of account and admittedly was time barred unless limitation was extended by this letter.

Both Courts have found that it was a clear admission of liability within the meaning of that section. The decisive words are that the writer admitted the existence of a running account between the parties and went on to say that his representatives would in *Phagun* or *Chait* compare accounts and pay what was found to be due.

The learned counsel for the appellants has relied on the case of *Jageshwar Roy* v. *Raj Narain Mitter* (1). In every case of this kind the document in question has to be interpreted by its own language and it is not very helpful to cite rulings as to the meaning to be attached to a document in another case unless the wording is the same. The case of *Jageshwar Roy* v. *Raj Narain Mitter* is entirely distinguishable from this case. That was not a case of accounts between the parties and the wording of that letter is very different from the present one. In our opinion the matter is really concluded by the Privy Council case, *Mani Ram Seth* v. *Seth Rup Chand* (2).

We, therefore, dismiss the appeal but without costs as the respondents are not represented.

Appeal dismissed.

(1) [1904] 31 Cal. 195—8 C. W. N. 168.
(2) [1906] 38 Cal. 1047—33 I. A. 165—4 C. L. J. 94—8 Bom. L. R. 501—10 C W. N. 874—1 M. L. T. 199—3 A. L. J. 525—16 M. L. J. 300—2 N. L. R. 130 (P. C.)

1925 ALLAHABAD 341

RYVES AND MUKERJI, JJ.

Mahadeo Rai and others—Plaintiffs—Appellants.

v.

Jan Muhammad and others—Defendants—Respondents.

Second Appel No. 246 of 1923, Decided on 21st January, 1925, from a decree of the Dt. J., Ghazipur.

Landlord and Tenant — Abadi — Pucca well sunk in Sahan *attached to tenants' house—Zemindar cannot sue for demolition.*

A suit by a zemindar against a tenant of his who has a house in the abadi, for demolition of a pucca well which the tenant had sunk in the *Sahan* in front of and appurtenant to his house does not lie. 1898 *A. W. N.* 44 ; 42 *I. C.* 51 *and* 51 *I. C.* 1006 *Foll.* [P 341, C 2]

A. P. Pandeya—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit brought by a zemindar against a tenant of his who had a house in the abadi for the demolition of a pucca well which that tenant had sunk in the Sahan in front of and appurtenant to his house. Both Courts below have dismissed the suit.

The plaintiff appeals. He claims that under what has been called the common law of these provinces, a zemindar is the owner of every inch of ground within the ambit of his zemindari, and that no tenant can, without his consent, make any permanent structure on any part of that zemindari. It is further argued that the sinking of the well in the Sahan of the defendant's house is a use of the land which is inconsistent with the purposes for which that land was given to the tenant, namely for ingress and egress, and that being so, the tenant has no right whatever to sink the well.

There is no authority in this Court in support of the plaintiff's case and this is not surprising for it seems to us that the plaintiff is in no way damnified by the action of the defendants. It has been ruled many years ago that a tenant can improve his house in the abadi ; vide *Balkishen* v. *Muhammad Ismail Khan* (1). There are, however, two rulings of the Oudh Court which are directly in point. In *Mahabal* v. *Sarju* (2), Mr. Lindsay, then Judicial Commissioner and

(1) [1898] A. W. N 44.
(2) [1917] 4 O. L. J. 454—42 I. C. 51.

now a Judge of this Court, held under precisely similar circumstances that the sinking of a pucca well in a part of the land which was appurtenant to a tenant's house would not give a cause of action to the zemindar. The particular portion of land in that case on which the well was sunk was described as "Sahan-wa-rasta." That decision was followed by the same Court in *Sheo Singh* v. *Rajeshwar Bali* (3). In our opinion these decisions are right and we follow them. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(3) [1919] 6 O. L. J. 281—51 I. C. 1006.

1925 ALLAHABAD 342

LINDSAY AND KANHAIYA LAL, JJ.

Maqsud Ali and others—Plaintiffs—Appellants.

v.

Abdullah and others—Defendants—Respondents.

Second Appeal No. 391 of 1923, Decided on 10th November 1924, from a decree of the Sub. J., Meerut.

Pre-emption—Wajib-ul-arz—Two wajib-ul-arzes—Earlier one putting brothers and co-sharers separately—Later one lumping them together—Brothers were held to supersede co-sharers.

There were two wajib-ul-arzes prepared within an interval of about six or seven years. The earlier one contained a classification of pre-emptors as follows:—

1 Own brothers; 2. Co-sharers in the same patti; 3. Co-sharers in other pattis. The second document gave only one classification of pre-emptors, namely; "own brothers and co-sharers of the village.

Held: that the two wajib-ul-arzes ought to be read together and that under the custom of pre-emption an own brother of the vendor had a better right to take the property than a co-sharer in the village. [P 343 C 1]

Harindra Krishna Mukherji—for Appellants.

G. W. Dillon and *Sheo Dyal Sinha*—for Respondents.

Judgment.—In this case we are concerned with the interpretation of two wajib ul-arzes. The question to be decided is whether the plaintiff, who was Nasir Ullah Khan now represented by the present appellants, Maqsud Ali and others, was entitled to a preference in the matter of exercising a right of pre-emption. The vendor of the property in dispute was own brother of Nasir Ullah, and the purchaser Kabul Khan who is now represented by two defendants, Ahsan Ali and Abdullah, was a co-sharer in the village and also a relation, but a distant relation, of the vendor.

The Court of first instance gave the plaintiff a decree for pre-emption on a finding that on the language of the record of custom as contained in the two wajib-ul-arzes the plaintiff as own brother of the vendor had better right than the vendee who was a co-sharer only and in any case a more distant relation. The lower appellate Court has reversed the finding of the Court of first instance on this point, being of opinion that the palintiff as own brother of the vendor had no better right. Another question was raised in the Court of first instance. It was pleaded by the vendee that the plaintiff had full knowledge of the sale sought to be pre-empted and that he had acquiesced therein so as to be no longer entitled to assert a claim for pre-emption. The Court of first instance held that the transaction now in dispute was carried out without the knowledge of the plaintiff and that there was no reason to debar him from maintaining the suit. On this question of the consent or acquiesence of the plaintiff the judgment of the lower appellate Court is silent.

We have decided to deal with this question of fact ourselves as it is not worth while sending the case back to the lower appellate Court for finding. In all probability the case would come before some other Judge than the one who heard the appeal.

Dealing with the first question, namely the preferential right of the plaintiff that has to be considered, in connection with the two documents which are filed, Exhibit 3 and Exhibit C. Exhibit C is a copy of the document known as the wajib-ul-arz prepared by Mohar Singh. In this document there is a classification of pre-emports which reads as follows:—(1) Own brothers; (2) Co-sharers in the same patti; (3) Co-sharers in other pattis. The second document, namely, the copy of the wajib-ul-arz prepared at the time of Munshi Nasir Ali Khan, gives only one classification of pre-emptors, namely: "Own brothers and co-sharers of the village." It is provided that if none of these people wish to pre-empt a sale may be made to strangers. The learned Subordinate Judge laid great

stress on the wajib-ul-arz of Nasir Ali Khan, that being later in date, although as we understand, the difference between the dates of the preparation of these two wajib-ul-arzes cannot have been more than six or seven years. The judge was of opinion that on the language of the later wajib-ul-arz own brothers and co-sharers in the villages were all lumped together in one category in such a way that a brother could have had no preferential right over any other person who happened to be a co-sharer in the village On the other hand, it is equally clear that in the wajib-ul-arz prepared by Mohar Singh the own brothers of the vendor stood in a category by themselves and had preferential right over other persons who were co-sharers in the patti or in the village. We are not disposed to take the view taken by the Court below, and it seems to us that the two wajib-ul-arzes ought to be read together. We can hardly think that, having regard to the fact that the earlier record was made in favour of own brothers, the later record can have been correctly prepared if it is meant to indicate that the own brothers of the vendor were put on exactly the same footing as any other co-sharer in the village. It seems to us the more reasonable construction to adopt that the right of pre-emption recorded in these two documents was in fact the same, and all that appears is that when the later record was prepared it was prepared in a less careful manner than the one which preceded it. On the whole, we think that a distinct case is made out for holding that under the custom of pre-emption, which apparently is not denied, an own brother of the vendor has a better right to take the property than a co-sharer in the village. That being so, the late plaintiff Nasir Ullah was entitled to pre-empt.

There remains the other question which is a question of fact. Nasir Ullah denied that he in any way acquiesced in the sale which he was seeking to pre-empt. The sale-deed in dispute was executed on the 9th February 1921, and was registered on the same date. It is proved that on the same date, that is to say, 9th February 1921, the plaintiff Nasir Ullah and his brother Muhammad Khan and one Daulat executed another sale-deed relating to property in another village and this deed was executed in favour of the same purchaser Kabul Khan. It was sought by means of this later document and also by means of oral evidence, to show that the plaintiff was fully cognizant of the sale which he is now claiming to pre-empt, and that therefore, his suit is not maintainable. The document relating to the sale in suit was attested by two witnesses who were examined in Court. They deposed that the plaintiff was present on the 9th February 1921, when both documents were being drawn up by the same scribe. They do not however say that the plaintiff was given any opportunity of taking the property or that such an offer having been made was refused by him. All that the evidence of witnesses amounts to is that he was present on the spot. Another witness was called who went further than this. He deposed definitely that the plaintiff was present when the sale-deed in dispute was executed and that he had been asked to take the property and had refused on the ground that he had not the money.

It is the fact that this second document relating to the other village, a document which was registered on the 2nd of March 1921, bears the signature of Nasir Ullah. He was asked in the witness-box to explain this and he deposed that he put his signature to it, not on the 9th February 1921, but on the date on which the document was presented for registration, and this statement the Court of first instance believed. It would be difficult for us to differ on this matter with the finding of the first Court. There is something suspicious about this other document of 9th February 1921, which is marked Exhibit D. We have already mentioned that there were three vendors under this deed, Muhammad Khan, Nasir Ullah Khan and Daulat. The document as it stands bears the signature of Muhammad Khan and the thumb-impression of Daulat. Between these two signatures we find a second signature made by the vendor Muhammad Khan and underneath this is written the name of Nasir Ullah Khan. It looks to us, therefore, as if the signature of Nasir Ullah had been appended to this document at a later date and it is a suspicious circumstance which has not been explained, that the signature of one of the vendors should appear twice on the document. On the whole, we think that the Court of first instance was justified in coming to the conclusion that there was no reliable

evidence to show that the plaintiff had acquiesced in the dispute and that he was thereby debarred from asserting his claim for pre-emption. Our finding of fact is accordingly in agreement with that of the Court of first instance. It follows from this that the appeal is allowed. We set aside the decree of the Court below and restore the decree of the Court of first instance. The plaintiffs-appellants will be entitled to their costs here and in the lower appellate Court and the costs in this Court will include fees on the higher scale.

We understand that after the first decree the pre-emption money was deposited in Court. Whether it is there yet or not we do not know. but if it is not, we think that the plaintiff ought to be given an opportunity to redeposit the money. We give them two months' time from the date of this decree. In default of deposit so made the suit will stand dismissed with costs in all Courts including in this Court fees on the higher scale,

Appeal accepted.

✱ 1925 ALLAHABAD 344.

SULAIMAN AND MUKERJI, JJ.

Ratni Bai—Decree-holder—Appellant.

v.

Ghasi Ram Nathu Ram and others—Judgment-debtors—Respondents.

Ex. F. A. No. 464 of 1923, Decided on 12th December, 1924 from the decree of Court of Small Causes, Cawnpore.

✱(a) *Civil P. C., S. 47—Order discharging surety from suretyship is decree—Surety is a party within S. 47—Civil P. C., S. 145.*

When any person has become liable as surety for the fulfilment of any condition imposed on him, such person is for the purposes of appeal a party within the meaning of S. 47 and therefore an order discharging him from the suretyship is a decree and is appealable. [P. 345, C. 1.]

(b) *Civil P. C. S. 55—Surety bringing judgment debtor in Court during stay ordered in his favour —Conditions of suretyship are not fulfilled.*

Where the surety for the appearance of judgment-debtor brought the letter to Court though not so called upon an order granting stay of execution was passed in his favour and was still in force.

Held: that the conditions of suretyship were not fulfilled and he could not therefore be discharged. [P. 345 C. 2].

Surendra Nath Sen and *S. N. Gupta*—for Appellant.

Saila Nath Mukerji and *M. A. Aziz*—for Respondents.

Sulaiman, J.—This is an execution first appeal from an order dated the 14th of May, 1923 directing that the respondent surety be discharged.

In execution of a decree of Musammat Ammi Bai against Nathu Ram, the judgment-debtor, the latter was arrested but on the 26th of February, 1923 on the respondent Sham Behari Lal executing a security bord, the judgment-debtor was discharged. Under the bond Sham Behari Lal undertook that Nathu Ram would apply to the insolvency Court for being adjudicated an insolvent within a month from that date and in case he failed to do so he would be produced in Court, and, further, if he failed to appear in Court then the surety would produce him when ordered, both in the Court executing the decree and the insolvency Court, and in case he failed to do so, then the surety would be liable to the extent of Rs. 17,000, the decretal amount.

Within one month of that date an application for being adjudicated an insolvent was presented by Nathu Ram to the insolvency Court but it was not in proper form and was consequently rejected. In the meantime an appeal on the execution side was preferred to the High Court and in this Court an application for stay was made and an *ex parte ad interim* stay order was granted on the 21st of March, 1923 and one month's time was given to Nathu Ram, judgment-debtor, to furnish security. This time was to expire on the 21st of April, 1923 and till then the proceedings were stayed. On the 9th of April, 1923 the surety, Sham Behari Lal, filed an application before the execution Court in which he alleged that the judgment-debtor was present in Court and prayed that the surety be discharged. Notice was ordered to be issued to the decree-holder as well as to the judgment-debtor. The judgment-debtor apparently did not appear again in person, and it was this application which was finally disposed of by the order under appeal. The learned Subordinate Judge came to the conclusion that inasmuch as the surety did produce the judgment-debtor on the 9th of April, 1923, he fulfilled his undertaking and must, therefore, be discharged from all liability. The decree-holder has appealed from this order.

A preliminary objection was taken on behalf of the respondent that no appea lay. It was first contended that the case

did not fall under S. 47 of the Code of Civil Procedure but fell under Order 38, rule 3. If that contention were to be accepted then an appeal is expressly provided from that order under Order 43, rule 1, sub-clause (*q*). We are , however, of opinion that this case clearly fell under S. 47 of the Code. Under section 145 when any person has become liable as surety for the fulfilment of any condition imposed on him, the decree or order may be executed against him to the extent to which he has rendered himself personally liable in the manner provided for the execution of the decree and such person shall for the purposes of appeal be deemed a party within the meaning of S. 47. It is clear that by his undertaking, Sham Behari Lal rendered himself personally liable and the execution could proceed against him if he did not fulfil the condition imposed on him. For purposes of appeal he must be deemed to have been a party to these proceedings. The order passed by the learned Judge of the Court below was an order passed in the execution department practically declaring that the person, who was so made liable and who was to be deemed a party really was not liable. This, in our opinion, decided a question relating to the execution and discharge of the decree and was determined by the execution Court. In our opinion, therefore the order passed must be deemed to be a decree within the meaning S. 2 of the Code and an appeal would, therefor lie.

On the merits we are satisfied that this appeal must be allowed. Under the terms of the security bond as well as S. 55 of the Code, the surety had to undertake that the judgment-debtor would apply to be declared an insolvent within one month of that date and he would appear, when called upon, in any proceedings upon the application for insolvency or upon the decree in execution of which he was arrested. The surety had never been called upon by the Court to produce the judgment-debtor. He brought him to the Court on the 9th of April, 1923 at his own instance. On that date the decree-holder was not present in Court and also the stay order passed by the High Court was in force and it was impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody. The production of the judgment-debtor in Court on that date, therefore, did not amount to his appearance when called upon to appear. It is not suggested that the judgment debtor was produced by the surety on any date after the 21st of April, 1923 when the stay order had expired and when the decree-holder would be in a position to get the judgment-debtor arrested so as to be restored to the position he occupied before the security was furnished. Even if it be conceded that it is open to a surety to apply at his own instance to the Court to discharge him, that must be only when the Court sees that thereby the decree-holder is in no way prejudiced, otherwise the undertaking given by the surety cannot be said to have been fulfilled. In our opinion the appearance of the judgment-debtor on the 9th of April 1923 did not amount to a fulfilment of the condition imposed on the surety by the security bond. On that date the Court could not do anything with judgment-debtor. It follows, therefore ,the that the order discharging the surety was not a proper one and cannot be upheld. We accordingly allow this appeal and setting aside the order dated the 14th of May, 1923. dismiss the present application for discharge made by the surety with costs in both Courts.

Appeal accepted.

1925 ALLAHABAD 345

LINDSAY AND KANHAIYA LAL, JJ.

Narain Singh—Plaintiff—Appellant.

v.

Gajraj—Defendant—Respondent.

Second Appeal No. 359 of 1923, Decided on 10th November 1924, from a decree of the Addl. Sub. J., Banda.

(*a*) *Wajib-ul-arz—Construction— Language of another wajib-ul-arz cannot be considered.*

The language of one wajib-ul-arz cannot be interpreted by the language of another. [P. 346 C1.]

(*b*) *Pre-emption — Wajib-ul-arz — "Whenever share of co-sharer is sold or mortgaged" — Preferen e among co-sharers* inter se *is not excluded.*

The pertinent words relating to the right of pre-emption and contained in a chapter of tho wajib-ul-arz expressly dealing with the rights of co-sharers *inter se* were, "whenever the share of a co-sharer is sold or mortgaged" ;

Held : that the right of pre-emption arose not only on sale or mortgage to a stranger but that there was a preferential right *inter se* between co-sharers. [P. 346. C. 1, 2]

K. N. Laghate—for Appellant.

Rama Nama Prasad—for Respondent.

Judgment.—After hearing the learned counsel we think that this appeal should prevail. The question is one of interpretation of a *wajib-ul-arz*. It is not denied that a custom of pre-emption exists. The question is whether under the record of that custom the plaintiff had a better right to acquire the property than the defendant-vendee. The Court of first instance held in favour of the plaintiff and gave him a decree for pre-emption. The lower appellate Court has differed from the view taken by the Court of first instance and holding that the plaintiff had no preferetial right, it dismissed his claim. It seems to us on a perusal of the *wajib-ul-arz* before us that the interpretation of the lower appellate Court cannot be supported. According to what we find in the *wajib-ul-arz* the provisions relating to pre-emption are contained in the second chapter which deals with the rights of co-sharers *inter se* (*ba khudha*). We come then to clause 13 which deals with the custom of pre-emption and there it is stated that where a share of a co-sharer is transferred by a sale or mortgage, first a co-sharer who is a *sharik* and then co-sharers of the mahal can claim pre-emption, provided they give the real value of the property, such as might be offered by a stranger. In case of a dispute as to the price the decision is to be made through the Court.

The learned Judge, relying on certain rulings to which he refers in his judgment, held that there no right of pre-emption arose in favour of any one in the village until there was an attempt to sell to a stranger, *i.e.*, a person outside the village altogether.

The language of the *wajib-ul-arz* referred to in the case with which the learned Subordinate Judge has supported his judgment was different from the language of the *wajib-ul-arz* now before us, and in cases of this kind we cannot interpret the language of one document by the language of another.

Taking the words as they stand, we think it cannot be said that the right of pre-emption arises only in a case where an attempt is made to sell a portion of the village property to a stranger. The words are absolute : "Whenever the share of a co-sharer is sold or mortgaged." It is not said "sold or mortgaged to any person in particular." All that is indicated is that if any sale or mortgage takes place then the right of pre-emption is exerciseable by certain persons in a certain order. We cannot hold that there is no preferential right *inter se* between co-sharers for, as we have already said, the chapter of the *wajib-ul-arz* in which this record occurs deals expressly with the rights of co-sharers *inter se*.

It may be that the learned Judge was led to his conclusion by the words "*ghair admi*" which occur in the context. The words "*ghair admi*" or stranger there are used in connection with the value of the property sold. In other words it is laid down that what the co-sharer must give, in order to obtain pre-emption, is to be the real or market price, *i.e.*, the price which an outsider would give for the property. We do not think that the use of the expression "*ghair admi*" can be taken in any sense to restrict the general meaning of the words which precede them, and which show that a right of pre-emption is to arise in any case where a portion of the village is sold or mortgaged. We do not think it necessary to refer to reported cases in connection with a question of the mere construction of a particular document. It seems to us that the Court of first instance in this case came to a rignt conclusion and that the decision of that Court should be upheld. We therefore allow the appeal, set aside the decree of the Court below, and restore the decree of the Court of first instance. The plaintiff is entitled to his costs both here and in the Courts below including fees in this Court on the higher scale.

Appeal accepted.

1925 ALLAHABAD 346

RYVES AND MUKERJI, JJ.

Shib Charan Das—Plaintiff — Appellant.

v.

Kharka and another — Defendants—Respondents.

Second Appeal No. 463 of 1923, Decided on 5th December 1924, from a decree of the Dt. J., Meerut,

T. P. Act, S 111 (*g*)—*Mere denial of landlord's title—Lease not forfeited.*

Under clause (g) so nothing more is necessary to forfeit a lease beyond the mere denial of the landlord's title. The lessor must do some act showing his intention to determine the lease.

[P. 347, C. 2]

Plaintiff landlord brought a suit in 1912 to eject the defendant lesseses and in that suit the defendants denied the landlord's title. The plaintiff withdrew that suit and for nine years afterwards did absolutely nothing to show that he did intend to determine the lease, when he filed another suit in ejectment.

Held that in the circumstances there was no forfeiture.

Kailas Nath Katju and *Kailas Chandra Mital*—for Appellant.

Nehal Chand and *Brij Mohan Lal Dave*—for Respondents.

Ryves, J.—This is a plaintiff's appeal. He is the owner of a Purwa situated within the Municipality of Meerut. He sued to eject the defendants from three houses on the allegation that the sites of the houses had been let originally to the father of the defendants at a rental of three annas per mensem for them to build on, on the understanding that whenever the plaintiff desired it, the defendants should vacate the land on receiving the price of the materials of the buildings. The defendants denied that the plaintiffs were the owners of the land. They said that their predecessor-in-title had acquired the sites from Government. They also pleaded that they had paid no rent to the plaintiff for over 12 years and that if the plaintiff had any title originally, he had lost it by adverse possession.

The lower Court held that the plaintiff was the owner of the land but that the tenancy was a permanent one and, therefore, decreed the suit only so far as the rent was concerned. The plaintiff appealed.

The learned Judge has found that the tenancy, so far as the pucca house was concerned, was a permanent one and dismissed the suit.

With regard to two houses, however, it decreed the ejectment of the defendants from the two kachcha houses. There is no appeal from that portion of the decree. The plaintiff appeals with reference to the pucca house and three main points are urged:—

(1) That once the plaintiff had established the fact that he was the owner and that the defendants had failed to prove adverse possession, the Court below ought to have decreed the ejectment of the defendants without going into any other question as to what was the relationship between the parties.

(2) It was held that if the Court was entitled to go into the question of tenancy, that tenancy, as a matter of fact, came to an end in 1912 when the plaintiff brought a suit for ejectment and the defendants denied the title of the plaintiff. It is argued that this operated as a forfeiture of the lease and that, therefore, the plaintiff was entitled to eject the defendants,

(3) It was objected that there was no material on the record from which the Court could find that the tenancy was a permanent one.

It seems to me that when the plaintiff pleaded that the tenancy was of a particular nature and the defendants denied the fact, it was open to the Court to go into the question. In fact, I think the Court was bound to find not only that there was a tenancy but also what was the nature of the tenancy because if there was no tenancy the plea of adverse possession would prevail as rent had not been paid for over 12 years.

On the second ground I think that under clause (g) of S. 111 of the Transfer of Property Act something more is necessary to forfeit a lease beyond the mere denial of the landlord's title. The section says that the lessor must do some act showing his intention to determine the lease. It is true that the plaintiff brought a suit in 1912 to eject the defendant and in that suit the defendants denied the landlord's title. The plaintiff withdrew that suit and up to the filing of this suit, nine years afterwards, has done absolutely nothing to show that he did intend to determine the lease. He has not even issued notices to determine the lease before bringingthe suit. *Vide*: *Nowrang Singh* v. *Janardan Kishor Lal Singh* (1) and *Prag Narain* v. *Kadir Bakhsh* (2).

On the third point I think it is really a question of fact. The Court has found that the lease was granted sometime before the mutiny and that the terms of it are not definitely known. But it has found that the rent was merely nominal and has never been enhanced, that the sites were let out for building purposes and were useless for any other purpose and that the tenants who had built on this small area have sold and mortgaged their houses without interference by the plaintiff. The house in question was built

(1) [1917] 45 Cal. 469—22 C. W. N. 312—41 I. C. 952—27 C. L. J. 277.
(2) [1913] 35 All. 145—11 A. L. J. 115—18 I. C. 728.

some 40 years ago and is a pucca house which cost over Rs. 4,000 to build. Under these circumstances I think the Court was justified in holding that so far as the pucca house is concerned the defendants-respondents' tenancy is permanent. This is in agreement with the Privy Council ruling in *Nabakumari Debi* v. *Behari Lal Sen* (3). In my opinion the decision of the Court below is right. I would accordingly dismiss the appeal with costs.

Mukerji, J.—I agree. I wish to add only a few words. The plaintiff could not succeed without proving that the lease under which the defendants were in possession had come to an end. It was not enough for the plaintiff to prove that he was the owner of the land. If there was nothing else except the plaintiff's ownership on the one hand, and the defendants' long continued possession on the other, the plaintiff would not succeed, and for the simple reason that the defendants' possession would be regarded as adverse. The plaintiff, therefore, must plead and prove a tenancy. This having been done and established, it was further necessary for the plaintiff's success to prove that the lease had come to an end. The plaintiff could prove the determination of the lease in two ways:—

(1) Either by proving forfeiture and some act on his part showing an intention to enforce the forfeiture and,

(2) By giving a notice to quit.

Neither of these two conditions have been fulfilled. The suit was, therefore, bound to fail.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

(3) [1907] 34 Cal. 902—6 C. L. J. 122—11 C. W. N. 865—4 A. L. J. 570—9 Bom. L. R. 846=17 M. L. J. 397—2 M. L. T. 433 (P. C.)

1925 ALLAHABAD 348

MUKERJI, J.

Raghubir Saran Das—Plaintiff—Appellant.

v.

Ram Das—Defendant—Respondent.

Second Appeal No. 494 of 1923, Decided on 12th November, 1924, from a decree of the Dt. J., Meerut.

(a) *Arbitration—Parties asking Court to decide by local inspection—No intention to be bound by decree—Decision is not award—Appeal lies.*

The plaintiff claimed that the plaint wall and land were his private property. He complained that the defendant interfered with his right of possession in certain ways. At the trial of the suit the counsel for the parties stated that they were not prepared to adduce any oral evidence. They suggested that the judge should inspect the locality and should decide the case on the basis of what he might see on the spot and on an examination of such documentary evidence as might be adduced by the parties up to 3 p. m., of the day on which the statement was recorded.

Held: that no intention on the part of the parties to bind themselves by the decision that might be given by the Court could be gathered from the language used in the case, and as all that the parties did was to make a statement that they were not going to adduce oral evidence and that they requested the Court to exercise its inherent power of inspection of the locality, the Court was not constituted an arbitrator and its judgment was not an award and was open to appeal. [P 349, C 1,2]

(b) *Possessory right — Property frequented by public—No right arises.*

No question of possessory right can attach to property frequented by passers by as if it were a public road. [P 350, C 1]

(c) *Possessory right—Right cannot be extended beyond actual user.*

If user of a wall to support a roof has given the plaintiff any possessory right, that possessory right must exist on those portions of the wall alone which support his buildings or beams. His possessory right cannot be extended, by any fiction of law, or as a matter of inference, over any other portion of the wall, a portion only of which is in plaintiff's use. [P 350, C 1]

(d) *Easements Act, S. 27—Right to drop water on ground — Servient owner can do act whereby water will first fall on the roof of a house and then on the ground.*

Where a person has acquired by grant from a Municipality a right to drop water on a public road the Municipality will be at liberty to permit another person to build a house, so that the water from plaintiff's house, instead of falling directly on the road will fall on the roof of that house and then fall into the street. [P 350, C 2]

Peary Lal Banerji and *Kailas Nath Katju*—for Appellant.

Kailas Chandra Mital—for Respondent.

Judgment.—This second appeal raises some interesting points of law. It appears that the suit related to a ceratin wall and a piece of land immediately to the south of it. The plaintiff who is the appellant before this Court claimed that the wall and the land were his private property. He complained that the respondent, the defendant, interfered with his right of possession in certain ways. At this stage of the case it is not neces-

sary to enter into the details. The Court of first instance partially decreed the suit and ordered the supposed interferences with the right of the plaintiff to be removed. The lower appellate Court came almost to a directly opposite conclusion and ordered the suit to be dismissed *in toto*. The first point that has been taken in this Court is that no appeal lay to the Court below. This plea arises out of the following circumstances. At the trial of the suit, the counsel for the parties stated that they were not prepared to adduce any oral evidence. They suggested that the Court, Subordinate Judge, should inspect the locality and should decide the case on the basis of what he might see on the spot and on an examination of such documentary evidence as might be adduced by the parties up to 3 p. m., of the day when the statement was recorded. The learned Subordinate Judge inspected the locality, examined the documentary evidence, heard the arguments for the parties and decided the case. It is urged for the plaintiff-appellant that the parties really constituted the Subordinate Judge their sole arbitrator of the case and that the judgment was really an award of an arbitrator, and no appeal lay to the District Judge. Several cases reported in *Shahzadi Begam* v. *Muhammad Ibrahim*, (1) *Bahir Das Chakravarty* v. *Nabin Chunder Pal* (2), *Nidamarthi Mukkanti* v. *Thamman Ramayya*, (3) and *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*. (4) have been relied on on behalf of the appellant in support of his argument. I have examined each and every one of these cases and I have found that the intentions of the parties in those cases were clear and were that they were binding themselves by the decision that might be given by the Court. No such intention can be gathered from the language used in this particular case. All that the parties did was to make a statement that they were not going to adduce oral evidence and that they requested the Court to exercise its inherent power of inspection of the locality. That is all. The parties did nothing beyond this. It was open to the parties not to adduce any oral evidence. As a matter of fact, in the circumstances of a case like this, the oral evidence could be of little use. The oral evidence that could be adduced would only go to show the state of facts as could be ascertained more easily on an inspection. The facts were, for example, how certain beams lay, certain spouts existed and so forth. In my opinion an appeal did lie to the lower appellate Court.

Coming to the merits of the case, the learned Judge has found that the plaintiff had no title to the property claimed, *viz.*, to the wall and the land and dismissed the suit. The Court also considered certain other aspect of the cases which will be mentioned presently. In this Court, it has been urged that if the lower Court's finding that the plaintiff had not title be accepted as final, there still remained the fact that the plaintiff had certain possessory rights and the lower appellate Court had ignored the consequences of such rights as were apparent on the face of the record. I propose to examine this aspect of the case. There can be no doubt that the finding of the learned Judge as to title is conclusive. This finding is based on facts observed on the spot and on examination of the documentary evidence adduced by the parties. The Court found that the wall which the plaintiff claimed as his own was a part of a much large tract of land within which were good many shops and business quarters. The Judge found that the land which the plaintiff claimed as his own was a portion of a lane which went all round the land enclosed by the wall and inferred that it was a part of the site or the market Smithganj itself which was enclosed by the enclosing wall. These were findings to which the lower Court had absolute jurisdiction to arrive and I am clear that this finding is binding on this Court.

Now coming to the question of possessory right and the consequences thereof, the Court of first instance dismissed a part of the plaintiff's suit and there was an appeal against that judgment. We need not therefore consider that part of the plaintiff's suit which failed in the Court of first instance. The judgment of the appellate Court shows that only one point was taken before it, concerning the question as it remained after the finding that the plaintiff had no title either to

(1) [1921] 43 All. 266 — 59 I. C. 787 — 19 A. L. J. 14,
(2) [1902] 29 Cal. 306—6 C. W. N. 121.
(3) [1903] 26 Mad. 76.
(4) [1919] 42 Mad. 625 — 36 M. L. J. 291 — 25 M. L. T. 397 — 51 I. C. 827 — (1919) M. W. N. 221.

the wall or to the site. As the judgment shows, it was urged on behalf of the plaintiff that the defendant's new building had blocked up two of his windows, opening on the lane. The learned judge pointed out that these openings had been created during the course of the suit and when the defendant was erecting his own building. It is clear therefore that there are no merits in this portion of the case. I may point out that nothing was said in the plaint about these windows for the simple reason that they never existed when the claim was filed.

The Court of first instance having found that the wall and the land belonged to the plaintiff ordered that the mud spread on the surface of the land (which has been described throughout as (*abchak*) should be removed and the room built over the land should be demolished and the water spouts of the plaintiff should be restored to their original condition. This is all the relief which the plaintiff got there. Now if the land be not plaintiff's property no question of the removal of the earth that was stored on that land arises. According to the plaintiff's statement in the plaint, the *abchak* land in suit used to be frequented by passers by almost as if it were a public road. No question of possessory right can therefore attach to such property. We have to remember that title, there is none. The land lay vacant and people visiting the market passed over it. There was therefore no *de facto* possession of the plaintiff over the land. Order as to demolition of the roof cannot be sustained in the absence of a finding that the land over which the roof was built was the property of the plaintiff. It is true that the plaintiff has used a part of the wall, which he claimed as his and which has been found not to be his, for the purposes of supporting his own building. But if this user of the wall has given the plaintiff any possessory right at all, that possessory right must exist on those portions of the wall alone which support his buildings or beams. His possessory right cannot be extended, by any fiction of law, or as a matter of inference, over any other portion of the large wall, a portion only of which is in plaintiff's use. His claim therefore to have the roof built over the lane removed cannot be sustained in any view of the case.

There remains the question of spouts. It appears that the water from the spouts will no longer flow over the surface of the lane, but will fall on the roof of the newly built room and will be drained off from that place. It has been urged that it is an absolute right of the plaintiff to let the water from his spouts fall on the land and that the defendant had no right to interfere. It is the decided opinion of both the Courts below that the suit is based in pure stubbornness on the part of the parties and that the actual inconvenience suffered by the plaintiff was insignificant. The question then is whether the fact that the plaintiff's spouts dropped water on the surface of the land will entitle him to insist on any building erected under the spouts being removed. The learned Judge in the Court below has found that the lane is the property of either Government or the Municipal Board. He has found that the plaintiff obtained from time to time the permission of the Municipal Board to erect his buildings. The utmost then that he can say is that the Municipality by allowing him to construct the spouts granted to the plaintiff a right of easement to discharge water from his roofs over Municipal land. If that be so the plaintiff cannot claim any higher right than that of the owner of a dominant heritage. It is common ground that the construction in dispute was made by the defendant with the permission of the Municipal Board. The Municipal Board would have a right as the owner of a servient heritage to make any arrangement they like so long as they did not thereby restrict the easement or render its exercise less convenient. The principle underlying will be found enacted in S. 27 of the Easements Act. It cannot be said that the right of dropping of water was a possessory right. The right might at the most be a right of easement acquired by grant and nothing else. If it be a right of easement, the law enacted in S. 27 of the Easements Act will apply in full force. If it did not, the plaintiff's position would be worse.

I am satisfied that there is nothing in this appeal which should induce this Court to interfere with the judgment of the learned District Judge. The appeal fails and it is hereby dismissed with costs which will include counsel's fees in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 351

RYVES AND DANIELS, JJ.

Kuber Upadhia—Plaintiff—Appellant.

v.

Ramakar Dat Upadhia and others—Defendants—Respondents.

Second Appeal No. 617 of 1923, Decided on 11th December 1924, from a decree of Dt. J., Azamgarh.

Civil P. C., O. 32 R. 3—Appointment irregular—No prejudice to minor—Decree is binding—Omission to appeal is not negligence.

So long as the minor has not been prejudiced, mere irregularity in the appointment of a guardian will not be a ground for setting aside the decree. 1923 *Lah.* 575 *and* 14 *A.L.J.* 589 *Foll.* [P 351 C 2]

Omission by guardian to appeal in consequence of legal advice that an appeal would be unsuccessful, does not amount to negligence. [P 352 C 1]

Mukhtar Ahmad—for Appellant.

Iqbal Ahmad—for Respondents.

Daniels, J.—This appeal arises out of a suit brought by Kuber Upadhia, a minor, for a declaration that the decree in suit No. 308 of 1912 was not binding on him because he was not properly represented in that suit. That suit was brought on a mortgage bond executed by Muasi, the father of the plaintiff-appellant and Hanuman, Muasi's brother. The plaintiff in that suit joined the two minor sons of Muasi, one of them being the plaintiff, as defendants and proposed that Muasi should be appointed their guardian *ad litem*. As a matter of fact, Mt. Sonbarsa Kunwar, the mother of the plaintiff, was appointed guardian by the Court, in spite of the fact that when notice was served on her inviting her to become guardian she refused to accept the notice. At the hearing the father filed a written statement contesting the suit on his own behalf and on behalf of his sons and he defended the suit. The suit was decreed and the father did not appeal.

In this suit as brought the allegation in the plaint was that the father's failure to appeal from that decree was gross negligence and that, therefore, the decree should not be held binding on the plaintiff. A further allegation was made in the plaint that the father had actually colluded with the plaintiff.

The trial Court decreed the suit holding that the minor plaintiff was not properly represented in the former suit and that, therefore, the proceedings as against him were void. On appeal the learned District Judge reversed this decree. He held that although the proceedings as to the appointment of a guardian were irregular nevertheless the father had, in fact, acted as guardian and defended the suit and that his interests were in no way adverse to his sons who were born after the mortgage was made, (so that no question of legal necessity arose), and that the sons had been in no way prejudiced.

Before us it has been argued broadly that where the provisions of Order 32 are not strictly complied with everything that follows thereafter is null and void because, it is said, that the language used is mandatory. There are a number of decisions of this Court in which it has been held that so long as the minor has not been prejudiced, mere irregularity in the appointment of a guardian will not be a ground for setting aside the decree. In this case it is to be noted that the father of the present plaintiff-appellant is joint with him, and the facts of the case cannot be distinguished from those of *Ram Barechha Ram* v. *Tarak Tiwari* (1). In that case the manager of a family who was a defendant declined to act as a guardian *ad litem* for one of the minor defendants. The Court thereupon appointed the Nazir as guardian without issuing the requisite notice as required under Order 32, rule 3, clause 4. The Nazir put in no defence. The manager, however contested the suit and it was held that in the absence of any finding as to fraud or collusion, although there had been grave irregularity in the appointment of a guardian *ad litem*, yet as the manager of the family had fully contested the suit, the minor had in no way been prejudiced and could not get the decree set aside. It has been held in several cases, one of the most recent of which is *Phulli* v. *Debi Prasad* (2), that the absence of a formal order appointing a guardian *ad litem* for a minor is not in itself sufficient to render subsequent proceedings void in the absence of any prejudice having been found to have occurred to the defendant minor. We agree with both these decisions. In this case there is no finding of collusion. The only negligence which is attributed to the father is the fact that he did not appeal against the decree in suit No. 308 of 1912. Whether the father was likely to have been successful in appeal in that case depended upon a right construction of the mortgage deed on which the suit

(1) [1916] 14 A.L.J. 589 =33 I.C. 805.
(2) 1923 Lah. 575=5 Lah. 38.

was brought, The learned District Judge has come to the conclusion that if it was necessary to decide that point, he would have agreed with the Court in that case. If the Court is right in holding that the father did not appeal in consequence of legal advice that an appeal would be unsuccessful, it is obvious that no negligence can be attributed to him. In our opinion the appeal fails and is dismissed with costs including in this Court fees on the higher scale. *Appeal dismissed.*

1925 ALLAHABAD 352

NEAVE, J.

Jagannath Prasad and others—Appellants.

v

Jado Rai—Plaintiff—Respondent.

Second Appeal No. 1633 of 1922, Decided on 31st July 1924, against the decree of the Sub. J., Muzaffarnagar, D/- 16th May 1922.

✱ *Civil P. C., O. 34 R. 6—Decree against Hindu widow—Other properties can be attached—Hindu Law—Alienation.*

The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon is entitled to proceed against the other properties. [P 352 C 2]

P. L. Banerje—for Appellants.

A. P. Dube—for Respondent.

Judgment — The issue remanded to the Court below has been decided in the affirmative, the learned Subordinate Judge holding, as the Munsif did before him, that the loan taken by the ladies was for legal necessity. This finding has been challenged on the grounds that it is based only on recitals in the deed itself and because no notice was given by the lower Court to the respondent to appear on the date fixed for determination of the issue. The latter ground has not been pressed. As regards the former the learned Subordinate Judge has considered other evidence which he has held to corroborate the recitals in the deed and to prove that actually the money was applied to the purpose alleged therein.

We have it then that Mt. Katori lent money to the widow of Asharfi Lal for legal necessity and secured the debt by the execution of the mortgage bond. The property secured proving insufficient she obtained a decree for the balance under O. 34 R. 6 and attached the money now in suit.

The lower appellate Court has held that the case is covered by the authority of *Kallu* v. *Faiyaz Ali Khan* (1). The learned counsel for the respondent relies on the same ruling and also cites *Dhiraj Singh* v. *Manga Ram* (2). In both these cases however there is one important difference which makes them distinguishable from the present case, for in both the debt, though for legal necessity, was unsecured' In *Kallu* v. *Faiyaz Ali Khan* (1) the Court remarked at page 398 "when Deokishen lent money to Mt. Gaura in 1883 he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree which he obtained on his simple money bond could only bind the rights and interests of his debtor on whose personal security he had advanced the money. Mt. Gaura is dead. She had only a widow's estate, and with her death the rights and interests in the property in suit purchased in execution of the decree against her came to an end," So too in *Dhiraj Sing* v. *Manga Ram* (2) the learned Judges say "the plaintiff, if he had chosen, could before lending his money, have obtained from the Hindu widow the security of the ancestral property by obtaining a mortgage. He did not choose to demand a mortgage before advancing his money : he accepted the personal liability of the widow. He now seeks to get a decree under which he can bring to sale the ancestral property in the hands of the reversioners. He seeks a decree which would bind that property. In other words he is seeking a decree in this suit, there, being no assets of the widow in the hands of the reversioners, which he could only have obtained if he had a valid charge on the ancestral property." Here the facts are precisely the opposite. The creditor did obtain a mortgage and it is in execution of the decree she obtained on that mortgage that she got the further decree under O. 34 R. 6 under which she now seeks to take the money in suit. I hold that she is entitled to do so and allowing the appeal I restore the decree of the first Court. The appellants will get their costs throughout including in this Court fees on the higher scale.

Appeal allowed.

---

(1) [1903] 30 All. 394 = (1908) A. W. N. 173 = 5 A. L. J. 36 .

(2) [1897] 19 All. 300 = (1897) A.W.N. 69.

1925 ALLAHABAD 353

MUKERJI, J.

Mt. Sham Devi—Plaintiff—Appellant.

v.

Bhagwat Dayal—Defendant—Respondent.

Second Appeal No. 561 of 1923, Decided on 14th November, 1924, against the decree of the Dt. J., Bulandshahr.

(a) *Civil P. C., S. 100—Inference from admitted entries is a question of fact.*

An inference of fact from admitted entries in documents cannot be disturbed in second appeal unless the inference is perverse or illegitimate. [P. 354 C. 1]

(b) *Limitation Act, S. 19—Statement that mortgagee rights were purchased is not acknowledgment of liability to be redeemed.*

When a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into possession of the vendor as a mortgagee. All that he admits is that the vendor came into possession of the property on foot of a mortgage. No question arises in his mind as to whether the mortgage subsits or has become time barred. The statement by itself does not signify to the mind of the person making the statement or to anbody else that the maker of the statement thinks or believes that he is liable to be redeemed at the date of making the statement. Such statement therefore is not an acknowledgment within S. 19 as any acknowledgment of the original transaction would not necessarily amount to an acknowledgment that the liability which would follow from the original transaction subsists at the date of the statement. [P. 355, C. 1]

B. K. Mukerji and *S. N. Mukerji*—for Appellant.

Peary Lal Banerji and *S. N. Gupta*—for Respondent.

Judgment.—The plaintiff of the Court of first instance is the appellant in this Court. She brought, as a purchaser of the equity of redemption, a suit for redemption of a mortgage alleged to have been executed in 1843. The suit succeeded in the Court of first instance but the learned District Judge on appeal dismissed it. He came to two conclusions, *viz.*, the appellant had failed to prove that she had any subsisting title to the property at the date of the suit and that the suit was barred by time. In appeal, it is contended that both the findings are incorrect. The learned Counsel for the respondent urged that the finding as to title was a finding of fact and was binding on this Court. On the question whether the finding of the learned Judge was a finding of fact, the argument of the learned Counsel for the appellant was that the facts were all admitted, the interpretation of the documents was all admitted, but the argument of the learned Judge was faulty and it was open to this Court to see where the fallacy of the argument of the learned Judge lay and then it was further open to this Court to consider the case on the merits. In order to appreciate this argument it was necessary to go into the evidence which was practically entirely documentary. I have examined the entire evidence and that evidence stands as follows:—It appears that there were two brothers Asalat Khan and Karim Bakhsh, each of the brothers owning a 10 biswas share in a certain village. This was in 1806. As I have said the mortgage was executed in 1843. It appears that the factum of the mortgage was found established by the Court of first instance and the question was not raised again before the learned District Judge. Then we find that by 1855 the property of the brothers had been alienated. Karim Bakhsh had mortgaged 5 biswas to one Chittar Mal and 5 biswas to one Abdullah. Out of the share of Asalat Khan 7½ biswas had been purchased by Abdullah and Abdullah had taken a mortgage of the remaining 2½ biswas. It is this mortgage of 2½ biswas that is sought to be redeemed. Then we find that Abdullah's son Abdul Latif joined the mutineers and his property was confiscated. In 1861 his property was sold and was purchased by the respondent's ancestor. This property was described as 8 biswas proprietary rights and 6 biswas mortgagee rights. It will be noticed that a certain change had taken place between 1855 and 1861 when the auction sale was held. In 1855 Abdullah had proprietary rights in 7½ biswas and mortgagee rights in 7½ biswas. In 1861 he had only 14 biswas in all, *viz.*, 8 biswas in proprietary rights and 6 biswas as a mortgagee. Then it appears that in the khewat of 1861 which is to be found in the wajib-ul-arz of that year dated the 10th of October, 1861, the property was recorded as follows:—Descendants of Karim Bakhsh's mortgagors of 4½ biswas, the same property being held by Harsukh Rai (the ancestor of the respondent) as mortgagee. Harsukh Rai proprietor of 9½ biswas. It was stated that out of these 9½ biswas he had purchased 8 biswas belonging to Abdul Latif and he had purchased 1½ biswas from Karim Bakhsh's descendants. Chittar

Mal was shown as the mortgagee of 6 biswas being the property of Karim Bakhsh's descendants. It will be noticed that no names of descendants of Asalat Khan ever appeared in the wajib-ul-arz and khewat of the 10th of October, 1861. Further, we find that Fatehyab son of Asalat protested against this entry and made an application for correction of the khewat. His contention was that his name should have been recorded as a mortgagor of 2½ biswas. His application was dismissed, we do not know for what reasons, on the 20th of January, 1862. Fatehyab lived up to the year 1921, but it does not appear that he ever stirred himself to obtain a correction of the khewat. It was on his death that his descendants sold the property to the appellant. On all this evidence the learned Judge came to the conclusion that the appellant had failed to prove that she or her predecessor had any title in the 2½ biswas left in them.

The learned Counsel for the appellant has contended that the mortgagee was put in possession of property and the mortgagee, was bound to hand over that property to the descendants of the mortgagor and it was for him, *viz.*, for the mortgagee to account for the loss of title in the mortgagor. There can be no doubt that there is a good deal of force in this argument. Abstractly speaking this argument is sound. But we have to look at the argument in the light of the circumstances of the case. We see that between 1855 and 1861, *viz.*, within the space of six years, a decided change had taken place in the entry in the khewat and that change was to the detriment of Fatehyab a descendant of Asalat Khan. Fatehyab became aware of that change and he took steps to have an alleged error remedied. He failed. But he never took steps by way of a suit in the Civil Court or elsewhere to have the error corrected. The question then is whether under the circumstances the Court below was justified in saying that after the lapse of 60 years, that is after the entry of 1861 had been allowed to stand for over 60 years, the plaintiff can say that her or her predecessor's title still subsists. Many things may have happened between 1855 and 1861 to justify the entries made in the later year. In my opinion the inference to be drawn is an inference of fact from admitted entries in documents and it cannot be said that that inference is perverse or illegitimate. It is not necessary for me to express my own opinion on the point. I do think that the Judge's finding as to want of title in the appellant is a finding of fact and that finding is binding on this Court.

As I am deciding this second appeal as a single Judge and there is every likelihood of there being a Letters Patent Appeal I would like to decide the second question, *viz.*, that of limitation as well.

Undoubtedly the suit would be time-barred except for an alleged acknowledgment made in 1861. It appears that after his purchase Harsukh Rai made an application to the Collector tendering the purchase money and asking for a delivery of property to him. In this application he said that he was paying so much for the proprietary rights purchased by him and so much for the mortgagee rights purchased by him. It is argued that this statement of Harsukh Rai that he was paying so much money for the mortgagee rights was an acknowledgment of the fact that he was liable to be redeemed. Reliance has been placed on the case of *Mani Ram Seth* v. *Seth Rup Chand* (1), On the other hand the learned Counsel for the respondent relies on the same case on which the Court below relied *viz.*, *Khiali Ram* v. *Taik Ram* (2).

The Privy Council case relied upon by the appellant has been distinguished in a much later case by the Madras High Court, *viz.*, *Kandasami Reddi* v. *Suppammal* (3). It has been pointed out in the Madras case that the facts before the Privy Council were entirely peculiar and that case was no authority for the proposition that a mere statement that a certain person was a mortgagee amounted to a statement that that mortgage subsisted as an enforcible transaction. In the case before the Madras High Court the suit was on foot of a mortgage which would be time-barred except for a certain statement in a plaint once filed by the defendants. In that plaint the defendants as plaintiffs of the suit had stated that they had executed on a certain date a certain hypothecation deed for a certain amount of money

(1) [1906] 33 Cal. 1047=33 I. A. 165=4 C.L.J. 94=8 Bom. L. R. 501=10 C.W.N. 874=1 M.L.T. 199=3 A.L.J. 525=16 M.L.J. 300=2 N.L.R. 130 (P. C.)

(2) [1916] 38 All. 540=36 I. C. 422=14 A.L.J. 834.

(3) 1922 Mad. 104=45 Mad. 443=42 M. L. J. 268=15 M.L.W. 325=(1922) M.W.N. 168.

and they had received the consideration in a certain way. The learned Judges of the Madras High Court were of opinion that mere statement of a fact that a certain mortgage had been executed did not amount to an acknowledgment of an existing liability under it.

There can be no doubt the question of law discussed in Allahabad case (14 A. L. J., 834) did not arise after the finding that the mortgage sought to be redeemed had not been established. But the case before this Court was a first appeal and it was probably necessary for the learned Judges to decide all the questions raised before them. In the Allahabad case the question raised was very similar to the question raised in this Court. Indeed, the alleged acknowledgment in the Allahabad case was in much stronger language. The learned Judges following the case of *Dharma Bhital* v. *Gobind* (4) were of opinion that an acknowledgment must be conscious acknowledgment and must show that the person who was, acknowledging understood that he was by the statement, acknowledging a liability. Their Lordships quoted *in extenso* from the Bombay case and came to the conclusion that the document before them did not amount to an acknowledgment.

Apart from authority, on the language of S. 19 of the Limitation Act, it appears clear to me that for a statement to amount to an acknowledgment there should be an acknowledgment of liability. When a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into the possession of the vendor as a mortgagee. All that he admits is that the vendor came into possession of the property on foot of mortgage. No question arises in his mind as to whether the mortgage subsists or has become time-barred. The statement by itself does not signify to the mind of the person making the statement or to anybody else that the maker of the statement thinks and believes that he is liable to be redeemed at the date of making the statement. As I have said apart from authority, I am of opinion that an acknowledgment of liability must be a conscious acknowledgment of the same.

Now, the question is whether the Privy Council in 33 Calcutta has in any way so explained S. 19 of the Limitation Act as to lay down that any acknowledgment of the original transaction would amount to an acknowledgment that the liability which would follow from the original transaction subsists at the date of the statement. As pointed out by the learned Judges of the Madras High Court, the defendant in the Privy Council case, beyond stating that he had a current account with the estate of a deceased person, also stated that any such liability that he might be under would not disqualify him to be appointed an executor of the estate. This latter statement clearly signified that the man said not only that he had an account with the estate of the deceased but also that he might be a debtor to the estate on the date of making the statement. The Privy Council case therefore is in no way an authority for the case now before me. I therefore agree with the Court below that the suit is time-barred.

The result is that the appeal fails and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Appeal dismissed.

(4) [1884] 8 Bom. 99.

1925 ALLAHABAD 355

LINDSAY AND KANHAIYA LAL, JJ.

Umar Daraz and another—Plaintiffs Appellants.

v.

Sri Ram Das — Defendant — Respondent.

Second Appeal No. 753 of 1923, Decided on 9th January 1925, from a decree of the Dt. J., Saharanpur.

(a) *Pre-emption—Suit for—One plaintiff having no right to preempt—Whole suit fails.*

It is fatal for a plaintiff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption. (1883) 5 *All.* 197 *Foll.* [P. 356, C. 1]

(b) *Civil P. C., O. 6, R. 17—Pre-emption suit—One plaintiff not entitled—Suit dismissed—Appeal—Unentitled plaintiff's name cannot be removed.*

The Court is not entitled to resort to any powers of amendment which it has under the Code of Civil Procedure in order to allow an amendment in a case of pre-emption suit where the plaintiff, whose suit has been dismissed on the ground of his violation of the law of pre-emption by associating with himself in the suit a person not

entitled to pre-emption, seeks at the appellate stage to cure the defect by striking out the name of the other plaintiff. [P. 356, C. 1]

S. A. Haidar—for Appellants.

Nehal Chand—for Respondent.

Judgment.—We are of opinion that this case has been rightly decided in the Courts below. The decision no doubt has been on technical grounds, but as the learned Judge of the lower appellate Court has observed, the law of pre-emption is a highly technical law.

The suit for pre-emption, which was filed by two plaintiffs, Umar Daraz and his minor son Rafiq Ahmad, failed on the ground that Umar Daraz, being a person who was entitled to bring a claim for pre-emption with regard to the sale in question, associated in his claim his minor son, who had no such interest as entitled him to claim pre-emption. In fact the Courts below have treated the son as a stranger and consequently applying the law, which has always been followed in this Court and as it has been expounded in *Bhawani Prasad* v. *Damru* (1), they have dismissed the suit.

When the case came up here, Mr. Haidar, who appears on behalf of the appellants, in order to cure the defect in the suit, has asked us to remove the name of the minor Rafiq Ahmad from the appeal and allow the appeal to be continued only by the first plaintiff, Umar Daraz.

To begin with, the mere removal of Rafiq Ahmad's name from the array of the appellants will not cure the defect in the suit. Again, we do not think we are entitled to resort to any powers of amendment which we have under the Code of Civil Procedure in order to allow an amendment in a case of this kind when the rule of law is that it is fatal for a plainliff in a pre-emption suit to associate with him in that suit any person who is not entitled to pre-emption. We may refer in this connection to the case reported in *Bhupal Singh* v. *Mohan Singh* (2).

We have not so for touched on the facts but they are very simple. The property which was sold under the sale-deed in suit consisted of two items, namely some land in a village called Karondi and some other land in a village called Wahabpur. The first plaintiff, lives in Karondi and has a share in that village. By virtue of his being a co-sharer in the village he had no doubt a right of pre-emption so far as Karondi was concerned.

In Wahabpur it appears that some time before the sale sought to be pre-empted was carried out a share had been acquired by Umar Daraz in the name of his minor son Rafiq Ahmad. Rafiq Ahmad's name appears in the khewat of mauza Wahabpur while the name of Umar Daraz does not. But in the witness-box Umar Daraz himself admitted that his son Rafiq Ahmad was a mere benamidar for him. So far as the property in Wahabpur is concerned, he stated distinctly that it belonged to himself and that he had bought it with his own money. As the Wahabpur property was purchased when Rafiq Ahmad was six years of age, it is not the least likely that Rafiq Ahmad had the money to purchase this property. On the facts, therefore, as admitted by the first plaintiff himself, he is out of Court. He has associated with him in this suit for pre-emption his son Rafiq Ahmad who for the purposes of this case must be treated as a stranger. Mr. Haidar, who has argued the case on behalf of the appellants, has referred us to a ruling of the Oudh Court to be found in *Abudulla* v. *Mt. Wahid-un-nissa* (3). There the Oudh Court refused to follow the law as laid down in *Bhawani Prasad* v. *Dimru* (1). It is to be noted here that pre emption cases in Oudh are dealt with under the special provisions of the Oudh Laws Act, and in any case we must follow the decision of our own Court. So far as we are aware, this case of *Bhawani Prasad* v. *Dimru* (1), has been consistently followed here. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1882] 5 All. 197=(1882) A.W.N. 217.
(2) [1897] 19 All. 324=(1897) A.W.N. 72.
(3) [1898] I O. C. 308.

1925 ALLAHABAD 356

RYVES AND DANIELS, JJ.

Gopi Nath and another — Plaintiffs — Appellants.

v.

Ram Nath—Defendant—Respondent.

Second Appeal No. 798 of 1923, Decided on 22nd December, 1924, from a decree of the Sub. J., Muttra.

(a) *Co-operative Societies Act* (1912) *S.* 43 (2)—*"Business" includes election of officers.*

Having regard to the very wide form in which S. 43 and the rules made under it are couched, it should be held that the word "business" was not intended to be confined to money business. The election of its officers is certainly a part of the business of the society and the intention of the Act was that this and any dispute of a similar character should be referred for the decision of the Registrar or the arbitrator appointed by him in accordance with the rules made under S. 43 and not to the Civil Court. [P 358 C 1]

(b) *Co-operative Societies Act* (*II of* 1912) *S.* 43—*Rules under, by the U. P. Government—R.* 20—*Reference to arbitration under Civil P. C., II Sch.—Rule does not cover.*

A reference to arbitration under the provisions of the second schedule of the Civil Procedure Code is entirely distinct from the procedure contemplated by rule 20 of the Rules. [P 358 C 1]

Satish Chandra Das—for Appellants.

Respondent was not represented.

Daniels, J.—This is an appeal by two preference share-holders in the Muttra District Co-operative Bank. The appellants were the plaintiffs in the trial Court. They brought a suit against four defendants for a declaration that the latter had not been legally elected Directors of the Bank and for an injunction to restrain them from acting as such. The Directors were elected for a period of three years. Owing to the delay which has taken place in the hearing of the appeal, that period has now expired and it may be for this reason that the three surviving defendants are not now represented before us. The fourth defendant died while the suit was pending.

The facts of the case are briefly these:—A meeting was held on 21st September, 1921 for the appointment of four Directors under the bye-laws of the Society. The society was one constituted under the Co-operative Societies Act of 1912. The meeting was a disorderly one and about 4 p. m. it was adjourned by the Chairman. It was adjourned on the ground that the meeting could not be concluded by daylight, but the Subordinate Judge also finds that the meeting, was so disorderly that from the very beginning of the meeting, the Chairman, who was the Collector of the district, was unable to make himself heard except by means of a megaphone. After the Chairman had left, the party of B. Ganga Prasad, which was opposed to the candidates favoured by the Chairman, continued the meeting on their own account and proceeded to elect certain persons as Directors.

The Chairman had originally adjourned the meeting until the next day, September 22nd, 1921. On that day, finding that a number of supporters of the defendants had gone away under the impression that the proceedings were finished, he further adjourned the meeting till October the 4th. On 4th October a resolution was proposed by B. Ganga Prasad's party urging that an election had already taken place and no election remained to be carried out. This resolution was disallowed by the Chairman. B. Ganga Prasad's party then left the meeting in a body, and the persons remaining proceeded to elect the four defendants as Directors.

It is clearly proved that the Chairman acted both at the meeting of October the 4th and previously as a partisan. He was strongly opposed to the candidature of the persons favoured by B. Ganga Prasad's party and desired to prevent their election if possible. The point which we have to determine, however, is, in the first place, whether the suit filed by the plaintiffs lies in law. The question depends on the interpretation of rules framed by the Local Government under S. 43 of the Act. The Act is in many ways a skeleton Act and leaves very many important matters to be determined by rules. The rule-making power is contained in S. 43 and is framed in the widest possible manner. It gives the Local Government a general power to make rules to carry out the purposes of the Act, and then proceeds to enumerate twenty particular points in respect of which rules may be made. The enumeration of these points is preceded by the words "in particular and without prejudice to the generality of the foregoing power." Among the special points mentioned in clause (1) is "any dispute touching the business of a society between members or past members of the society". The section lays down that such rules may provide for any dispute being referred to the Registrar for decision, or, if he so directs, to an arbitrator or arbitrators. Any rules made under this section are to be published in the local Official Gazette and on such publication are to have the effect of law. Rules have been made under this section and were published in the United Provinces Gazette of December 6th, 1919, part I, page 1763. They provide, among

other matters, that any dispute of the nature specified in clause (L) of S. 43 shall be referred to the Registrar, who may either decide it himself or refer it for decision to a single arbitrator appointed by him or to three arbitrators of whom he shall appoint the chairman. The Registrar or the arbitrators are given the powers of a Civil Court for the purpose of summoning witnesses and it is laid down that their award shall be enforceable by a Civil Court in the same manner as if it were a decree passed by such a Court. It is also provided that no such award shall be called in question in any Civil or Revenue Court.

It has been contended before us as it was contended in the Courts below, that the word "business" in the Act and in these rules is confined to money business such as the giving of loans to members and the settlement of money claims. Having regard to the very wide form in which S 43 and the rules made under it are couched, we think that the word "business" was not intended to be understood in any such restricted sense. The election of its officers was certainly a part of the business of the society and we think that the intention of the Act was that this and any dispute of a similar character should be referred for the decision of the Registrar or the arbitrators appointed by him in accordance with the rules made under S. 43 and not to the Civil Court. It is further contended before us that a reference was made to the Registrar after the suit had been filed. The parties agreed to refer it to arbitration and named the Registrar of Co-operative Societies as arbitrator. On a reference being made to him, he declined to act. This was a reference to arbitration under the provisions of the second schedule of the Civil Procedure Code and is entirely distinct from the procedure contemplated by rule 20 of the Rules of 3rd September, 1919. In a reference to arbitration under the Civil Procedure Code an arbitrator has full discretion either to act or to decline to act whereas if the dispute had been referred to the Registrar under the rules, he would have been legally bound either to decide it himself or to refer it for decision in accordance with the rules.

For these reasons we think that the Court below was right in holding that the suit was not maintainable. We, therefore, dismiss the appeal but without costs as the respondents are not represented.

Appeal rejected.

1925 ALLAHABAD 358

LINDSAY AND KANHAIYA LAL, JJ.

Kunwar Nihal Singh — Defendant — Appellant.

v.

Chanda Kunwar and another — Plaintiffs—Respondents.

Second Appeal Nos. 774 and 775 of 1923. Decided on 8th January, 1925, from a decree of the Dt. J.. Agra.

(a) *T. P. Act, S. 53—Co-sharer not co-owner of plots transferred—Section does not apply.*

S. 53 does not apply where a transfer is effected to prejudice the rights of pre-emption of a co-sharer of the village who is not the co-owner of the specific plots transferred. [P 359 C 2]

(b) *Pre-emption — Suit for — Vendee can defeat claim by obtaining interest in village and becoming co-sharer, before decree—Contract Act, S. 23 is not violated thereby—Contract Act, S. 23.*

No person who claims pre-emption can succeed unless he can show a subsisting right of pre-emption; and he cannot be deemed to have such a subsisting right until he is in a position to show that on the date on which he seeks to obtain the decree he had a preferential right as against the defendant vendee. If prior to the date of such a decree the defendant vendee acquires an interest in the village or mahal in which the disputed property is situated and becomes a co-sharer entitled to resist the claim of any other person brought against him, no decree can be passed against him for pre-emption. The object of such an acquisition is clearly not to defeat the law of pre-emption but to acquire a preferential right. S. 23 of the Contract Act does not forbid an acquisition of that nature [P 360 C 1]

(c) *Agra Tenancy Act, S. 20— Equity of redemption—Gift of, is not invalid.*

A deed of gift which does not purport to transfer any ex-proprietary rights in mortgaged property but which merely purports to transfer the equity of redemption held by the donors in the property cannot be regarded as invalid. [P 360 C 1]

Narain Prasad Asthana and *Girdharilal Agarwala*—for Appellant.

A. Aziz—for Respondents.

Judgment.—These two second appeals arise out of two suits for pre-emption brought in respect of two different transactions. The decision in one case is likely to affect the decision in the other. It appears that Musammat Kesar was the

owner of a certain share in mahal khas of the village Anwalkhera. On the 26th May, 1919 she sold that share to Kunwar Nihal Singh, and a suit was brought by the present plaintiffs-respondents for the pre-emption of that property, alleging that the consideration specified in the deed of sale was bolstered up to defeat their pre-emptive right.

During the pendency of that suit, Kunwar Nihal Singh, the defendant-vendee obtained a deed of gift of plot No. 221 khasra measuring 1 bigha 4 biswas situated in mahal khas of the same village from Daryai Singh and Balwant Singh, the brothers of the deceased husband of Musammat Kesar. That deed of gift was set up by Kunwar Nihal Singh as a shield against the claim of the plaintiffs. The plaintiffs, however, sought to pre-empt that transaction by a subsequent suit filed by them against the alleged donee and his donors on the allegation that the transaction was really a sale clothed in the form of a gift to defeat their pre-emptive right.

The former suit was filed in the Court of the Subordinate Judge of Agra. The latter suit was filed in the Court of the Munsif of Agra. The decision of the Munsif of Agra in the latter suit was that the deed of gift was not a sale and no suit for pre-emption could therefore, be entertained. There was an appeal from this decree to the District Judge of Agra who came to the conclusion that the donee had undertaken to pay a prior mortgage due to Rup Ram, and that the gift was to that extent for a consideration, promised to be payable. At the same time he expressed the opinion that the deed of gift was void under S. 53 of the Transfer of Property Act and S. 23 of the Indian Contract Act inasmuch as it was intended thereby to defraud the plaintiffs who had filed a suit for pre-emption in respect of the property and to defeat the right which they had acquired by reason of the prior sale. The result of that decision was that the suit for pre-emption brought by the present plaintiffs-respondents in respect of the alleged deed of gift was dismissed. The plaintiffs have filed no appeal from that decree which has become final. The defendant-vendee has, however, filed an appeal against that decree; and his contention is that the decision of the lower appellate Court that the deed of gift was void under S. 23 of the Indian Contract Act or S. 53 of the Transfer of Property Act was erroneous. The learned District Judge had further held that the gift was virtually a transfer of an exproprietary right and it was, therefore, also void under S. 20 of the U. P. Tenancy Act (II of 1901). The correctness of that finding is also challenged here.

These findings do not really affect the result of the decision in the suit for pre-emption brought by the plaintiffs in respect of the alleged gift, because that suit has failed and the decision in that suit has become final. Those findings only affect the previous suit brought by the plaintiffs for pre-emption of the sale effected by Musammat Kesar in favour of Kunwar Nihal Singh on the 27th May, 1919. The contention of Kunwar Nihal Singh is that by reason of the deed of gift, he became a co-sharer in the mahal and that the plaintiffs consequently were not entitled to a preferential right. To that the reply of the plaintiffs is that that gift was really a sale, though clothed in the from of a gift. That defence having failed, they fall back upon the finding of the learned District Judge that the gift was void because it offended against the provisions of S. 53 of the Transfer of Property Act, S. 23 of the Indian Contract Act, and S. 20 of the U. P. Tenancy Act (II of 1901).

We have, therefore, to examine how far these contentions can be sustained. S. 53 of the transfer of Property Act has no application bacause it deals with a case where a transfer is effected either to defraud a future creditor or defeat the rights of co-owners or other persons having an interest in the property transferred. The plaintiffs are admittedly not the creditors of the alleged donors. They do not claim to be co-owners of the specified plot transferred, though they may be co-sharers of the village. As co-sharers they may have a right to claim a partition but the deed of gift, if valid, operates to transfer only such rights as the alleged donor possesses in the plots transferred, and so far as that interest is concerned, S. 53 of the Transfer of Property Act can have no application. That interest belongs exclusively to the alleged donor and the transfer cannot be regarded as a transfer made to defeat the interest, if any, which the plaintiffs may possess therein.

S. 23 of the Indian Contract Act has similarly no application, because it is recognized that a right of pre-emption can be defeated by ligitimate methods known

to the law. One of those methods is to obtain a preferential or equal right by the acquisition of a certain interest in the mahal in which the disputed property is situated at any time prior to the decree. No person who claims pre-emption can succeed unless he can show a subsisting right of pre-emption; and he cannot be deemed to have such a subsisting right until he is in a position to show that on the date on which he seeks to obtain the decree he had a preferential right as against the defendant vendee. If prior to the date of such a decree the defendant-vendee acquires an interest in the village or mahal in which the disputed property is situated and becomes a co-sharer entitled to resist the claim of any other person brought against him, no decree can be passed against him for pre-emption. The object of such an acquisition is clearly not to defeat the law of pre-emption but to acquire a preferential right. S. 23 does not forbid an acquisition of that nature.

S. 20 of the Agra Tenancy Act has also no bearing on the present question, because the deed of gift purports to transfer the proprietary rights of the donor. It is said that prior to the gift there was a simple mortgage effected by Daryai Singh and Balwant Singh in favour of Kunwar Nihal Singh for the purpose of paying a previous usufructuary mortgage held by Jagram Singh. But the deed of gift now in question does not purport to transfer any exproprietary rights. It merely purports to transfer what on the above facts amounted to the equity of redemption held by the donors in the said property and the gift cannot, therefore, be regarded as invalid.

The suit for pre-emption brought by the plaintiffs in respect of the sale of the 26th May, 1919 must, therefore, fail. Second Appeal No. 775 of 1923 is, therefore, allowed and the suit of the plaintiffs dismissed with costs here and hitherto.

Appeal allowed.

1925 ALLAHABAD 360

LINDSAY AND KANHAIYA LAL, JJ.

Hazari Lal—Defendant—Appellant.

v.

Abbas Mirza—Plaintiff—Respondent.

Second Appeal No. 1111 of 1923, Decided on 6th November, 1924, from a decree of the Dt. J., Meerut.

Pre-emption — Wajib-ul-arz — Construction — Mere relationship was held insufficient to create right.

Where the walib-ul-arz provided for a right of pre-emption in three classes of persons, namely (1) Bhai haqiqi, (2) Bhai qaribi and (3) Digar hisseddran-i-deh.

Held, that no person can claim to pre-empt as a "Bhai haqiqi" or a "Bhai qaribi" unless he has got the further qualification of being a co-sharer in the village. [P. 360, C. 2.]

M. L. Agarwala—for Appellant.

Hamid Hasan and *Kailas Chandra Mital*—for Respondent.

Judgment.—In our opinion this appeal must be allowed. The decision of the Court below is erroneous. The suit was a suit for pre-emption. The plaintiff in the case was a relation of the vendor but was not a co-sharer in the village. On the other hand, the purchaser was a co-sharer in the village but not related to the vendor. Both the Courts below have held that in spite of the fact that the plaintiff was not a co-sharer, he was entitled to a decree for pre-emption. This decision was arrived at on the language of the *wajib-ul-arz* to which we must now refer. The language of that document appears to us to be quite clear. It provides for a right of pre-emption in three classes of persons namely: (1) *Bhai haqiqi* (2) *Bhai qaribi* (3) *Digar hisseddran-i-deh.*

The point which was raised in both the Courts below was that the word "Digar" in this context indicated clearly that it was necessary that the members of the first and second classes should also be co-sharers in the village. In other words, mere relationship without possession of some proprietary rights in the village gave no title to pre-empt.

The Court of first instance was of opinion that the word "Digar" did not import this sense into the context. The learned Judge of the lower appellate Court was rather doubtful on this question of interpretation, but he was not prepared to differ from the view taken by the learned Subordinate Judge. It seems to us that the meaning of the *wajib-ul-arz* is perfectly plain and that no person can claim to pre-empt as a "Bhai haqiqi" or a "Bhai qaribi" unless he has got the further qualification of being a co-sharer in the village.

Mr. Hamid Hasan has cited to us two cases, ***Abdul Wahid v. Wilayat Husain***

(1) and *Ram Din* v. *Pokhar Singh* (2). It is sufficient for us to say that the language of the *wajib-ul-arz* in those two cases was quite different from the language of the document with which we are now concerned. We allow the appeal, set aside the decree of the Court below and direct that the plaintiff's suit do stand dismissed with costs in all Courts.

Decree set aside.

(1) [1902] A. W. N. 109.
(2) [1905] 27 All. 553=2 A. L. J. 253=(1905) A. W. N. 97.

1925 ALLAHABAD 361

LINDSAY AND KANHAIYA LAL, JJ.

Nadir Husain—Plaintiff—Appellant.

v.

Sadiq Husain — Defendant — Respondent.

Second Appeal No. 1022 of 1923, Decided on 3rd November, 1924, against a decree of the Second Add. J., Gorakhpur.

(a) *Practice—Judgment—Pre-emption decree — Appellate Court can take notice of subsequent developments and reverse decree.*

After the passing of the decree by the Court of first instance in favour of the plaintiff in a pre-emption suit, certain developments took place the result of which was that the vendees title to immunity from pre-emption was established.

Held, that the Appellate Court was justified in taking notice of this fact and reversing the lower Court's decree for pre-emption.

[P. 361, C. 2.]

(b) *Mahomedan Law — Pre-emption—Two co-sharers—Equal rights of pre-emption—Each should be allowed to pre-empt half.*

Where two co-sharers in a property have equal rights of pre-emption these rights ought to be given effect to by allowing each to pre-empt half the property transferred. 19 *A.* 466; 21 *A.* 292 *Foll.* [P. 362, C. 1.]

(c) *Civil P. C., S.* 100—*Question purely legal is open.*

A pure question of law can be raised for first time in second appeal. [P. 362, C. 2.]

M. Wali-ullah—for Appellant.

Gulzari Lal—for Respondent.

Judgment.—This is a pre-emption second appeal. The plaintiff is the appellant and the case has to be decided in accordance with the provisions of the Muhammedan law of pre-emption.

The suit was a suit to pre-empt the sale of a certain fractional share of a house which was carried out by a document, dated the 20th October, 1921.

The plaintiff brought his suit for pre-emption on the 24th April, 1922.

While that suit was pending the purchaser of the property, on the 15th July, 1922, took a transfer of a portion of the premises from one Ali Raza.

Before the suit for pre-emption was decided Ali Raza on the 21st Nov. 1922, filed a suit against his transferee for the avoidance of the deed of transfer on the ground of fraud and undue influence,

Before this latter suit was decided the pre-emption suit of the plaintiff-appellant was decreed on the 6th of December, 1922, by the Court of first instance.

The finding of the Munsif was that the transfer of the 15th July, 1922, in favour of the vendee had not been proved.

The defendant appealed to the District Judge and when the case came up there the appeal was allowed and the plaintiff's suit was dismissed in its entirety.

The learned Judge of the lower appellate Court took notice of the fact that after the pre-emption suit had been decided by the Munsif the suit brought by Ali Raza for avoidance of the transfer was withdrawn. The learned Judge, therefore, being of opinion that the result of the withdrawal was the failure of the suit and consequently the establishment of the transfer which Ali Raza had previously executed in favour of the purchaser in the pre emption suit, held that on the facts as they stood it was established that the purchaser was at the time of the first Courts' decree a co sharer in the property. He held, therefore, that the plaintiff had no better right of pre-emption than the purchaser and so he dismissed the suit.

It has been argued before us in appeal that the learned Judge of the Court below was in error in coming to this decision. The point taken is that he was not entitled to take notice of anything which happened subsequent to the date of the decree of the Court of first instance so as to arrive at a decision that the transfer executed by Ali Raza in favour of the purchaser was a valid transfer.

We do not agree with this. It seems to us that the learned Judge was perfectly entitled to take the course he did. He had before him the fact that the transfer which had been challenged by the transferor had become established by reason of the withdrawal of the suit which was brought for the purpose of challenging it, and his decision on this point obviously

must relate back to the date of the transfer, namely, the 15th July, 1922. We think, therefore, that he was entitled to hold that at the time of the decree of the Court of first instance in this compromise suit the vendee was a co-sharer in the premises, a portion of which had been sold and was sought to be pre-empted.

On this part of the case therefore we think the argument of the appellant must fail.

Another pcint raised here with reference to the transfer is this, namely that it is argued that transfer made by Ali Raza being the transfer of an undivided share the doctrine of "Mushaa" applies and the transfer is invalid As to this all we can say is that no such point was raised in the Court below and we have before us no materials which would enable us to decide the question if we allow it to be raised.

There remains only a third point which is a pure point of law and which is raised in the 6th ground of the memorandum of appeal. Dr, Wali-ullah for the appellant contends that in any case the Court was wrong in dismissing the pre-emption suit in its entirety. He cites certain rulings of this Court and also of the Bombay High Court in this connection. It certainly has been held by this Court in *Amir Hasan* v. *Rahim Bakhsh* (1), and *Abdullah* v. *Amanatullah* (2), that where two co-sharers in a property have equal rights of pre-emption these rights ought to be given effect to, and the rulings of this Court have been accepted by a Full Bench of the Bombay High Court in the case of *Vithaldas Kaahandas Soni* v. *Jamiet Ram Maneklal* (3). The Calcutta High Court, it is true, has taken another view, but we are bound to follow the decisions of our own Court.

If we give effect, therefore, to the law as laid down in the rulings which have been referred to, it seems to us that in any case the plaintiff here was entitled to a decree for pre-emption of half the property transferred.

It has been argued before us and it certainly seems to be the case that this question was not raised in the lower appellate Court. Obviously it could not have been raised in the Court of first instance. However we have to bear in mind that the appellant here was respondent in the Court below and there was no occasion for him to file any written petition of objection against the first Court's decree. We think indeed that the point ought to have been raised in the lower Court and the respondent ought to have supported the decree of the Court of first instance so far as it was possible for him to do. We do not know really whether this question was raised or not. All that can be said is that we do not find any indication of it in the judgment. When all is said and done, however, the question is a pure matter of law and there will be no harm done to any party by its being raised in the stage of second appeal. We therefore allow this appeal in part for the reasons already given and reversing the decree of the Court below direct that a decree for pre-emption of half the property transferred by the document of the 20th October, 1921 be passed in favour of the plaintiff-appellant on payment of Rs. 15. We allow the appellant two months to deposit this money in the Court of first instance. On his failure to deposit the money the result will be that the suit of the plaintiff will stand dismissed with costs in all Courts. As the plea upon which this appeal has succeeded was not raised in the Court below we think the proper order to pass is that in case of payment of the pre-emption money by the plaintiff as directed the parties do bear their own costs in all the three Courts.

Appeal accepted in part.

(1) [1897] 19 All 466=(1897) A. W. N. 118.
(2) [1899] 21 All. 292.
(3) [1920] 44 Bom. 887=58 I. C. 279=22 Bom. L. R. 698. (F. B.)

1925 ALLAHABAD 362

LINDSAY AND KANHAIYA LAL, JJ.

Dalip and others—Defendants—Appellants.

v.

Khazan Singh—Plaintiff—Respondent.

Second Appeals Nos. 1214 and 1215 of 1923, Decided on 22nd January 1925 from a decree of the First Add. Judge, Aligarh.

Pre-emption—Custom recorded in settlement—Mahal being one man's property at time of settlement—Subsequent division—Custom applies.

The settlement record evidenced the existence of the custom of pre-emption in the village. But at the time of the settlement and for some time later, one of the mahals had been the exclusive property of a single individual. Subsequently it had been transferred to several persons.

Held: that in respect of a property situated in the Mahal the custom of pre-emption applied. 39 All. 480 Dist. [P 363 C 2]

A. P. Dube—for Appellants.

Shiva Prasad Sinha—for Respondent.

Lindsay, J.—Both these appeals have arisen out of two suits for pre-emption and they may be disposed of by one judgment. The cases have been up in appeal here before and were sent back for redisposal to the Court of the learned District Judge of Bulandshahr.

The question before us is whether a custom of pre-emption admittedly obtaining in the village of mauza Ganaura Shaikh, applies in respect of the particular property now sought to be pre-empted, It is to be mentioned here that the property in question is situated in a mahal known as mahal Alladad. The plaintiffs are co-sharers with the vendor in mahal Alladad. The vendee is admittedly a stranger.

The plaintiffs relied upon what was set out in the document known as the "*dastur dehi*" prepared in the year 1296 F at the settlement of Mr. Stoker. The *dastur dehi* must certainly be taken to be a record of custom, and there can be no doubt that the custom of pre emption is recorded. The language of the document is as follows :—

"In joint zamindari mahals and in pattidaris, if any co-sharer desires to transfer his property, he must offer it first to co-sharers who are near relations descended from the same common ancestor. After them he must offer it to co-sharers in the patti, mahal or village (gaon). If none of these persons desire to acquire the property, the vendor is at liberty to transfer to a stranger."

It was said in the Court below, and it was not disputed there, that at the time when the settlement took place, mahal Alladad Khan was the exclusive property of one person, namely, Alladad himself. There is no evidence on the record to the contrary.

On the basis of this fact it has been argued before us by the vendee that, although a custom of pre-emption is recorded in the *dastur dehi*, nevertheless the plaintiffs are not entitled to take advantage of it because the custom could not apply to any property situated in mahal Alladad. The argument is that because the mahal in question was at the time of the settlement, and it seems for some years afterwards, the sole property of Alladad, the custom would not apply. There is evidence on the record to show that the mahal continued in the possession of Alladad Khan up till the year 1897. He then sold it to another single proprietor who subsequently sold it to a number of persons who are related to the present vendor and pre-emptors.

We are, however, unable to accept the argument that the plaintiffs are not entitled to exercise a right of pre-emption under this custom. Mr. Dube relied on the case of *Kamrunnissa* v. *Sugra Bibi* (1). There, dealing with a mauza or village which in the year 1881 had become the property of a single owner, the Pre-emption Bench of this Court held that the custom of pre-emption which had undoubtedly existed prior to that time had become dead. The learned Judges differed from the Judge of the Court below who was of opinion that in the circumstances the custom was not dead but only in abeyance; in other words, the learned District Judge seemed to think that after the village ceased to be the property of a single owner and came into the possession of several co-owners, the custom would revive. It was laid down distinctly, however that the custom was dead and that a new custom would have to grow up before any one could assert a right of pre-emption.

It is to be noticed that in this case the Bench was dealing with a mahal which was co-extensive with the mauza, and at page 481 of the report they say in support of their judgment that custom means a practice prevailing amongst a certain community. If that community has been reduced to a single individual, it is impossible that the practice can any longer exist.

That argument, however, cannot be applied to a case like the one now before us. All that is made to appear is that a particular portion of this village of Ganaura Shaikh had at some time or other become a mahal in possession of a single owner. That fact, however, would not indicate the disappearance of the village community, and it seems to us perfectly clear that the reasoning which was applied in *Kamrunnissa* v. *Sugra Bibi* (1) cannot hold good in a case like

(1) [1917] 39 All. 480=40 I.C. 427=15 A.L.J 422.

the present. We are satisfied, therefore, that the vendees cannot maintain in this case that the plaintiffs are not entitled to pre-empt the property under the custom recorded in the *dastur dehi* of 1296 Fasli. The judgments of the Courts below are correct; both the appeals fail and are dismissed with costs.

Appeal dismissed.

✱ 1925 ALLAHABAD 364

MEARS, C. J. AND PIGGOTT, J.

Narain Das and others—Defendants—Appellants.

v.

Chiranji Lal—Plaintiff—Respondent.

First Appeal No. 67 of 1922, Decided on 12th December, 1924, from an order of the Sub. J., Meerut.

✱ (*a*) *Civil P. C., O. 47, R. 1—'For any other sufficient reason' is not limited to matters ejusdem generis with matters in earlier part of the rule—The words provide for exceptional cases.*

The words 'for any other sufficient reason' in O. 47, R. 1 need not be restricted to matters which are strictly *ejusdem generis* with those referred to in the earlier part of the rule. On the contrary, the words are not only very wide in themselves, but are intentionally so made by the legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed.

[P. 365, C. 1]

✱ (*b*) *Civil P.C., O. 47, R. 7—Appeal from order granting review—Grounds are limited to R. 7.*

Under O. 43, rule 1 an appeal is allowed against an order granting an application for review of judgment, but that rule is obviously controlled by the provisions of O. 47, rule 7. Taken together, the effect of the two rules is that, though an appeal against such an order lies, it must be supported only on the one or other of the grounds set forth in O. 47, R. 7 and must fail unless it can be brought within the scope of the grounds set forth in that rule. 27 *A.* 695 *Ref.*

[P. 365, C. 2]

Peary Lal Banerji—for Appellants.

Kailas Chandra Mital and *Kailas Nath Katju*—for Respondent.

Piggott, J.—This appeal arises out of a litigation; the whole facts and circumstances of which we have been considering on a regular First Appeal from the decree itself. We think it unnecessary to recapitulate any facts beyond those necessary to make it clear what the precise point now before us is. There was a decree passed between the parties on the 3rd of January, 1922. That decree was in an alternative form. The plaintiffs were to have a right to recover Rs. 15,000 with costs from the defendants, provided they fulfilled a certain antecedent condition. That condition was that 63 bales of cotton, and by this was meant 63 specified bales, which had been subject matter of litigation in the suit, should be delivered by the plaintiffs to the defendants at the latters' shop at Meerut on or before the 3rd March, 1922. If the plaintiffs failed to comply with this condition, then they were to have a decree only for Rs. 7,125 with proportionate costs. On the 3rd of March, 1922 the plaintiffs applied to the Court to extend the time. The first application presented by them purported to be under S. 148 of the Code of Civil Procedure, and this application was necessarily rejected by the Court in view of the Full Bench decision in *Suranjan Singh* v. *Rambahal Lal* (1). Immediately, and on the very same day, the plaintiffs presented an alternative application, asking the Court to review its judgment and by way of such review to give them more time within which to comply with the specified condition. The Court fixed a date for enquiry into this matter, and after hearing one of the plaintiffs and examining certain documentary evidence, came, in substance, to the conclusion that the plaintiffs had been prevented from complying exactly with the terms of the decree as originally passed by a cause outside their control. That cause was the refusal of a Railway Company at Bombay to provide the plaintiffs with the necessary wagon or wagons for the conveyance of the bales of cotton from that place to Delhi, or to Meerut, and this refusal was again due to the existence of a strike on one of the Railways—we believe on the East Indian Railway—in consequence of which certain bookings had been suspended at Bombay. The Court came to the conclusion that the plaintiffs had shown sufficient cause for their inability to comply with the terms of the decree as originally passed, and it granted a review of judgment by which the original decree was modified and the date April 19th was substituted for the date March the 3rd. In passing this order the Court avowedly and expressly acted in the exercise of its powers of review under S. 114 and Order 47 of the Code of Civil Prodedure We must take it that in the

(1) [1913] 35 All. 582=21 I.C. 585=11 A. L. J. 950.

opinion of the Court the plaintiffs had shown sufficient cause for the granting of a review of the decree "for any other sufficient reason.

We have before us an appeal by the defendants against that order. This appeal, excepting so far as it deals with the merits of the question, is based mainly upon the technical ground that the words "for any other sufficient reason" in O. 47, R. 1 of the Code of Civil Procedure, must not be extended to matters which are not strictly, *ejusdem generis* with those referred to in the earliar part of the rule. Reliance is also placed on the argument that a Court should not be permitted to do in the guise of a review of judgment, something which, according to the decisions of this Court, it is not expressly empowered to do either by S. 148 of the Code of Civil Procedure, or by any other rule under the said Code. To this latter argument we attach little importance. Either the Court had power to review its judgment under O. 47, R. 1 and S. 114 of the Code of Civil Procedure, or it had not. If it had, it was acting within its jurisdiction. We have been referred to one case decided in revision by a Bench of this Court, namely that of *Kanhai Singh* v. *Mt. Kundan* (2), in which it is suggested the learned Judges held that an order very similar to the one now before us had been passed without jurisdiction. In that case the learned Judges expressly held that the order with which they were dealing could not possibly be taken to be an order passed by way of review or judgment. The order now before us expressly is an order passed by way of review of judgment. In our opinion the words "for any other sufficient reason" in O. 47, R. 8 are not only very wide in themselves, but were intentionally so made by the legislature, because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed. We are not prepared to hold that the Court below was outside its jurisdiction in passing the order now under appeal.

The next question is whether that order can be successfully attacked on the merits. We are bound to say that there is something to be said on the merits against the course followed by the trial Court. If the evidence laid before the learned Subordinate Judge is examined in detail, it will be seen that the position remains somewhat as follows. The plaintiffs had time from the 3rd of January to the 3rd of March, 1922 within which to take certain steps. They began to interest themselves actively in the matter on the 3rd of February, 1922. They were then prevented by cause wholly beyond their control from carrying out the order of the Court within the period of one month then left to them. It is a very arguable point whether the plaintiff, who was examined by the learned Subordinate Judge, did offer any reasonable explanation of the delay between the 3rd of January and the 3rd of February, 1922. On the other hand, there is some force in the contention of counsel representing the plaintiffs-respondents, that this point was never pressed in cross examination when the plaintiff was in the witness-box. We think, however, that on this point the plaintiffs have a technical answer to the appeal which must be allowed to prevail. It is quite true that under O. 43, R. 1 an appeal is allowed against an order granting an application for review of judgment, but that rule is obviously controlled by the provisions of O. 47, R. 7. Taken together, the effect of the two rules is that, though an appeal against such an order lies, it must be supported only on the one or other of the grounds set forth in O. 47, R. 7 and must fail unless it can be brought within the scope of the grounds set forth in that rule. This has always been the view of this Court, and it was so affirmed in the older case of *Ali Akbar* v. *Khurshed Ali* (3) under the former Code of Civil Procedure. The point is, if anything, even clearer under the present Code. In our opinion the arguments addressed to us on the merits in support of this appeal cannot be brought within the purview of any of the clauses of O. 47, R. 7 of the Code of Civil Procedure. The appeal must, therefore, fail and we dismiss it with costs.

Appeal dismissed.

---

(2) [1920] 42 All. 639=54 I.C. 16=18 A. L. J. 826.

(1) [1905] 27 All. 695=(1905) A.W.N. 154=2 A. L. J. 465.

✱ 1925 ALLAHABAD 366

LINDSAY AND KANHAIYA LAL, JJ.

Budh Sagar and another—Defendants—Appellants.

v.

Bishun Sahai—Plaintiff—Respondent.

First Appeal No. 26 of 1922, Decided on 6th November 1924, from a decree of the Addl. Sub. J., Bassi.

(a) Hindu Law—Partition— Exclusion from share—Congenital blindness—Onus of proof is on party asserting.

The onus of proving that a party was congenitally blind so as to be excluded from a share in joint property lies on the party asserting the same. [P. 366, C. 2.]

✱ *(b) Family arrangement— Descendants of parties are bound.*

A family arrangement is binding as much on the parties thereto as on their sons and descendants. [P. 367, C. 1.]

✱ *(c) Hindu Law—Partition—Exclusion from share—Partition suit by blind co-parcener compromised by recognising his title — Agreement is conclusive.*

Where in a partition suit the defendant pleads that plaintiff is not entitled to any share as he is congenitally blind, but the defendant does not proceed with the trial of the issue and enters into an agreement with the plaintiff by which the dispute is settled and one of the conditions of which is the recognition of the plaintiff's title by the defendant, the agreement is binding on the defendant and his descendants and is conclusive of the plaintiff's right to share in the joint property. [P. 366, C. 2.]

✱ *(d) Specific Relief Act, S. 21—Suit compromised—Future disputes to be referred to arbitration —Suit on same subject is not barred.*

Where a suit is settled by an agreement one of the provisions of which is that future disputes should be referred to arbitration, the provision has no force and does not preclude a suit brought without resorting to arbitration. [P. 367, C. 2.]

Surendra Nath Sen—for Appellants.

Kailas Nath Katju—for Respondent.

Facts.—The appeal arose out of a suit for partition of a half share of certain family property which was brought by the plaintiff respondent against the defendants who were his nephews. The family consisted of three brothers Nageshar, Jageshar and Rameshar. Rameshar died leaving a widow Mt. Muna. On the 11th May 1918, an agreement was executed by Bishun Sahai, son of Nageshar, and Raghubar Dayal, son of Jageshar, agreeing to pay a maintenance of Rs. 200 per year to Mt. Muna for her life. Subsequently a suit for partition was brought by Bishun Sahai against Raghubar Dayal and his son. Budh Sagar, in respect of his half share of the family property, which was settled by an agreement of the 13th July 1919, the effect of which was that the right of Bishun Sahai in the co-parcenary property was recognized and that of Raghubar Dayal to act as the manager of the family was acknowledged. Raghubar Dayal died in 1920. The present suit was brought by Bishun Sahai against his sons for a partition of his half share. The main defence urged on behalf of Raghubar Dayal's sons was that the plaintiff had been born blind and was not entitle to a share in the family property and that he was precluded by the agreement of the 13th July 1919, from bringing a suit without referring the matter in controversy to the arbitration of one Ram Dat. The Court below was of opinion that the defendants had failed to establish that the plaintiff was born blind.

Kanhaiya Lal, J.—[His Lordship after stating the facts of the case as set out above and discussing the evidence, proceeded as follows :—]

The onus lay on the defendants appellants to give strict proof that the plaintiff suffered from a congenital disability which excluded him from inheritance and that onus has not been discharged.

There is another matter which is still more conclusive on the point of the plaintiff's title. In 1919 when the plaintiff sued for a partition of his share, the defence raised by Raghubar Dayal on behalf of himself and Budh Sagar, according to the learned Subordinate Judge, was that the plaintiff had been born congenitally blind. Raghubar Dayal did not, however, proceed with the trial of that issue. He preferred to enter into an agreement with the plaintiff by which he recognized his right as a co-parcener in consideration of the then plaintiff withdrawing his claim for partition and acknowledging him as the then head of the family, and further agreed that if in future any male issue was born to the plaintiff then that very issue would be the heir of his property, and that if no male issue was born to him, the surviving male member of his family shall be "his heir" according to the Hindu law. There was a further agreement that if Raghubar Dayal showed any kind of dishonesty or unfair dealing as manager, the plaintiff would, in the first instance, refer the matter to the arbitration of Ramdat Kurmi and get it settled, or else seek his remedy in a competent Court for the partition of his share. That agreement clearly acknowledges the title of the plaintiff as a co-parcener in the family

property. The right of the plaintiff was till then disputed ; and that was the consideration of the agreement which operates as a family arrangement binding as much on the parties thereto as on their sons and descendants. In accordance with the agreement an application was filed in the Court in which the suit for partition was pending, on the 28th July 1915, whereby the suit was withdrawn ; and the agreement above referred to was specifically mentioned therein as settling the matters in dispute between the parties at the time.

The learned counsel for the defendants-appellants has called our attention to the decision in *Lala Muddun Gopal Lal* v. *Khikhindu Koer* (1) where their Lordships, dealing with a case in which a person had been deaf and dumb from his birth and was allowed a share, observed that it was quite natural for the other members of the family to have dealt with him with kindness and affection and even to have treated him as a member of the family entitled to equal rights. It may be that there might be circumstances in which an afflicted brother might be treated with such consideration in order to promote the peace and welfare of the family and to consider acts done out of kindness and affection to the disadvantage of the doer of them may lead to considerable injustice. But that was a case in which the finding arrived at was that the person concerned was born deaf and dumb and was incapable of inheriting or succeeding to any property under the Hindu law ; and the subsequent conduct of the other members of the family was sought to be used as evidence of the creation of new title by gift. No such consideration arises in this case. The agreement of the 13th July 1919, does not create any new title. It merely settled a dispute which was then pending, recognised an antecedent title and prescribed the manner in which the future management of the family property was to be carried on. That agreement is, in our opinion, conclusive on the rights of the parties : and inasmuch as all the members of the family, as then existed, were parties to the litigation, for the settlement of which that agreement was executed, we must regard it as a family arrangement, or final settlement of the matter in controversy, as binding on the then members of the family as on the defendants who were subsequently born.

(1) [1890] 18 Cal. 341=18 I.A. 19 (P.C.)

As regards the objection that the agreement of the 13th July 1919, precluded the plaintiff from bringing a suit for partition without resorting to arbitration, we have only to point out that an agreement to refer future disputes has no such force and S. 21 of the Specific Relief Act (I of 1877) does not affect the provisions of the Code of Civil Procedure and the plaintiff is not precluded in consequence from instituting the suit. On the other hand, the agreement gave him the right to sue for partition and that right remains unaffected by the failure of the plaintiff to have recourse to this arbitration of Ram Dat. This appeal must therefore, fail and is hereby dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 367

LINDSAY AND KANHAIYA LAL, JJ.

Kanhaiya Lal—Plaintiff—Appellant.

v.

Niranjan Lal and others — Defendants—Respondents.

First Appeal No. 36 of 1922, Decided on 9th December 1924, from a decree of the Addl. Sub. J., Aligarh.

Hindu Law — Alienation — Father—Mortgage effected to discharge antecedent debt—Sons are liable unless antecedent debt is immoral or illegal.

If the managing member of a joint undivided estate purports to burden the estate with a mortgage, and he happens to be the father, his sons are bound by the mortgage, if the mortgage is effected to discharge an antecedent debt, unless the sons can escape liability by showing that the antecedent debt was incurred for immoral or illegal purposes. 39 *A.* 437 (*P. C.*) *and* 1924 *P. C.* 50. *Ref.* [P. 368, C. 1]

Surendra Nath Sen, Lalit Mohan Banerji and *Panna Lal*—for Appellant.

Nehal Chand and *Gulzari Lal* — for Respondents.

Kanhaiya Lal, J. The decision of the Court below in this case cannot be sustained. The plaintiff seeks to recover the money due on a mortgage effected by Gobind Ram, the father of the defendants Nos. 1 and 2 and the grandfather of the defendants Nos. 3 and 4, in favour of Dwarka Das on the 31st May, 1909. The plaintiff is the son of Dwarka Das. The mortgage was effected for the sum of Rs. 7,000, the whole of which was left with the mortgagee for the satisfaction of a prior mortgage of the 10th February, 1902 held by the defendant Zamir-ul-Hasan Khan.

The defendant Nos. 1 to 4 met the claim with the plea that the document in

question, if executed by Gobind Ram, was executed without consideration, and that there was no legal necessity to justify the mortgage. The defendant, Abdul Hamid Khan, is said to have purchased a portion of the mortgaged property at auction in execution of a decree on a prior mortgage, to which Gobind Ram was a party. Abdul Hamid Khan sold his rights to Zamir-ul-Hasan Khan on the 2nd April, 1921. The defence of Abdul Hamid Khan was that he had no interest subsisting in any portion of the mortgaged property; and that of Zamir-ul-Hasan Khan was that his vendor had purchased the right of Gobind Ram in satisfaction of a decree on a prior charge and the property purchased by him was not therefore liable for the plaintiff's claim.

The Court below dismissed the claim, following the decision in *Sahu Ram Chandar* v. *Bhoop Singh* (1). The view taken by it was that the prior mortgage debt, for the satisfaction of which the mortgage in suit was executed, did not amount to an antecedent debt, inasmuch as no legal necessity was shown to justify a mortgage of the ancestral property by Gobind Ram at the time. It was asserted on behalf of the defendants Nos. 1 to 4 that Gobind Ram was a man of immoral character and extravagant habits; but no finding was recorded by the Court below on that point.

The decision of their Lordships in *Sahu Ram Chandra* v. *Bhoop Singh* (1) has since been qualified by the later decision in *Brij Narain Rai* v. *Mangla Prasad Rai* (2). In the later decision their Lordships have held that if the managing member of a joint undivided estate purports to burden the estate with a mortgage, and he happens to be the father, his sons are bound by the mortgage, if the mortgage is effected to discharge an antecedent debt. This is of course subject to the ordinary rule that the sons can escape liability by showing that the antecedent debt was incurred for immoral or illegal purposes. The evidence adduced by the contesting defendants on the point is of a very vague and general character. All that it shows is that Gobind Ram, who was employed as a sub-Registrar and had apparently inherited some property from his adoptive father, was addicted to immoral habits and that he spent money extravagantly to meet his licentious habits. There is no evidence, however, to show that the particular debt, for the payment of which the mortgage in suit was executed, was made for immoral purpose. On the other hand, there is evidence to show that it was executed mainly to pay certain prior debts due by the mortgagor. The defendants Nos. 1 to 4 are, therefore, liable for the payment of the money due on the mortgage in suit.

A portion of the mortgaged property, comprising 1 biswa 7 biswansis and 7 kachwansis of No. 2 khewat of the village Qiampur, appears to have been purchased by Abdul Hamid Khan in execution of a decree on the prior mortgage. That property has since been sold by him to Zamir-ul-hasan Khan. The plaintiff cannot enforce his mortgage against that property, because the mortgagor was a party to the decree in satisfaction of which that sale took place. The decree was passed in 1907 before the mortgage in suit was made. The findings of the Court below on the other points raised in the suit are not challenged here. The appeal is, therefore, allowed and the claim of the plaintiff decreed with costs and future interest at the stipulated rate from the date of the suit till six months from this date and thereafter at 6 per cent. per annum. The decree will be framed in terms of Order 34, rule 4 of the Code of Civil Procedure and six months time will be allowed for payment. The decree will not affect the property purchased by Zamir-ul-Hasan Khan under the sale-deed executed by Abdul Hamid Khan in his favour on the 2nd April, 1921. Defendant No. 6 will get his costs here and hitherto from the plaintiff. The other defendants will bear their own costs throughout. Costs in this Court in either case will include fees on the higher scale.

Appeal allowed.

---

(1) [1917] 39 All. 437=44 I.A. 126=21 C.W.N. 698=1 P. L. W. 557=15 A. L. J. 437=19 Bom. L. R. 498=26 C. L. J. 1=33 M.L.J. 14=(1917) M. W.N. 439=22 M. L. T. 22=39 I. C. 280=6 L. W. 213 (P. C.)

(2) 1924 P. C. 50=46 All. 95=51 I. A. 129=21 A. L. J. 934=5 L. R. P. C. 1=28 C. W. N. 253=46 M. L. J. 23=5 P. L. T. 1=2 Pat. L. R. 41=(1924) M. W. N. 68=19 M. L. W. 72=33 M. L. T. 457=26 Bom. L. R. 500=11 O. L. J. 107 (P. C.)

★ 1925 ALLAHABAD 369

MUKERJI, J.

Umrao Singh and *another*—Defendants—Appellants.

v.

Pirthi and *others* — Plaintiffs — Respondents.

Second Appeal No. 899 of 1921, Decided on 30th July 1924, against the decree of the D/- J., Meerut.

(a) *Practice — Now plea — Case remanded in second appeal—Objection to remand cannot be raised after return of case.*

Where at the stage of second appeal the case is remanded for decision on a certain issue and the case comes back after remand, the parties having had full opportunity to meet the case, it cannot be urged that the Court should not have allowed a new case to be set up. [P 370 C 1]

★ (b) *Hindu Law — Widow—Continuing in possession after remarriage—Prescription benefits first husband's estate.*

Where after re-marriage, a Hindu widow remains in possession of her husband's lands for 12 years but does not claim to do so in her own right but only as her first husband's widow, she acquired the property for her first husband and on her death, his reversioners succeed to the estate. [P 370 C 2]

Kailas Nath Katju—for Appellants.

Gulzari Lal—for Respondents.

Judgment.—The facts of this case are rather complicated, but they appear to be as follows. The pedigree given in the judgment of the learned District Judge dated the 18th May, 1921 should be referred to, to understand the relationship which exists between the parties. There were three brothers, ignoring the fourth who does not count, *viz.*, Sheo Singh, Khubi and Sobha. Sobha's son was Bawar and his wife was Mt Dhapo. Khubi's son was Nihal. Sheo Singh's sons were Nanak and Fatte We hear nothing as to what happened to Nanak and he was seen left out of account. Fatte's sons are the defendants. They are also the appellants in this Court. Bawar died about 50 years ago and on his death his widow married his cousin Nihal. The plaintiffs-respondents are the sons of Mt. Dhapo and Nihal. Bawar left no issue. The plaintiffs brought the suit, out of which this appeal has arisen for the ejectment of the appellants on the ground that the plots in suit were the *Sir* lands of Mt. Dhapo, their mother, and the appellants were their tenants. The defence was that the defendants were also co-sharers in the village and they were not holding as tenants of Mt. Dhapo. The Court of first instance found that the defendants-appellants had brought a suit in Civil Court against Mt. Dhapo, for a declaration of their title as sir-holders when Mt. Dhapo had brought a suit in the Revenue Court for their ejectment. Indeed, the suit of the appellants against Mt. Dhapo arose out of the ejectment suit instituted by Mt. Dhapo. In that suit it was held that Mt. Dhapo was the sir-holder and she alone had the right to the possession of the lands in suit. Relying mainly on this judgment, and also on the circumstance that, the mutation orders on Dhapo's death were made in favour of the plaintiffs, who are after all the sons of Mt. Dhapo, the Court of first instance, the learned Assistant Collector, decreed the suit. There was an appeal to the District Judge. Nobody questioned the jurisdiction of that officer, because, undoubtedly a question of proprietary title was in issue. The learned District Judge came to the conclusion that the plaintiff -respondents as heirs of Mt. Dhapo were entitled to eject the defendants. He accordingly dismissed the appeal.

In the Court, evidently, an entirely new case was set up and it was this. Mt. Dhapo was the widow of Bawar and was in possession in that capacity. The parties to the suit were the reversioners to the estate of Bawar, that the plaintiffs alone were not entitled to the entire holding and that they were not, therefore, entitled to eject the appellants who were co-sharers. The learned Judge of this Court before whom the second appeal came thought an enquiry should be made on this point and he remanded the following issue for decision. The learned Judge did not write any judgment regarding his grounds for remanding the issue. But it is clear from grounds taken up in second appeal and from his order that he entertained the plea that if Mt. Dhapo was holding the property on behalf of her first husband Bawar, the parties would be entitled only as reversioners and the plaintiffs would have no special title to the property as the sons of Mt. Dhapo.

The issue that was remanded was this :—

" Was Mt. Dhapo in possession of the plots in dispute as the widow of Bawar, or was she in possession of these plots adversely to the heirs of Bawar aforesaid

in case her right to possession "came to an end on her re-marriage, and if so, how long did such possession continue?"

It has been urged before me that, this Court should not have allowed a new case to be set up. I would agree with this contention, but I think it is too late to renew it. If there had been no remand the matter would have been different. But there was a remand and the parties had full opportunity to meet this new case. In the circumstances I do not think it is desirable that the new phase of the case presented before this Court should be altogether ignored. The learned District Judge on remand came to the conclusion that according to the custom obtaining among the Jats, Mt. Dhapo would forfeit her right to the estate of her first husband as his widow. He accordingly held that the possession of Mt. Dhapo was adverse. Evidently the learned Judge meant that she had completed an independent title for herself. If we accept this position it is clear that the plaintiffs' suit is bound to succeed. For, in that case, nobody other than the plaintiffs would be entitled to succeed to the absolute property of Mt. Dhapo. But it is contended for the appellants that the learned Judge was wrong in law in holding that the facts proved showed that Mt. Dhapo was in adverse possession of the property in question. It appears that the judgment, which was given in favour of Mt. Dhapo in the civil suit brought by the appellants against her for a declaration of title to the lands, does not operate as *res judicata* on the question whether Mt. Dhapo was holding the lands in her own right or as a Hindu widow. No such question then arose, for, Mt. Dhapo herself was alive. The position now is this. It is common ground that, on the death of Bawar. Mt. Dhapo became entitled to the property. She then married a cousin of Bawar, Nihal, who would be, at least, one of the reversioners to the estate of Bawar. Another reversioner would be Fatte, the father of the appellants. If Mt. Dhapo forfeited her rights to the estate of Bawar, Nihal and Fatte would be entitled to come in at once and oust Mt, Dhapo from her possession. This did not happen. Thus Mt. Dhapo remained in possession in the teeth of the title of Fatte and Nihal. Her possession was undoubtedly adverse to them. But the matter does not conclude there. The question is whether Mt. Dhapo has prescribed for herself in her independent right or as the widow of Bawar. It is to be remembered that she came into possession as the widow of Bawar. There is no indication whether she knew or not that on her re-marriage she forfeited her right to the estate of Bawar. There is no indication that Mt. Dhapo ever declared that she was holding the property in her own right and not as the widow of Bawar. The probability therefore is that Mt. Dhapo continued to hold the property in the same right in which she came into possession, *viz*, as the widow of Bawar. By completing 12 years adverse possession against Nihal and Fatte she acquired the property for her first husband Bawar. If this be right the reversioners to the estate of Bawar would be entitled to the property left by Mt. Dhapo and not Mt. Dhapo's own sons, as such. The view taken in the Privy Council case of *Mt. Lajwanti* v. *Safa Chand* (1), under similar circumstances was that, the lady in possession was in adverse possession to the reversioners. But she completed a title on behalf of her late husband and the person (the daughter of the late husband and step daughter to the lady) who was entitled to the estate of her husband was the person who must succeed. I hold under the circumstances that Mt. Dhapo prescribed for the benefit of her first husband's estate and that, therefore, the parties are the heirs to that estate.

Now the question is what should be the fate of the suit, according to the finding recorded above. The suit was brought in the Revenue Court, but an appeal lay to the Civil Court as a question of proprietary title had been raised. In the circumstances it would not be right to dismiss the suit simply on the ground that a Revenue Court was not competent to grant a declaratory decree such as I propose to grant in this case. The parties being entitled to the possession of the lands in suit, the plaintiffs would not be competent to eject the defendants, whose possession is of several years.

I, therefore, modify the decrees of the Courts below and instead of decreeing the ejectment of the defendants I give a decree for joint possession to the plaintiffs

(1) 1924 P. C. 121—3 Lah. 192—91 I. A. 171—22 A. L. J. 304—24 M. L. T. 87—5 L. R. P. C. 94—20 M. L. W. 10—28 C.W.N. 960—(1924) M. W. N. 442—2 Pat. L. R. 245 (P. C.)

over the lands in suit with the defendants to the extent of the share that the plaintiffs may have in the property. I refrain from defining what their share would be, because I am not in a position to know whether Nihal had three or four sons surviving Mt. Dhapo. The quantity of share would depend on this information. In the circumstances of the case I order that the parties should pay their own costs throughout.

Appeal accepted.

★ 1925 ALLAHABAD 371

LINDSAY AND KANHAIYA LAL, JJ.

Harakh Chand—Appellant.

v.

Ganga Prasad and others—Respondents

First appeal No. 313 of 1921, Decided on the 23rd December, 1924, from the decision of the Sub. J., Azamgarh.

★ *Tort—Defamation—Mere abuse—Reputation suffering due to circumstances—Action lies.*

Mere verbal abuse, not tended to lower a man in the estimation of others or to bring him in obloquy, contempt or ridicule or to injure him in his profession or trade may not be actionable without special damage. An abuse may be uttered merely to cause an affront to the feelings of another or as an insult to his sense of dignity or self-respect with ut other persons knowing of it or without producing an impression in the minds of others hearing it, prejudicial to his position or dignity. It may, however, be uttered in circumstances tending, if not vindicated, to lower the person addressed in the estimation of the people present or to bring him into ridicule or contempt. In such a case the words will amount to defamation and will be actionable. [P. 372 C 1]

D. E. O'Conor—for Appellant.

Tej Bahadur Sapru, Peary Lal Banarjee and Mukhtar Ahmed—for Respondents.

Facts.—The plaintiff, B. Harakh Chand was one of six candidates for election to the Municipal Board of Azamgarh. There were six members to be elected by the non-Muslim electorate and there were two parties one headed by the plaintiff and the other headed by B. Ganga Prasad Rai, a pleader practising at Azamgarh. Each of these parties had set up its own proteges for the membership and the aim of each party was to secure the chairmanship of the new Board for one of its own men. B. Harakh Chand was the Chairman of the previous Board. B. Ganga Prasad Rai wanted to oust him from his chairmanship and to get himself elected as Chairman in his place. This would not have been possible unless he had succeeded in securing a majority in the new Board to vote for his election to the chairmanship. The election was to have been held on the 14th March, 1918. The allegation of the plaintiff was that on the morning of that date his servants brought his voters to his house to be taken eventually to the Town Hall where the polling was to have taken place, but at that very time B. Ganga Prasad Rai and the other defendants, who belonged to his party and were also candidates for the election, came with many men armed with lathis and wanted to take away those voters with them. It was further alleged that when the servants of the plaintiff informed the plaintiff of that fact and the plaintiff ordered his servants not to allow the voters to be taken away, and the servants tried to keep them back, the defendants threatened to beat the servants and openly abused the plaintiff in the following terms :—

(1) Tell *bahanchod* Harakh Chand that if he has a great aspiration to become a Chairman, he should come to-day in open field. (*Kahdeo bahanchod Harakh Chand se agar bara dawa Chairmani ka hai to aj maidan men a jawae*).

(2) Tell the *sala* (wife's brother) Bania that if he wants to remain safe, he should remain quiet and should hot stand against us otherwise he would receive thousands of shoes. (*Bania sale se kahdeo ki ab agar apni khairiat chahta hai to khamosh rahe, hum logenke mugable men dawa na kare warna hazaren jute parenge*).

(3) Tell the *sala* Bania that far from becoming a Chairman, he would again have to weigh flour and dal for us and that if he would not do so, he would be beaten with shoes. (*Bania sale se kaho ki Chairmani to dur gai phir hamlogen ka ata dal taulna parega na karega to jute khaiga*).

(4) Tell the *sala* of illegitimate birth that we are standing and that if he has courage he should come out. (*Kaho harami sale se hamlog khare hain dawa hai to keon nahin nikalta*).

The plaintiff stated that he went over to the roof of his house to see what the matter was and heard the above expressions being used in reference to him and that when he left the roof and went back, the defendants and their companions went away, clapping their hands and uttering "Bhaga sala" meaning that the wife't brother had run away. The complaint of the plaintiff was that in consequence of the aforesaid ct s and words done and uttered publicly

in the open market and in the presence of many people for the purpose of causing humiliation and disgrace to him he had suffered great mental pain and was dishonoured and put to extreme disgrace, for which he claimed Rs. 50,000 damages.

Kanhaiya Lal, J.—[His Lordship stated facts and after discussing evidence and holding that the plaintiff's statement as to the use of the filthy language by the defendants with reference to him in public was amply proved continued :—]

The next question for consideration is how for the use of such language had lowered the plaintiff in the estimation of the people and caused him harm or damage and was defamatory. Mere verbal abuse, not tending to lower a man in the estimation of others or to bring him into obloquy, contempt or redicule or to injure him in his profession or trade may not be actionable without special damage. An abuse may be uttered merely to cause an affront to the feelings of another or as an insult to his sense of dignity or self respect without other persons knowing of it or without producing an impression in the minds of others hearing it prejudicial to his position or dignity. It may, however, be uttered in circumstances tending, if not vindicated, to lower the persons addressed in the estimation of the people present or to bring him into ridicule or contempt. The defendant Ganga Prasad Rai, states that words like those referred to in the plaint would, if addressed to him, disturb his feelings and cause mental pain, but they would not cause any damage to his reputation or lower him in the estimation of the persons present. But that is not the view which the plaintiff and several respectable witnesses produced on behalf of the plaintiff take. Kunwar Abdul Karim Khan, who was a Deputy Collector at Azamgarh from 1909—1914, says that he knew the plaintiff personally, that he was a highly respectable and distinguished *rais* and held in great esteem by the officers of the station and the other *raises*, and that having regard to the position and the respectability of the plaintiff, the use of words of the kind complained of, if addressed to him, on the road-side would be treated as insulting and scandalous, and if the person addressed heard them and kept quiet and did nothing to vindicate his character, he would be considered the meanest man and forfeit his regard. Mr. Maqbul Hasan, who was Naib Tahsildar & then Tahsildar at Azamgarh till November 1912, similarly deposes that he knew the plaintiff personally and considered him to be a very good and respectable man, that he was treated with great respect by all the officials and that regard being had to his status and position, the use of the abusive and indecent words of the kind mentioned in the plaint on a public road with reference to him would undoubtedly cause him disgrace and lower him in the public esteem, if he did nothing and remained silent. Mohammad Mustafa Ahmad, who was Tahasildar in the Azamgarh district from June 1900 to 1904, says that the plaintiff was the most distinguished rais at Azamgarh and was respected by all the officers of the district and that the use of the words like those referred to in the plaint in respect of a person of the position of the plaintiff on a thoroughfare or on any occasion would put him to much disgrace and lower the respect to which he would otherwise be entitled. M. Afzal Ullah, who was employed as a Sadar Kanungo at Azamgarh from March 1911 to 1917 and as an officiating Tahsildar at Muhammadabad from March 1918 to April 1919, states that the plaintiff was the biggest and the most distinguished *rais* of Azamgarh, that the officers and the public looked upon him with respect and that words of the kind referred to in the plaint used with regard to him in a thoroughfare would put him to disgrace. Mr. A. S. Kidvi states that he was deputy Superintendent of Police at Azamgarh since November 1917, that the plaintiff was one of the premier of the *raises* of Azamgarh and had recently been made a special Magistrate of the second class, that he was respected by the officers of the district and that he would suffer damage by an abuse of the description mentioned, uttered openly and in broad daylight from a public road. He adds that the reputation of any self-respecting man in those circumstances would be injured. Harichand, a witness for the defendants, says that the plaintiff was a very respectable man in the town and that abuse of the nature mentioned in the plaint would bring him into disrepute among the people and more particularly among his connections and people of his caste.

The abuses were obviously uttered with a view to degrade and humiliate the plaintiff and bring him into contempt in the eyes of the people. Apart from the

context or the occasion on which such words may be used, such words need not always literally imply that the person so described had committed incest, with his sister (*bahinchod*) or was a bastard (*harami*) or a person to whose sister the person addressing was married (*sale*). They are often used where two parties quarrel not to express what they would literally imply but to express anger or reproach. The plaintiff in fact admits that he did not take those words as charging him with any particular act but he took them as abuses uttered by the defendants to establish their prestige. They were uttered in public, and coupled with the insinuation that the plaintiff should not aspire to be a Chairman of the Municipal Board but was only fit to be a shopkeeper and to sell *ata* and *dal* to his customers, and a further threat that he would be beaten with shoes, if he did anything else, there can be little room for doubt that they were uttered to expose the plaintiff to ridicule, contempt or obloquy and to dissuade those who were likely to support his candidature from giving their votes for him. It is not clear how many votes were ultimately secured by the plaintiff at the election but it is clear from the statement of Jamna Misir that no other person thereafter brought any other voters that day. Some of the witnesses produced by the defendants belong to the caste to which the plaintiff belongs ; and it is urged that if the words ascribed to the defendants had actually been used, it was not likely that they would have supported the defendants. But the words used were intended to hurt the plaintiff in the eyes of the people and were not necessarily derogatory to the caste as a whole. The entire attack was directed against the personality of the plaintiff who had directed his servants to prevent the voters from being interfered with or taken away and the story told by the witnesses who were residents at the spot is, considering the great excitement which the election had caused, not at all improbale.

In *Diwan Singh* v. *Matup Singh* (1) Mahmud, J. pointed out that the English law of slander as forming part of the law of defamation and as such drawing some distinction between the words actionable *per se* and words requiring proof of special or actual damage was not necessarily applicable to this country. In *Parvathi* v. *Manner* (2) Sir Charles Turner, C. J., similarly observed that the rule of English law which prohibited, except in certain cases, an action for damages for oral defamation unless special damage was alleged, should not be adopted by Courts in British India ; and that if defamatory expressions were used under such circumstances as to cause the plaintiff to have a reasonable apprehension that his reputation had been injured and to inflict upon him pain in consequence of such belief, the plaintiff would be entitled to recover damages without actual proof of the loss sustained.

The penal law of India recognizes no distinction between slander and libel and punishes the utterance of anything which is likely to lower a man in the eyes of the people or to cause an injury to the reputation of the person addressed. The Hindu Law (Sacred Books of the East, Vol. 7, page 27 and Vol. 33, page 207) also made the utterance of abusive and insulting language penal both as an offence against society in general and tending to provoke a breach of the public peace. But for the purpose of enforcing a civil liability, the use of abusive or vulgar language addressed merely to cause mental pain to the person addressed may not afford any ground for such a claim unless its effect is to hurt his reputation or to expose him to hatred, contempt, ridicule or obloquy or to make him shunned or avoided by those who would otherwise have associated with him. In *Girish Chandra Mitter* v. *Jatadhari* (3) the mere use of abusive and insulting language was held to be insufficient to justify a claim for damages. But as pointed out in that case the tendency and probable effect of words must be determined in reference to the circumstances in which they are used ; and words not *per se* actionable may become actionable under other circumstances. The finding in that case was that no one who heard the words thought the worse of the person to whom or in respect of whom they were addressed and that though the words were insulting, the reputation of the person addressed was in no way affected. That is not the case here. In *Sukam Teli* v. *Bipal Teli* (4), a distinction was drawn between mere verbal abuse and words which were defamatory in themselves, and it was held

(1) [1888] 10 All. 425—1888 A.W.N. 157.

(2) [1884] 8 Mad. 175.
(3) [1899] 26 Cal. 653—3 C.W.N. 551 (F. B.)
(4) [1906] 34 Cal. 48—4 C.L.J. 388.

that in the latter event an action would lie. In *Sagar Ram* v. *Badu Ram* (5), language imputing moral misconduct was held to be actionable in this country, though no substantial loss proved to have resulted from its use.

Having regard to the position of the plaintiff, his family status, and the public humiliation to which he was subjected in the presence of the persons who had come to vote for him, we consider that he should be awarded Rs. 2,000 damages. There is some evidence on the record to show that the plaintiff has not had a good moral character and that he has been associating with prostitutes from time to time. But his private character has little to do with the humiliation and disgrace to which he was publicly subjected with a view to deprive him of any possible votes which he might otherwise receive in support of his candidature and thereby reduce his chance of election as Chairman of the Board in case he was successful.

Lindsay, J.—I agree with the conclusions both of fact and law at which my learned brother has arrived and desire only to add a few words for the purpose of explaining why I hold that the language imputed to the defendants and proved to have been used by them is actionable. I approve of the law as laid down in two of the cases above referred to *viz.* *Parvathi* v. *Manner* (2) and *Dewan Singh* v. *Matup Singh* (1). Defematory language has been defined to be such language as injures or tends to injure a man's reputation and to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem, and the true test of the defamatory nature of any given language is its tendency to excite against the plaintiff any of the adverse opinions or feelings just enumerated. The typical form of defamation is, perhaps, an attack upon the moral character of the plaintiff. But even if there be no suggestion of misconduct or of moral turpitude, the language will still be defamatory if it tends to bring the plaintiff into ridicule or contempt. Any language of this nature, however published, will, according to the authorities cited above, furnish a cause of action for a suit for defamation.

It has been argued before us that the language complained of in this case amounts to no more than vulgar abuse, and it has, no doubt, been laid down that language to which this description applies is not actionable. It is not, however, easy to arrive at any practical and precise definition of the expression "vulgar abuse". It may, perhaps, be treated as an equivalent for "insult" and as such connoting an attack upon dignity rather than upon reputation or, to put it in other words, an assault upon a man's self-esteem as opposed to the estimation in which he is held by others. But, in truth, the expression is equivocal and language which is insulting in the above sense may be defamatory as well. We have, as laid down in the Madras case quoted above, to consider the time at, and the circumstances in which, the language was used, and to ascertain whether it was such as, in those circumstances, to induce in the person who says he has been defamed a reasonable apprehension that his reputation has been harmed and to inflict upon him the pain consequent on such a belief.

What then are the facts of this case? It is admitted on all hands that the plaintiff is a man of position in Azamgarh. He belongs to a well-known family of high social standing, possessed of great wealth and carrying on extensive and lucrative business. It is true that his morals are not, on his own showing, above reproach but there is plenty of evidence to show that notwithstanding this he has displayed public spirit and has contributed generously to useful and charitable works. And it would be quite absurd to maintain that he is a person who has no reputation to lose. At the time when the language he complains of was uttered, he was still the Chairman of the Municipal Board and was aspiring to re-election to that office. It is clear that his ambition in this direction was being thwarted by a party of which the defendants were the leading members and they have made no attempt to conceal the fact that they were out, by means of this election, to oust the plaintiff if they could. In these circumstances, what would be the tendency of the language they are found to have used? Is it not fair to say that it would at least be calculated to expose the plaintiff to contempt or ridicule or both? Leaving out of consideration the foul epithets with which he was bespattered, it is plain that he was told that his chances of the Chair-

(5) [1904] 1 A.L.J. 102.

manship were gone and that having fallen from his high estate, he would be reduced to the position of a petty huckster weighing out ounces of *ata* and *dal* to the meanest customer. To any one accustomed to the conditions of life in India, it is at once apparent that a taunt of this description addressed to the plaintiff in the presence of a bazar crowd would inevitably expose him to ridicule if nothing worse. And if we are able, as we undoubtedly are, to reach this conclusion, we can have no difficulty in holding that the language complained of meets the test referred to above and was defamatory.

And, speaking for myself, I have no doubt that it was used deliberately and of set purpose in order to deter voters from giving their support at the poll to members of the plaintiff's party who were seeking election on that day to the Municipal Board. In a very recent case decided in England in which a lady who had been a candidate for Parliament complained of being libelled, Lord Darling held that in the circumstances an action would lie. He said :—

"The intention was to make the electors dislike the candidate and abstain from voting for her. If that were so it was undoubtedly an actionable libel for which damages might be awarded." (Case of *Terrington* v. *London Express Newspapers Limited* reported in theLondon "Times" of the 12th November, 1924.)

For those reasons I agree with the judgment of my learned brother and assent to the decree he proposes.

By the Court.—This appeal is, therefore, allowed and the claim of the plaintiff decreed for Rs. 2.000 damages with proportionate costs here and hitherto which shall include fees in the Court on the higher scale. The defendants shall bear their own costs throughout.

Appeal accepted.

★ 1925 ALLAHABAD 375

MEARS, C. J. AND PIGGOTT, J.

Manki Kunwar—Plaintiff—Appellant.

v.

Kundan Kunwar—Defendant—Respondent.

First Appeal No. 147 of 1922, Decided on 7th January, 1925, from a decree of the Sub. J., Benares.

★ *Hindu Law—Succession—Daughters — Rich and poor'—Comparative poverty is the test.*

If a marked difference is found in the financial position of the sisters, and one of those sisters is in straitened circumstances, that is sufficient to bring into operation the authority of the Mitakshara that the sister who is "unprovided for" shall take precedence over the sister who is "enriched". The case has to be looked at from the point of view of comparative poverty of the claimants, and it is not essential that the poor sister should be bound to point to some definite acquisition of property by the rich sister. It is sufficient if her surroundings are such that she should be regarded as a rich woman. The ordinary case is that she has married into a family of position and wealth. [P 376, C 1]

Surendra Nath Sen—for Appellant.

Kailas Nath Katju—for Respondent.

Judgment.—This was a suit of a rather unusual but quite interesting character. It was a suit between two sisters, and the plaintiff claimed that she was entitled to a share to the extent of one-half of the entire property left by her father. In ordinary circumstances that claim was undoubtedly a good one in law, there being only herself, the plaintiff, and her sister, Kundan Kunwar, as the survivors of the father at the time of the claim. The defendant set up the plea that the plaintiff was a wealthy woman whilst she, the defendant, was very poor. She thereby invoked the statement of law recorded in the Mitakshara to the effect that the sister who is "unprovided for" shall take precedence over the sister who is "enriched". The learned Subordinate Judge took the view that the action should fail on the ground that the plaintiff was a rich woman, that the defendant was a very poor woman and that the authority of the Mistakshara gave to the defendant the right to succeed to the whole of the father's estate. This appeal raises two questions, one is a question of fact, the other is a question as to whether on the text of the Mitakshara the defendant has correctly described her sister as a wealthy one. We have been taken through the evidence of the means of the defendant, and we are of opinion that she has correctly described herself. Compared with the position of the defendant, the position of the plaintiff is rightly described as that of a wealthy woman. It was suggested in argument to us that you must construe the text of the Mitakshara and the words "enriched daughter" as meaning a daughter definitely provided for either by a document, such as a will,

or by having been definitely invested with property in her own right by some other method, gift or something in the nature of a settlement. We have been referred to several cases, the first one of which was that of *Oudh Kumari* v. *Chandra Dai* (1). In that case it was held that the only criterion was the comparative poverty. But it has been pointed out to us that in that case the rich daughter had at the time of marriage a valuable estate made over to her and, therefore, she was an enriched daughter in the sense that she had acquired property in her own right as apart from her general expectations of property and generally rich surroundings. A few years later that was followed by *Danno* v. *Darbo* (2). There the rich daughter had acquired nothing by will, had acquired nothing by gift or conveyance, but she was in comparison to her sister a woman who had married into a wealthy family. In that case the Court said, "the expression 'unprovided for', in contradistinction to the term 'enriched', must be construed in the sense of 'indigent', as opposed to 'possessed of means', irrespective of the sources of provision or non-provision". Other cases were cited to us, but we need only refer finally to the case of *Totawa* v. *Basawa* (3). That case is a definite authority, which shows that all that has to be regarded is this. If you find a marked difference in the financial position of the sisters, and one of those sisters in straitened circumstances, that is sufficient to bring into operation the authority of the Mitakshara. This case, as all the other ones, has to be looked at from the point of view of comparative poverty of the plaintiff and defendant, and it is not essential that the poor sister should be bound to point to some definite acquisition of property by the rich sister. It is sufficient to say that her surroundings are such that she would be regarded as a rich woman. The ordinary case, of course, is that she has married into a family of position and wealth. Taking that as a criterion we are of opinion that the claim of the plaintiff was rightly dismissed, and we dismiss this appeal with costs.

Appeal dismissed.

(1) [1880] 2 All., 561.
(2) [1882] 4 All., 243—1882 A. W. N. 30.
(3) 23 Bom., 229.

1925 ALLAHABAD 376

LINDSAY AND KANHAIYA LAL, JJ.

Muhammad Abdul Majid — Defendant—Appellant.

v

Ala Bux alias *Allan*—Plaintiff—Respondent.

First Appeal No. 171 of 1922, Decided on 14th January 1925, from decree of the Sub. J., Agra.

Court Fees Act, S. 7—Value in plaint determines forum of appeal—Suits Valuation Act, S. 8.

In order to determine the proper appellate Court what has to be looked at is the value of the original suit, *i. e.*, the amount or value of the subject-matter of the suit. The word "value" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court unless it appears that, either purposely or through gross negligence, the true value has been altogether misrepresented by the plaintiff. 32 *All.* 222 ; 34 *Cal.* 954 *Dissented from.*

[P 377 C 1]

Peary Lal Banerji—for Appellant.

Surendra Nath Sen and *Narain Prasad Asthana*—for Respondent.

Judgment—A preliminary objection has been raised to the hearing of this appeal. Mr. Narain Prasad who appears for the plaintiff-respondent, argues that the appeal does not lie to this Court but to the Court of the District Judge. The suit out of which the appeal has arisen was a suit for accounts and in paragraph 8 of the plaint the plaintiff stated that the valuation of the subject-matter of the suit for purposes of jurisdiction and payment of Court-fee was Rs. 2,500. The suit was accordingly laid in the Court of the Subordinate Judge of Agra. The learned Subordinate Judge has given the plaintiff a decree for Rs. 5,796-9 3. We have now this appeal by the defendant and the appeal is valued in this Court at the amount which has been awarded in the decree of the Subordinate Judge.

Mr. Narain Prasad argues, and we think correctly, that the appeal must lie to the Court of the District Judge. If the valuation as set out in the plaint is to determine the forum of appeal then Mr. Narain Prasad's contention is undoubtedly correct.

Mr. Peary Lal Banerji, on the other hand, has referred us to a Full Bench ruling of the Calcutta High Court to be found in *Ijjatulla* v. *Chandra Mohan* (1). He

(1) [1907] 34 Cal. 954=6 C. L. J. 255=11 C. W. N. 1133 (F. B.)

also refers us to a Bench decision of this Court to be found in *Goswami Sri Raman* v. *Bohra Desraj* (2). On the other hand, our attention has been called on a ruling of this Court in *Madho Das* v. *Ramji Pathak* (3), and also another ruling of a Bench of this Court in *Sudarshan Das Shastry* v. *Ram Prasad* (4). We are also referred to a judgment of a Full Bench of the Madras High Court which is to be found in *Kannyya Chetti* v. *Venkata Narasayya* (5). It appears to us, after a perusal of these rulings and also of the law on the subject as contained in S. 7 of the Court Fees Act and in S. 8 of the Suits Valuation Act of 1887 that the preliminary objection must be upheld.

In the case which was decided in this Court in *Madho Das* v. *Ramji Pathak* (3) it was clearly laid down that in order to determine the proper appellate Court what has to be looked at is the value of the original suit, that is to say, the amount or value of the subject-matter of the suit, and it was explained that the word "value" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court unless it appears that either purposely or through gross negligence, the true value has been altogether misrepresented by the plaintiff. At page 289 of the report it is said that it would be impossible to hold that the jurisdiction of an appellate Court should depend upon the amount of the decree of the appellate Court. It is the plaintiff's valuation in his plaint which controls jurisdiction not only of the first Court but of the appellate Court otherwise there would be no certainty as to the Court in which a suit should be brought or an appeal should be brought. This is a clear exposition of the law and one which we think ought to be followed in this case and was followed in the subsequent case *Sudarshan Das Shastri* v. *Ram Prasad* (4). With regard to the case, *Goswami Sri Ramam* v. *Bohra Desraj* (2), it professes to follow the Full Bench ruling of the Calcutta High Court *Ijjatulla* v. *Chandra Mohan* (1). That ruling in turn was based upon a previous ruling of the Calcutta Court which is to be found in *Golap Sundari Devi* v. *Indra Coomar Hazra* (6) In view of the interpretation of the law which has been given forth by the Benches of this Court in the cases already cited, we are unable to follow the Full Bench ruling of the Calcutta Court and are also unable to follow the Bench ruling of this Court to be found in *Goswami Sri Raman* v. *Bohra Desraj* (2). It seems to us that the law has been very clearly expounded in the Full Bench ruling of the Madras Court *Kannayya Chetti* v. *Venkata Narasayya* (5), and we are in agreement with what has been said in that judgment.

We think, it is sufficient for us to refer to the provisions of S. 7 of the Court Fees Act and S. 8 of the Suits Valuation Act of 1887.

The suit with which we are now concerned was a suit for accounts and, therefore, under the provisions of S. 7, paragraph 4 clause (*f*) the Court-fee had to be paid according to the amount at which the relief sought was valued in the plaint. It is to be noted that in the case of suit which are referred to in S. 7 paragraph 4 it is declared that in all such suits the plaintiff shall state the amount at which he values the relief sought ; and here we may also refer to the new provision which was introduced into the Civil Procedure Code under O 7 rule 1 (*i*). It is now necessary for the plaint to contain a statement of the value of the subject-matter of the suit for purposes of jurisdiction and Court-fees so far as the case admits, and so when S. 8 of the Suits Valuation Act is considered it carries us back to the provisions of the Court Fees Act and obviously the value for purposes of jurisdiction is the value which the plaintiff sets upon his claim in the plaint as directed in S. 7 paragraph 4 of the Court Fees Act as also by Order 7 rule 1. We think, with the learned Judges of the Madras High Court, that the confusion which has arisen in the discussion of this subject springs from the mistake which lies in supposing that the amount of value of the subject-matter of a suit is the real or market value. In our opinion it is not the real or market value which has to be taken into account for purposes of determining Court-fee or jurisdiction. The value is the value which the plaintiff as-

(2) [1910] 32 All. 222—7 A. L. J. 203—5 I. C. 875.
(3) [1894] 16 All. 286—1894 A. W. N. 84.
(4) [1911] 33 All. 97—7 I. C. 385—7 A. L. J. 963.
(5) [1917] 40 Mad. 1—32 M. L. J. 221—5 L. W. 580—39 I. C. 539—(1917) M. W. N. 367.
(6) [1909] 13 C W. N. 493—9 C. L. J. 367—1 I. C. 86—5 M. L. T. 360.

signs to his claim in the plaint. In other words, it is the "valuation" by the plaintiff as distinguished from the real or market value. We are quite clear, therefore, that applying the principles which have been laid down in *Madho Das* v. *Ramji Pathak* (3), and which we think ought to guide our decision, this appeal lies not to this Court but to the Court of the District Judge. The suit having been valued at Rs. 2,500 under S. 21 of the Bengal, Assam and N. W. P. Civil Courts Act 21 of 1887 the appeal lies to the District Judge. We have pointed out the difference of judicial opinion which exists with regard to the question now under consideration but for the reasons given we follow the interpretation of the law which was laid down in *Madho Das* v. *Ramji Pathak* (3). The consequence is that we direct that the memorandum of appeal be returned to the appellant for presentation to the Court of the District Judge of Agra. The respondent is entitled to his costs in this Court.

Appeal dismissed.

1925 ALLAHABAD 378

LINDSAY AND KANHAIYA LAL, JJ.

Kalika Singh—Plaintiff—Appellant

v.

Ram Lal Singh — Defendant — Respondent.

Second Appeal No. 530 of 1923, Decided on 28th November 1924, from a decree of the Sub. J., Jaunpur.

Pre-emption — Wajib-ul-arz — Rights of co-sharers inter se on sale to stranger can't entitle co-sharer to pre-emption on sale to co-sharer.

In the absence of specific words giving priority in the case of a sale by a co-sharer belonging to one category to a co-sharer belonging to another category, a clause for pre-emption, defining the rights of co-sharers *inter se* as against a stranger cannot be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class. 23 *All.* 427 *Foll.* [P 378 C 2 ; P 379 C 1]

A. P. Padeya—for Appellant.

Haribans Sahai—for Respondent.

Judgment.—The question for consideration in this case is whether under the custom of pre-emption prevalent in the villages in which the property sold is situated the plaintiff is entitled to a right of pre-emption in the case of a sale otherwise than in favour of a stranger to the co-parcenary body. The property sold stood in several villages the wajib-ul-arzes of which have been produced in the case. The sale was made in favour of a co-sharer of the village. The plaintiff was also a co-sharer ; but he claimed a preferential right by reason of his being a paternal kinsman of the vendor. The Court of first instance was of opinion that the wajib-ul-arzes of the villages in question gave him a right of preference over the vendee ; but the lower appellate Court found that no such right of preference was given where a sale was made to a member of the co-parcenary body. The wajib-ul-arz of the village Madho Patti Khas provides that if any co-sharer wants to transfer his share the right of purchase shall belong first to a paternal kinsman who is a co-sharer *ek jaddi sharik* and then to the co-sharers of the village on payment of the proper price in preference to a stranger. The wajib-ul-arz of the village Madho Patti provides that in the case of a transfer of property the right of pre-emption shall belong in the first instance to a co-sharer who is a Paternal kinsman *Sharik ek jaddi* then to the co-sharers in the property itself and after them to the co-sharers of the village in preference to a stranger on payment of such a price as a stranger pays. The wajib-ul-arz of Alampur village provides that if a co-sharer wants to sell his share the right of purchase shall belong in the first instance to a co-sharer who is a paternal kinsman *sharik ek jaddi* then to a co-sharer of the patti, and then to a co-sharer of the village on payment of the proper price in preference to a stranger.

In each of these wajib-ul-arzes the right of purchase seems to have been given in the order mentioned in the event of a sale to a stranger and though the different categories in which priority is to be exercised are mentioned, they are subject to the main qualification that the question of priority would only arise where a sale to a stranger is made. The wajib-ul-arz in the present case is very similar to the wajib-ul-arz in *Sheo Balak Singh* v. *Lachmi Dhar* (1). In that case it was held that in the absence of specific words giving priority in the case of a sale by a co-sharer belonging to one category to a co-sharer belonging to another category a clause for pre-emption, defining the rights

(1) (1901) 23 All. 427=1901 A. W. N. 120.

of co-sharers *inter se* as against a stranger could not be construed so as to give a right of pre-emption to a co-sharer of a superior class upon a sale to a co-sharer of an inferior class. The same principle has been applied in *Narain Saran Singh* v. *Sidh Narajn Singh* (2). The lower appellate Court was right in re'using to allow pre-emption in these circumstances.

The appeal therefore fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(2) (1908) 5 A. L. J. 655=(1908) A. W. N. 251.

1925 ALLAHABAD 379

STUART, J.

Azmatullah Khan— Plaintiff — Applicant.

v.

Ahmad Ali — Defendant — Opposite Party.

Civ. Rev. No. 21 of 1925, Decided on 1st April 1925, from an order of the Judge of Sm. C. C., Shahjahanpur.

Provincial Small Cause Courts Act (1877) *S. 17—Full security deposited—Genuine error in stating the amount due is immaterial.*

Where an applicant for setting aside an *ex parte* decree gave full security,

Held; that the circumstance that he made a genuine error by which he stated the amount for which the security had to be given to be less than it really was, did not affect the fact that he had given full security for what was due, and that there was substantial compliance with S. 17. [P 379 C 2]

Mukhtar Ahmad—for Applicant.

Kailas Nath Katju—for Opposite Party.

Facts.—Azmatullah, plaintiff obtained two *ex parte* decrees against Ahmadali defendant, who applied to have them set aside.

The Judge Small Cause Court set aside the *ex parte* decrees. The case was heard and dismissed on the merits. Plaintiff filed two applications in revision to the High Court against the order setting aside the *ex parte* decrees and restoring the suit, and also applied in revision against the decrees of the Small Cause Court dismissing the suits on the merits.

Stuart, J.—The main point for decision in these two revisions is whether there has been substantial compliance with the provisions of S. 17 of Act IX of 1887. A decree had been passed by the Small Cause Court *ex parte* against Ahmad Ali for Rs. 483-9 and Rs. 56-11 costs. This decree was passed on the 6th September, 1924. On the 14th October, 1924 Ahmad Ali applied under S. 17 to set aside the *ex parte* decree and, at the time of presenting his application, filed a bond by which he hypothecated a house which he asserted was worth Rs. 4,000 as security for the performance of the decree, but in this application he estimated the decretal amount at Rs. 530 instead of Rs. 540-4. The explanation which he gives for this error is that he had miscalculated the costs. He thus professed himself ready to give security for more than seven times the decretal amount, and actually had done so.

It was ordered that the security should be verified but before steps were taken by the Court to verify it, Ahmad Ali paid in cash into Court Rs. 540-4, the full decretal amount, as security. It is argued on behalf of the opposite side (the plaintiff's side) that Ahmad Ali did not comply with the provisions of S. 17. The leading case in this Court upon the point is *Jagannath* v. *Chet Ram* (1). Applying the principles laid down in that case, I consider that there has been substantial compliance with the provisions of S. 17. The applicant (the applicant for setting aside the *ex parte* decrees) was obliged to give full security. He gave full security. The circumstance that he made a genuine error by which he stated the amount for which the security had to be given at Rs. 10-4 less than it really was, does not affect the fact that he gave security for more than what was due. His action in depositing the amount in cash later can only be taken as part of the same transaction as had gone before and not as a belated attempt to file security at a date when he was not permitted to file it. By depositing the amount in cash he saved the trouble of further verification. In these circumstances the applications must fail. The application for restoring the *ex parte* decree fails. The application for setting aside the dismissal of the suit on merits has nothing to recommend it. I dismiss both applications with costs.

Applications dismissed.

(1) [1906] 28 All. 470=3 A. L. J. 318=1906 A. W. N. 93.

★★ 1925 ALLAHABAD 380
(Full Bench)

LINDSAY, KANHAIYA LAL AND DANIELS, JJ.

Abdul Rahman—Appellant.

v.

Abdul Rahman—Respondent.

First Appeal Nos. 455 of 1923, and 165 of 1924 and F. A. F. O. No. 77 of 1924, Decided on 8th January 1925, from the decree of the Commissioner of Agra.

★★ (*a*) *Government of India Act*, (1915) *S. 79—Special tribunal to decide special disputes—Local Legislature can create.*

The words "to make laws for the peace and good Government of the territories for the time being constituting that Province" in S. 79 are very wide and include a power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose. [P 381 C 2 & P 382 C 1]

★ (*b*) *Appeal—Right to appeal not inherent right.*

The right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by statute. 11 *Mad.* 26. 40 *Cal.* 21 *Ref. to.* [P 382 C 2]

(*c*) *Letters Patent (Allahabad) Cl.* 11—'*Civil Courts*'—*Courts created by S. 22 U. P. Municipal Act are not.*

The term "Civil Courts" used in the Letters Patent Cl. 11, does not cover a tribunal created under a particular statute for a particular purpose, *e. g.*, a Court created under the U. P. Municipalities Act. [P 382 C 2]

★ (*d*) *U. P. Municipalities Act*, (*II of* 1916) *S. 23 (e)—Power to decide case referred does not include power to hear appeal—Civil P. C., O. 41, R.* 1.

A power of reference is not a modified form of appellate jurisdiction. A right of appeal is a right conferred on the suitor. A power of reference is a power vested in the Court. It lies in the sole discretion of the Court to exercise or not to exercise it. An appeal presupposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. A Court to whom a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. 3 *P. L. J.* 581 *Dist.* [P 383 C 1]

(*e*) *U. P. Municipalities Act*, (*II of* 1916) *Ss.* 19 *to* 27—*Election of a member—Suit to challenge does not lie in Civil Court.*

The whole scheme of Ss. 19 to 27 clearly implies an intention that election of any person as a member of Board shall only be challenged by an election petition presented in accordance with the Act and no suit lies in Civil Court to challenge the same. [P 383 C 2]

Gopinath Kunzru—for Appellant.

Mushtaq Ahmad—for Respondent.

Daniels, J.—This judgment relates to three connected appeals which have been laid before a Full Bench because of the extreme importance of the questions involved. The appeals challenge the validity of certain sections of the U. P. Municipalities Act. All three arise out of a contested election for seats on the Municipal Board of Muttra which was held in the early part of 1923. There were four candidates for three seats. A poll was held and the appellant, Abdur Rahman, son of Ismail, was one of the persons declared to be elected. S. 22 of the U. P. Municipalities Act 1916, provides a special tribunal for the decision of disputes arising out of a Municipal election. Under the provisions of that section the respondent, Abdur Rahman, son of Zahuri, presented a petition against the election of the appellant, urging that it was vitiated by various corrupt practices. This petition was heard and determined by the Commissioner as an election Court under the provisions of the Act. The Commissioner upheld the petition, unseated the appellant and, under the powers vested in him by S. 25, declared the respondent duly elected in his place. The appellant, Abdur Rahman, son of Ismail, presented a petition for review to the Commissioner under S. 23 (2) (*f*) and that application was rejected. He then filed the present appeal from the Commissioner's decision to this Court, notwithstanding the fact that by S. 23 (2) (*e*) of the Act, it is declared that there shall bo no appeal from the Commissioner's order either on a question of law or fact and that no application in revision against or in respect of that decision shall be entertainable. That appeal is F. A. No. 455 of 1923. Besides filing this appeal he also filed a suit in the Court of the Subordinate Judge for various reliefs the principal of which were a declaration that he had been duly elected as a member of the Municipal Board and an injunction to restrain the respondent from acting as such member.

After that suit had been filed he applied for an adjournment which was granted on condition of paying Rs. 125 costs of the adjournment to the opposite party. He failed to pay these costs and his suit was dismissed for default, an application for further time being rejected. He subsequently applied to the Subordinate

Judge for restoration of the case and that application was rejected.

He has now filed F. A. No. 165 of 1924 from the order dismissing his suit for default, treating that order as a decree, and has also filed a first appeal from the order refusing to restore the suit. The latter appeal is F. A. F. O. No. 77 of 1924. The appellant was doubtful whether his relief lay by way of appeal or by way of application for restoration and to be on the safe side pursued both remedies.

The grounds of appeal in appeal No. 455 of 1923, which is the principal appeal, so far as it is necessary for us to consider them are :—

1. That it is *ultra vires* of the U. P. Local Legislature to appoint any Court or tribunal for the trial or the exclusive trial of election cases or to appoint the Commissioner as the election tribunal.

2. That at any rate it is *ultra vires* of the U. P. Local Legislature to take away or restrict in any manner the powers of appeal or revision of this Court and to make the decisicn of the Commissioner final.

The plea that it is *ultra vires* of the Local Legislative Council to create a Court for the decision of election cases or indeed, as the appellant's learned Counsel argued, for any purpose whatsoever does not require any lengthy discussion. It is admitted that the words conferring legislative power on a Local Legislature under S. 79 of the Government of India Act, 1915, are very wide. That Legislature has been given a general power to make laws for the peace and good Government of the territories for the time being constituting the province. The only limitation imposed on the extent of this power is that the Legislature must not make any law affecting any Act of Parliament. For certain kinds of legislation the previous sanction of the Governor-General is required, though failure to apply for previous sanction is, by sub-S. (5) of S. 79, cured if the Act when passed is duly assented to by the Governor-General in pursuance of the Act. No question of assent arises in this case. The previous sanction of the Governor-General was obtained to the passing of the U. P. Municipalities Act, and that Act was duly assented to by the Governor-General after it was passed. If a wide general power to legislate for the peace and good Government of the Province does not include a power to devise means for deciding on the validity of a disputed election to a seat on a Municipal Board, it is difficult to know what it does include.

The appellant's learned Counsel laid stress on the difference between the language of S. 79 and that of S. 65 of the same Act, which provides for the legislative power of the Governor-General in Legislative Council. He argues that because the words "for all persons, for all Courts and for all places and things" contained in that section are not produced in S. 79, it follows that the Local Legislature has no power to legislate for any Court. He might equally have argued from the omission of the words "for all persons" that the Local Legislature has no power to pass laws affecting any person. The words "to make laws for the peace and good Government of the territories for the time being constituting that Province" have been given a very wide construction in various cases, not only with reference to India but also to other portions of the Empire where similar words occur: *cf. Ashbury* v. *Ellis* (1). The Local Legislature has in a number of instances both under the Indian Councils Act of 1861 and under the Government of India Act created tribunals for particular purposes or excluded the jurisdiction of the Civil Courts in particular cases. The enactments containing these provisions have repeatedly come before the Courts and it has never hitherto been suggested that there was any doubt as to their validity. Village Courts were created by an Act of the Local Legislature in 1892. Special Judges to adjudicate on the indebtedness of encumbered proprietors were appointed under the Bundelkhand Encumbered Estates Act of 1903, and under the Bundelkhand Land Alienation Act of the same year the enforcement of certain classes of decrees was taken away from the Civil Courts and vested in the Collector. The Oudh Civil Courts Act has been twice amended by the Local Legislature. If the Local Legislature has no power to create Courts it can equally have no power to modify the constitution or powers of Courts already existing. Finally by a Local Act of 1920 village panchayats were established and were vested with both Civil and Criminal powers.

(1) [1893] A. C. 339=62 L. J., P. C. 107=1 R. 388=69 L. T. 159.

Other instances might be given from other Provinces, but these are sufficient to show that the power which is now challenged has been exercised and treated as valid by the Courts through a long series of years. We have no doubt whatever that a power to make laws for the peace and good Government of the Province included a power to direct that disputes of a particular kind shall be decided in a particular way and before a tribunal specially created for the purpose.

The appellant's main argument, however, was that the provisions of Ss. 19 to 27 of the U. P. Municipalities Act derogate from the powers conferred on the High Court at Allahabad by clause 11 of the Letters Patent and are, therefore, invalid. He originally suggested that they were invalid as interfering with the prerogative of the Crown but in view of the fact that the amendment of S. 84 of the Government of India Act, 1915 effected by the Government of India Act, 1916, expressly provides that no law of a Local Legislature shall be invalid solely because it affects the prerogative of the Crown and that by S. 2 of the latter Act this amendment was made retrospective, that position could no longer be maintained and he has frankly abandoned it. He has, however, argued that the powers of the High Court under the Letters Patent are declared by S. 106 of the Government of India Act, 1915, and that any attempt by a Local Legislature to derogate from those powers is an infringement of an Act of Parliament and, therefore. invalid under the express provisions of S. 79 (4) of the Government of India Act, 1915. It is unnecessary to consider this position because it is quite clear that the legislation, which is impugned, in no way interferes with the powers of the High Court under the Letters Patent. Clause 11 of the Letters Patent runs as follows :—

"And we do further ordain that the said High Court of Judicature for the North-Western Provinces shall be a Court of appeal from the Civil Courts of the North-Western Provinces, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law or regulations now in force."

The appellant wishes to treat the words "shall be a Court of appeal from the Civil Courts of the North-Western Provinces" as meaning that an appeal shall lie from any order passed by any Civil Court. This is an untenable position. It was held as far back as 1820 that the right of appeal is not an inherent right of the subject but only exists where it is expressly conferred by statute. *The King* v. *Hanson* (2). That view has been more than once affirmed the Privy Council; *e. g.*, *Meenakshi Naidoo* v. *Subramania Sastri* (3), and *Rangoon Bolatoung Company* v. *The Collector Rangoon* (4). The words cited lay down that the High Court is to be the supreme appellate tribunal (subject of course to any further appeal which may be allowed to His Majesty in Council) from the Civil Courts of the Province and from the Courts under the superintendence of the High Court and the concluding words of the clause state the cases in which an appeal can be brought. It is pointed out that no provision was made in clause 11 for rights of appeal which might be thereafter conferred. This was probably considered to be sufficiently provided for by clause 35 which makes the Letters Patent subject to the legislative powers of the Governor-General in Council. In the Letters Patent of the more recent High Courts the omission has been supplied by the insertion of the words "or as may after that date be declared subject to appeal by competent legislative authority" It may be added that the appellant's argument breaks down at the outset unless the term "Civil Courts" used in the Letters Patent can be held to include such a Court as that created by S. 22 of the U. P. Municipalities Act. It is not strictly necessary to decide the point but in the opinion of the majority of us these words were never intended to cover a tribunal created under a particular statute for a particular purpose.

There is equally little foundation for the contention that the Commissioner sitting as an election Court is subject to the superintendence of this Court. The power of superintendence rests on S 107 of the Government of India Act, which extended it to all Courts subject to the High Court's appellate jurisdiction. There is no other provision of law to which

(2) 4 Barn & Ald. 519.
(3) [1888] 11 Mad. 26=14 I. A. 160. (P. C.)
(4) [1912] 40 Cal. 21=39 I. A. 197=16 C.W.N. 961=12 M.L.T. 195=(1912) M. W. N. 781=16 C.L.J. 245=23 M.L.J. 276=14 Bom. L. R. 833=10 A.L.J. 271=6 L. B. R. 150=16 I. C. 188=5 Bur. L. T. 205 (P. C.)

appeal can be made as conferring a power of superintendence in this case. It is very difficult to argue that the election Court is under the appellate jurisdiction of the High Court when the Act which creates it expressly declared that there shall be no appeal from any of its decisions. The appellant relies on the fact that by S. 23 (e) of the Municipalities Act the Commissioner is empowered to refer a question of law to the High Court. He relies on expressions in certain decisions which speak of a power of reference as being a modified form of appellate jurisdiction, *e. g.*, *Sheo Narayan Prasad* v. *King-Emperor* (5). With all respect to learned Judges who are responsible for these decisions there is a radical difference between the two things. A right of appeal is a right conferred on the suitor. A power of reference, such as is given in this case is a power vested in the Court. It lies in the sole discretion of the Court to exercise it or not to exercise it. An appeal presupposes a decree or order already passed against which the appeal is directed. The power of reference is exercised while the case is still pending in order to enable the Court to arrive at a correct decision. It is beside the mark to urge that when a reference is made the Court making it is bound to abide by the decision of the Court of reference. This is merely the natural corollary of allowing a reference. It would be absurd to ask the highest Court in the Province to adjudicate on a question of law if the Court which made the reference were to be at liberty to disregard the decision. In the case of *In re Rattansee Parshottam* (6). the Bombay High Court held that it had no revisional jurisdiction over the proceedings of the Consular Court of Muscat, even though it was obligatory on the Consul to refer his proceedings for the order of the High Court in certain cases. A familiar illustration of the power of reference is that contained in the Kumaun Rules. Under rule 17 of those rules the Local Government can refer for the opinion of this Court any final decision of the High Court of Kumaun; but this certainly does not make either the Local Government or the Kumaun Courts subject to the superintendence of this Court.

It was further argued that if the Commissioner as an election Court sanctions a criminal prosecution for perjury or a kindred offence an appeal might lie to this Court under S. 476 B of the Criminal Procedure Code. It has already been held by this Court in *Ram Nath* v. *Emperor* (7), that no revision lies from the Commissioner's order in such a case. Whatever doubts may be entertained as to whether the Commissioner acting as an election Court is a Civil Court within the meaning of clause 11 of the Letters Patent he is certainly not a Civil Court within the meaning of the Civil Procedure Code or of S. 476 of the Criminal Procedure Code.

Even, however, if a power of superintendance existed this would not suffice to give a right of appeal such as is claimed in this case. However widely the power of superintendence may be construed it clearly does not extend to conferring a right of appeal in cases where an appeal is expressly barred by statute.

It is hardly necessary to consider the last portion of clause 11 of the Letters Patent. No such things as Municipal elections were known in the Province at the time when the Letters Patent were issued, so the right of appeal now claimed clearly had no existence.

In support of the two remaining appeals it is argued that even if Ss. 19 to 27 of the Municipalities Act are valid they do not exclude the right of suit. S. 9 of the Civil Procedure Code declares that Civil Courts shall have jurisdiction to try all suits of a civil nature except suits of which their cognisance is either expressly or impliedly barred. It is quite true that it is not stated in so many words that there shall be no right of suit. It is also true that in two places in the Act, Ss. 164 and 321, there are provisions expressly barring the right of suit in particular matters. But the whole scheme of Ss. 19 to 27 clearly implies an intention that the election of any person as a member of a Board shall only be challenged by an election petition presented in accordance with the Act. The inquiry held by the Commissioner is not a mere summary inquiry subject to the result of a suit. The commissioner is armed with all the powers of a Civil Court and his decision is intended to be a final settlement of the question in dispute.

(5) [1918] 3 P. L. J 581=19 Cr. L. J. 833=46 977=5 P.L.W. 324=1919 P. H.C.C. 1 (P.B.)
(6) [1900] 24 Bom. 471=1 Bom. L. R. 840.
(7) 1924 All. 684=46 All, 611=22 A.L.J. 497=5 L. R. A. Cr. 109.

The ordinary rule is that where the statute which creates the right also prescribes a specific remedy, the person aggrieved is limited to the remedy so prescribed. As this Court observed in *Sham Lal* v. *Bindoo* (8), with reference to a similar contention under the Guardians and Wards Act, a separate suit, if permitted, might result in two opposite decisions, equally final and equally binding, one declaring an election valid and the other declaring it invalid. The matter was well put by Sir Lawrence Jenkins, Chief Justice of Bombay High Court in *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay* (9):—

"But under S. 33 the Chief Justice has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for that purpose.

"But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.

"It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being."

The case of *Ashby* v. *White* (10), which is the foundation of the judgment in *Municipal Board of Agra* v. *Ashrafi Lal* (11), relied on by the appellants has no application here. In that case *Ashby*, as a burgess of the borough of Aylesbury, was awarded damages on the ground of a wrong done to him by the refusal of the defendants to allow him to record his vote at a Parliamentary election. The judgment of Chief Justice Holt, which was affirmed by the House of Lords, was based on the principle that where a legal right has been infringed the law must provide remedy, and the only remedy open to the plaintiff was by means of an election at law. That case cannot be cited as an authority for the proposition that a right of suit must lie in all cases, notwithstanding that a special remedy is provided by statute.

We are, therefore, clearly of opinion that there is no right of suit in the present case.

These findings are sufficient for the disposal of all three appeals. We may note in conclusion that one contention of the appellant was that the respondent was illiterate and, therefore, ineligible for election. This was no part for the appellant's original case before the Commissioner though it was pressed on the application for review. The respondent was present in the Court and it was found on examining him that he can both read and write Urdu. The appellant's case is in fact like a house of cards which collapses at whatever point it is touched.

For the reasons already given we dismiss all three appeals with costs including in this Court fees on the higher scale. In F. A. No. 455 of 1923, we allow a special fee of Rs. 200, the receipt of which has been certified.

Appeals dismissed.

(8) [1904] 26 All. 594=1 A. L. J. 266=(1904) A. W. N. 135.
(9) [1907] 31 Bom. 604=9 Bom. L. R. 417.
(10) [illegible] 2 Lord Reymond 938=3 Id. 320 =14 Howell. St., Tr. 695.
(11) 1922 All. 1=44 All. 202=20 A. L. J. 1.

1925 ALLAHABAD 384

SULAIMAN AND DANIELS, JJ.

East Indian Railway Company—Defendant—Appellant.

v.

Tota Ram Pirbhu Dayal—Plaintiff—Respondent.

Second Appeal No. 1776 of 1922, Decided on 8th December, 1924, from a decree of the Sub. J., Mainpuri.

Railways Act, S. 72—Suit for damages in respect of goods consigned—Railway must prove loss.

In a suit against the Railway Company for damages in respect of goods consigned to them the onus lies, in the first instance, on the railway to prove the loss of the goods. 45 *Bom.* 1201 *Fell.*

Ladli Prasad Zutshi—for Appellant.

Shambhu Nath Chaube—for Respondent.

Daniels, J.—This is a second appeal in a case in which a claim against the Railway Company in respect of certain goods consigned to them, has been decreed.

The lower court, following the case of *Ghelabai Punsi* v. *East Indian Railway Company* (1), has held that it lay, in the first instance, on the Railway to prove the loss of the goods. The Railway tendered certain evidence to prove this which the Court below has rejected. The Court below. therefore, held that the Railway was not protected by the risk-note B signed by the plaintiff. The learned counsel for the Railway first contends that we should not follow the ruling of *Ghelabhai Punsi* v. *East Indian Railway Company* (1). That ruling has, however, been followed by this Court in a number of cases of which we may instance *Badri Prasad* v. *G. I. P. Railway* (2) and *East Indian Railway Company* v. *Kishan Lal Tirkha Mal* (3). It has also been followed by the Patna High Court in *G. I. P. Railway Company* v. *Jitan Ram* (4).

It is next contended that the loss of the goods was admitted by the plaintiff in his plaint. We agree with the Court below that there is no such admission.

The appeal, therefore, fails. We accordingly dismiss it with costs including in this Court fees on the higher scale

Appeal dismissed.

(1) [1921] 45 Bom. 1201—63 I. C. 241—23 Bom. L, R. 525.
(2) 1925 All. 144—22 A. L. J. 89—5 L. R. All. Civ. 665.
(3) 1924 All. 7=45 All. 530=21 A. L. J. 438 =4 L.R.All (Civ) 249.
(4) 1923 Patna 285=2 Pat. 442=4 P. L. T. 173—(1923) P. H. C.C. 82—1 Pat. L. R. 169.

★ 1925 ALLAHABAD 385

WALSH AND MUKERJEE, JJ.

Lachhman Prasad Babu Ram of Cawnpore,—In the matter of.

Civil Mis. No. 164 of 1925, Decided on 26th March, 1925.

★ *Income Tax Act*, (1922) S. 66 (4)—*Principal office of assessee in one area—Branches in other income tax areas—Officer at the former area has jurisdiction to assess profit in other areas.*

The provisions of Sub-S. (4) of S. 64 of the Income Tax Act do not oust the jurisdiction of the Income-tax officer of the area in which the principal place of business of the assessee is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned. [P. 387, C 2]

Lalit Mohan Banerji—for the Crown.

Kailas Nath Katju and *Uma Shankar Bajpai*—for Applicant.

The reference under S. 66 of the Indian Income Tax-Act of 1922, from D.M. Stewart Esq., Commissioner of Income Tax, (U. P.) to the Hon'ble High Court was as under:—

Reference.

1. This is a demand for a reference to the High Court under S. 66 (2) of the Indian Income-tax Act, 1922, made by Lachhman Das Babu Ram of Cawnpore.

2. The principal place of business of the assessee is in Cawnpore but there are also branches in Bombay Karachi and Calcutta. When the assessment for the financial year 1924-25 came to be made, the Income-tax officer, Cawnpore, received reports from the Income-tax Officers of Bombay and Karachi containing an estimate of the profits of the assessee in those places. The Income-tax Officer in Calcutta, however, who had been requested to report the profits of the Calcutta branch after examining the firm's accounts, replied that according to the assessee's allegation the books relating to the branch business in Calcutta were at Cawnpore and would be duly produced before the Income-tax Officer: he accordingly reported no estimate of the profits. On the 24th July, 1924, the Income-tax Officer, Cawnpore, issued a notice under S. 22 (4) for the production, on the 3rd September, 1924, of the books not only of the principal place of business in Cawnpore but also of the several branches. The books relating to Cawnpore alone were produced on that date and a second notice under S. 22 (4) was issued while further the assessee was requested, under the provisions of S. 23 (3), to deal with certain ambiguities affecting the accounts of the principal place of business and the branches in Bombay and Calcutta. On the 4th September, 1924, the assessee was further called on under S. 22 (4) to produce the accounts of the Cawnpore business for the years Sambat 1977-78 in order to clear up further doubtful points, the date fixed being 30th September, 1924. On that date the assessee asked for an extension of time and was granted up to the 22nd October, 1924. The case was not decided on that date in the absence of proper authority for his representative from the owner of the business and the case was accordingly disposed of on the 23rd October, 1924. The representative, when asked why the books of the Calcutta branch were not produced, replied that it was most inconvenient that the Calcutta accounts should be produced in Cawnpore and that he was, therefore, unable to to do so. An application was also presented asking that the case might be referred to the Income-tax Officer, Calcutta, for the

examination of the accounts of that branch. The Income-tax Officer, considering the delay which had taken place and the failure of the assessee to produce his accounts before the Calcutta income-tax authorities in the first instance refused the request. On this ground, and also because the assessee did not produce the books of the principal place of business for Sambat 1977-78, he proceeded to frame an assessment under S. 23 (4).

A copy of the relevant portion of the order of assessment is appended (Appendix A).

3. On the 24th November, 1924, the assesee presented to the Income-tax Officer, Cawnpore, an application under S. 27 of the Indian Income-tax Act, 1922, praying " that the assessment as it stands be cancelled and it be sent to the Income-tax Officer of Calcutta to report the income of that branch." The grounds given in support of the application are contained in the petition of which a copy is contained in Appendix B.

4. The Income-tax Officer, in an order of which a copy is attached (Appendix C) did not consider that the assessee had proved his case and rejected the application. It will be noted that the assesee does not refer to the Application of S. 23 (4) to the assessment which was involved by his failure to produce the Cawnpore books relating to Sambat 1977-78. The Income Tax Officer also in his order does not refer to this point.

5. The assessee filed an appeal before the Assistant Commissioner of Income-Tax, the petition being contained in Appendix D.

6. The Assistant Commissioner, after hearing arguments, held that the contention of the appellant was in effect not that he had been prevented by any reasonable cause from complying with the notice under S. 22 (4) but that the Income Tax Officer had no jurisdiction and that the assessment was illegal. He refused to accept this interpretation of the law and rejected the appeal. A copy of the judgment is appended (Appendix E).

7. The assessee, in a petition of which a copy is attached (Appendix F), now desires a reference to be made to the High Court on the following questions of law :—

(1) Whether the Income-tax officer of Cawnpore, in face of the provisions laid down under S. 64 (4) and under notes and instructions, has any jurisdiction to issue a notice under S. 22 (4) for the account books of the branch shops situate at Bombay, Calcutta and Karachi.

(2) Whether the provisions laid down under S. 64 (1) empower an Income-tax Officer of one area in one province to issue notices under S. 22 (4) etc., and to make an estimate of the income of branch shops situate in a different area and in a different province altogether.

(3) Whether the assessing officer of the principal place of busines can compel the production of the branch accounts before him and him alone.

(4) Whether the rejection of the petitioner's application regarding the examination of the branch books at the branches was legal.

(5) Whether there is any evidence to support the finding of the Income-tax Officer of Cawnpore regarding the income of the Calcutta branch.

(6) Whether the assessment, as made, is *arbitrary or to the best of his judgment* as laid down under S. 23 (4).

(7) Whether the Income-tax Officer of Cawnpore or that of Calcutta alone is empowered to estimate the income of the Calcutta branch ; and

(8) Whether the assessment, made under S. 23 (4) by the Income-tax Officer of Cawnpore on account of the non-production of the books of the Calcutta branch alone, is legal."

In accordance with his previous action he does not refer to the applicability of S. 23 (4) involved by his failure to produce the accounts of Sambat 1977-78 for Cawnpore.

8. A copy of the above statement of the facts was supplied to the assessee who was also informed that the only points of law which, in the opinion of the Commissioner, could arise and which he proposed to refer for the decision of the High Court were—

(i) Was the opportunity given to the assessee to produce certain accounts, and, in particular the accounts of the Calcutta branch, reasonable ? and

(ii) Was the assessee prevented by sufficient cause from producing those books ?

The assessee in a letter written by his advocate of which a copy is attached (Appendix G) has replied that his " main legal contention " has not been referred to the High Court, *viz.*, that " the income-tax Officer of Cawnpore, in face of the

provisions laid down under S. 66 (4) and under notes and instructions, had no jurisdiction to issue a notice under S. 22 (4) for the account books of the branch shops at Bombay, Calcutta and Karachi and to make an estimate of the income of branch shops situate in a different area and in a different province altogether." The Commissioner is of opinion that this point does not arise out of an appellate order relating to S. 27 but as the assessee clearly feels aggrieved over the action taken by the Income-tax Officer and as the question is one of some importance, the Commissioner has decided to submit a reference under sub-section (1) of S. 66 of the Indian Income-tax Act, 1922, on the following point also.

Do the provisions of sub-section (4) of S. 64 of the Indian Income-Tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned ?

9. There are thus three points of law which are submitted for the opinion of the High Court—

(i) On the facts stated was the opportunity given to the assessee to produce certain accounts and in particular the accounts of the Calcutta branch, reasonable?

(ii) Was the assessee prevented by sufficient cause from producing those books ? and

(iii) Do the provisions of sub-section (4) of S. 64 of the Indian Income-tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned.

As regards the first question, the Commissioner is of opinion that as the period which was given for the production of accounts was a long one, it cannot be said that the assessee had no reasonable opportunity to comply with the notice. The Commissioner is also of opinion that the assessee was not prevented by sufficient cause from complying with the notice. He failed to do so on the ground that he was not obliged to do so. The word "prevent" in S. 27 involves some definite active cause, making compliance with the order impossible, and not a passive cause such as the opinion that compliance is not obligatory becuse of rights supposed to be secured under the Act.

On the third question the answer is, in the opinion of the Commissioner, clearly in the negative.

The Commissioner would add that the present proceedings will be sterile : the assessment under S. 23 (4) must in any case stand because the failure to produce the Cawnpore accounts for Sambat 1977-78 makes that sub-section applicable.

Judgment.

Walsh, J.—The answers to the three points submitted to us are as follows :—

On the facts stated, a reasonable opportunity was given to the assessee to produce the accounts of the Calcutta Branch, first in Calcutta, secondly in Cawnpore, where the Income-Tax Officer of Calcutta was led to believe that the books were available.

Secondly, on the evidence stated, the assessee was not prevented by sufficient cause from producing the books in Cawnpore.

Thirdly, in our opinion, the jurisdiction of the Income-Tax Officer of the area in which the principal place of business is situated is not ousted. The jurisdiction is concurrent. Under S. 64 sub-section 1, the Income-Tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-section 4, every Income-Tax Officer has aslo jurisdiction to exercise the powers of an Income-Tax Officer with regard to the profits arising in that area.

It is of course understood, and ought to be understood, by the authorities that the Income-Tax Officer of the principal place of business will not exercise his powers oppressively, so that persons willing to submit the requirements of the Income-Tax Officer of the particular area in which the Branch is situated, should not be deprived of an opportunity of supplying him with all proper materials, but exceptional cases may require exceptional remedies.

We allow the fee of Rs. 150 payable to the Government Advocate. As Mr. L. M. Banerji will no longer be Government Advocate when the certificate will be filed, we authorise it to be filed by his clerk.

Order accordingly.

1925 ALLAHABAD 388

WALSH AND MUKERJI, JJ.

Emperor—Appellant.

v.

Mahadeo and another—Accused.

Criminal Appeal No. 127 of 1925, Decided on 17th March, 1925, from an order of the Mag. First Class, Azamgarh.

U. P. Excise Act, (IV of 1910) S. 60 (f)—Article, suspected to be implements, found with accused—Excise officers must explain what they are.

In cases of offences under S. 60 (f) relating to implements the excise officers must explain to the Court what the implement, alleged to be found with the accused, is and for what purpose they suppose it is in the possession of the accused. They are experts in these matters, and Magistrates and other tribunals are not supposed to be familiar with implements of distillation and therefore require to be instructed in matters which are unconnected with their own work.

[P. 388, C. 2]

Lalit Mohan Banerji—for the Crown.

J. M. Banerji—for Accused.

Walsh, J.—We have come to the conclusion that this appeal must succeed. It has been brought on a question of principle, and we are bound to say that the Magistrate, no doubt doing his best to give the accused, as he said, a sort of vague benefit of the doubt, has misunderstood the legal position in a way which would be very serious for the administration of the law under this Act if it were correct. He discusses what would have been likely to have been found in the house of the accused if the accused had been carrying on illicit distillation of liquor. That was not the charge. He says that he also inspected the room and there was no evidence of distillation. That also was not the charge, and he, therefore, allowed his mind to be diverted by irrelevant considerations. He then comes to the conclusion, apparently with great hesitation and as an element of doubt, that the articles discovered in the room were kept there without the knowledge of the accused. That is quite irrelevant. He also holds, contrary to fact and law, that they were not in their possession. It, therefore, appears that the whole foundation of the judgment and the reasoning upon which it proceeded is destroyed, and we have to give an independent consideration to the case. The charge was of being in possession under S. 60 (*a*) of an excisable article, and under S. 60 (*f*) of implements for its manufacture. We are of opinion that the charge under S. 60 (*f*) is not sustainable. One may probably not be far wrong in inferring that the pipe which smelt of spirit and one end of which fitted the hole in the pot, was used, as Mr. J. M. Banerji for the respondents properly described, as a sort of strainer. It would appear that the liquor was poured into the tin, and kept there for sale or for storing purposes. If Inspectors of the Department rely upon a charge under S. 60 (*f*) relating to implements they must explain to the Court what the implement is, and for what purpose they suppose it is in the possession of the accused. They are experts in these matters and Magistrates and other tribunals are not supposed to be familiar with implements of distillation and require to be instructed in matters which are unconnected with their own work. Therefore that part of the charge must be dismissed. But the liquor was undoubtedy excisable liquor, and no body knew it better than Mahadeo and Baldeo, because they had originally sold under a licence from Government, which appears to be, from what Mahadeo has told us, a very profitable business. The position is this. The Inspectors made a sudden raid in this village, and went, quite early on a September morning, to the premises of the accused, and searched their house. The fact that they searched the house for nearly an hour is conclusive to our minds that they had no previous information as to anything stored there, or as to any excisable articles which had been deliberately planted on the accused to the knowledge of the Inspectors. They had suspicions, otherwise they would not have searched, and they were justified, as it turns out, in the suspicions which they had. Having unsuccessfully searched the house, they found a room adjoining. Now if that room had been cut off from the residence and could be truly described as quite separate and at a distance from the house, it might have raised an element of doubt in the case. But the room is really part of the structure, and connects with the house by a door. The door was locked. The key was in the possession of Baldeo accused. To hold that the owner of the house, who was in possession of the key, did not know what was inside the room, in the absence of very strong evidence to the contrary, appears

to us strange. At any rate on the production of the key, this liquor and strainer were found inside. The Magistrate was wrong in holding that these were not in possession of the accused. They were, and that threw upon them the onus, by S. 71 of the Excise Act, of accounting satisfactorily for such possession. There is really no accounting. There is a vague suggestion of planting by a rival in trade, but it is to be observed that, so far as we know, the visit of the Inspectors that day to the village was a surprise, and it is difficult to believe that anybody, even a rival in trade, would be so rash as to put his head so to speak, in the lion's mouth, and go to the spot carrying 3 seers of liquor. The first question to be asked him would be how are you in possession of that liquor. We think this suggestion is somewhat far-fetched. The other suggestion is that the dismissed servant, Dwarka, had done it. It is difficult to reconcile this with the facts of the case Dwarka could not have known when the Inspectors would visit the village. The suggestion is that he must have placed it there to spite his master days before, but there is no reason why he should have done so as Dwarka's dismissal took place that very day. We think it is one of those cases in which the accused, having originally held a licence and finding it profitable, thought they could put a little extra money into their pockets by the mean act of profiting themselves by robbing the public. If they want to carry on this bussiness, they must procure a proper licence. On the other hand, they have already successfully defended themselves before the Magistrate, and we know that they must have incurred expenditure by being represented here. We take that into account, and while convicting them of the offence under S. 60 (*a*), we think the justice of the case will be met by inflicting a fine of Rs. 100. We therefore, allow the appeal, convict both Mahadeo and Baldeo of possessing excisable articles under S. 60 (*a*) of the Excise Act, and fine each of them the sum of Rs. 50. We allow three weeks for payment. If the amount is not paid within that time, they must in default of payment, suffer three weeks' simple imprisonment.

Appeal allowed.

1925 ALLAHABAD 389

LINDSAY AND KANHAIYA LAL, JJ.

Sundar Bibi — Decree-holder — Appellant.

v.

Lal Rajendra Narain Singh—Judgment-debtor—Respondent.

Ex. First Appeal No. 64 of 1924, Decided on 6th February 1925, from a decree of the Sub. J., Jaunpur.

T. P. Act, S. 19—Interest to accrue after the death of the holder of estate—Interest is vested and not contingent.

Where under a compromise decree it was settled that *A* was to hold an estate till his death after which it was to go to *B*.

Held: that the interest acquired by *B* under the decree was veste interest.

[P 390, C 1 2; P 391 C 1]

Shiam Krishna Dar and *Gopinath Kunzru*—for Appellant.

Ram Nama Prasad—for Respondent.

Lindsay, J.—This is an appeal by Mt. Sundar Bibi who has obtained a decree against the respondent, Rajendar Narain Singh.

In execution of this decree she applied for attachment of the interest of the judgment-debtor in certain property comprised in an estate known as the Raja Bazar Estate.

The case for the decree-holder was that the judgment-debtor had a vested interest in this property and she asked that that property be attached and brought to sale in execution.

The judgment-debtor filed an objection contesting the application on various grounds. The particular ground which we have to notice here is contained in the 4th paragraph of the petition held by the judgment-debtor. In that paragraph he took the plea that the application for attachment and sale of his interest was not entertainable on the ground that he had no vested interest in this property but only a contingent interest.

The Subordinate Judge has decided this point in favour of the judgment-debtor and the judgment-creditor has now filed this appeal.

In order to understand the nature of the point which arises for decision, it is necessary to set out certain facts.

It appears that there is an estate known as the Raja Bazar Estate comprising certain landed property situated both in the Jaunpur and Partabgarh districts.

The last male owner of this estate was one Raja Mahesh Narain Singh. Mahesh Narain Singh was succeeded by his widow, and after this lady's death it apppears that possession of the property was taken by Babu Lal Bahadur Singh, a collateral relation of the last male owner.

Thereupon a suit was brought in the Court of the Subordinate Judge of Partabgarh in Oudh by Babu Rajendra Narain Singh who figures in the present proceedings as the judgment-debtor.

Rajendra Narain Singh is the elder brother of B. Lal Bahadur Singh and he laid claim to the estate on the ground that as the succession to the estate was in accordance with the rule of male lineal primogeniture, he was entitled to eject his his younger brother, Lal Bahadur Singh.

This suit was settled by a decree which was passed on the 20th of May 1915. It appears that this decree was passed on a compromise between the parties to the suit.

A copy of the decree is printed at page 128 of the printed record, P. C. A. No. 45 of 1919.

The question which we have to decide must be determined with reference to the provisions of this decree, and after hearing the arguments in the case and having considered the document in question, we are of opinion that the decision of the Subordinate Judge is erroneous and that Rajendra Narain Singh, according to the terms of the compromise and of this decree which is founded upon it, has a vested interest in the property in dispute.

The property comprised in the Raja Bazar Estate was divided into two portions, A and B. The portion described as A embraces the larger portion of the estate.

According to the compromise and decree B. Lal Bahadur Singh was to have a life-interest in that portion of the property which was described as A. The other party, B : Rajendra Narain Singh, was to have a life-interest in the remaining property described as B by way of maintenance.

In the third paragraph of the compromise it was provided that after the death of Lal Bahadur Singh, if Babu Rajendra Singh, the plaintiff, should be alive, he was to be the absolute owner of the property described as A with transferable and heritable rights. It was further provided by this clause of the compromise that if Rajendra Narain Singh were not alive at the time of Lal Bahadur Singh's death the heritable and transferable estate in property A was to go to that one of his male descendants who would be entitled to succeed him according to the rule of male lineal primogeniture.

There were further provisions in this deed of compromise by which it was directed that when Rajendra Narain Singh or his heir succeeded to the full estate in the property known as A the property which was described as B should be made over for maintenance to the descendants of Lal Bahadur Singh.

It is not necessary to refer to any of the other clauses in the compromise. The question, therefore, is what is the nature of the interest which was created by this decree in favour of Rajendra Narain Singh. It seems to us beyond all question that the interest was a vested interest and not a contingent interest as decided by the Judge of the Court below.

The learned Judge of the Court below seemed to be of opinion that because there was a possibility that Rajendra Narain Singh might not be alive at the termination of the life-estate in favour of Lal Bahadur and that in that event the estate would go over to his heir according to the rule of male lineal primogeniture, the interest which was created by this document was a contingent interest. In our opinion that is not so. It is clear from the terms of this document that, in the first instance, a life-interest was created in favour of Lal Bahadur Singh and necessarily the further interest which arose under the document was bound to take effect from the death of Lal Bahadur Singh. The death of Lal Bahadur Singh is not an uncertain event. It is of course uncertain at what time Lal Bahadur Singh will die but Lal Bahadur Singh's death is an event which must happen and, consequently, the further interest which was created under this document is necessarily a vested interest and not a contingent interest. The question whether Rajendra Narain Singh may not be alive at the time of the death of Lal Bahadur Singh and so may not receive this estate in possession does not affect the question at all. This is clear from a reference to the provisions of S. 19 of the Transfer of Property Act.

We have no doubt whatever, therefore, that the interest which Rajendra Narain

Singh has in this property specified as A, (which is the property of which attachment and sale have been sought), is a vested interest, and that being so, his interest in the property is transferable and can, therefore, be attached and brought to sale in execution of a decree.

We, therefore, allow this appeal set aside the order of the Court below and send the case back for decision after disposal of the other matters which arose under the petition of objections filed by the judgment-debtor. Costs here and hitherto will abide the result and in this Court will include fees on the higher scale.

Kanhaiya Lal, J.—The question for consideration in this appeal is what is the nature of the interest held by the judgment-debtor in the property in dispute. The property in question originally belonged to Raja Mahesh Singh Narain who was a taluqdar entered at No. 249 in list No. 1 appended to Act I of 1861. His estate comprised several distinct properties, one of which was known as taluqa Parhat, which was entered at No. 113 in list No. 2. Another was known as taluqa Mangaula which was entered at No. 56 in list No. 5 appended to Act I of 1869. Besides these properties he held certain landed property in the Jaunpur district which was not governed by Act I of 1869. He was succeeded by his widow, Rani Dhanraj Kunwar, on whose death Lal Bahadur Singh, one of the paternal kinsmen of her husband, took possession of the estate under a will, alleged to have been executed by the deceased Rani. Rajendra Narain Singh, the elder brother of Lal Bahadur Singh, however, claimed the whole estate, including the property situated in the Jaunpur district, in his own right and he filed a suit for the possession of the same, alleging that the estate was impartible according to the family custom and that he was entitled to it according to the rule of lineal primogeniture or single heir descent.

The suit resulted in a compromise, the effect of which forms the subject-matter for consideration in this appeal. The property dealt with by the compromise consisted of what might be described as the main estate, situated partly in the Jaunpur district and partly in Oudh, and the Babuana estate similarly situated in both places. By virtue of the compromise Lal Bahadur Singh was allowed to retain the main estate for life without any power of transfer and Rajendra Narain Singh was similarly allowed to retain the Babuana estate for his life without any power to transfer it so as to prejudice the rights of the eventual holder.

It was further provided that after the death of Lal Bahadur Singh, if Babu Rajendra Narain Singh should remain alive, he shall be the absolute owner of the main estate with transferable and heritable rights subject to certain conditions specified therein, and that if he did not survive Lal Bahadur Singh, then the property would go to his lineal male descendants according to the principle of male lineal primogeniture with transferable and heritable rights subject to similar conditions.

In regard to the Babuana estate it was similarly provided that after the death of Rajendra Narain Singh it shall go to Lal Bahadur Singh and, in case of his death, to his male issue of the male branch in lieu of maintenance, subject to certain limitations with which this case has no concern.

The property comprised in each of these estates was separately specified in the schedules appended to the deed of compromise, in accordance with which a decree was passed. The question for consideration is whether by virtue of the compromise Rajendra Narain Singh acquired a vested interest in the estate made over to Lal Bahadur Singh for his life.

The petition of compromise clearly indicates that the main estate which was to be held by Lal Bahadur Singh for his life was to go after his death to Rajendra Narain Singh, if he survived him, with transferable and heritable rights, and in case he died in the life-time of the former, to his lineal male descendant according to the rule of lineal primogeniture. S. 19 of the Transfer of Property Act lays down that where on a transfer of property an interest therein is created in favour of a person in terms specifying that it is to take effect on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer. The explanation appended to that section declares that the intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed or whereby a prior interest in the same property is

given or reserved to some other person or from a provision that if a particular event shall happen, the interest shall pass to another person. It is obvious, therefore, that the interest awarded by the compromise and the decree passed in accordance therewith to Rajendra Narain Singh was a vested interest, which was liable to be defeated in case he did not survive Lal Bahadur Singh. The condition imposed by the compromise merely affected the retention of that interest by Rajendra Narain Singh. It was not a condition precedent to its acquisition. In these circumstances the view taken by the Court below cannot be upheld.

How far such a defeasible interest can be safely sold before the contingency on which its defeasibility depends has happened without serious injury to the parties and whether any safeguards can be devised to prevent such injury are matters to be considered by the executing Court when holding the sale. There are other matters raised in the petition of objection which have not been dealt with by that Court. I, therefore, agree with the order proposed.

Appeal allowed.

★ 1925 ALLAHABAD 392

WALSH, J.

Bhimmi—Applicant.

v.

Pershadi—Opposite Party.

Criminal Ref. No. 28 of 1925, Decided on 15th January, 1925, reference by the S. J., Bareilly.

★ *Criminal P. C., S. 204 (3)—Order to complainant to pay process for enforcing accused's attendance on the date of judgment—Process not paid—Complaint cannot be dismissed.*

It is nowhere laid down in the Code that the complainant must file a process fee to enforce the attendance of the accused not on the date of trial nor on the date of arguments but on the date fixed for delivery of judgment. [P 393 C 1]

Where on the date fixed for delivery of judgment in a summons case the complainant was present but the accused was absent and the Magistrate had ordered the complainant to file a process fee to secure the attendance of the accused, but the complainant did not file the process fee required, and the case was dismissed for default of prosecution and accused was acquitted,

Held, that the order on the complainant to pay process fees was without jurisdiction and must set aside.

The Parties were not represented.

Referring Order.—This is an application for revision of an order of the Bench Magistrates of Aonla dated the 3rd October, 1924.

The facts of the case are as follows:—On the 31st June, 1924 Bhimmi, the applicant in this case, filed a complaint against Pershadi, under S. 352 and S. 323 of the Indian Penal Code. The complaint was instituted in the Court of the Sub-Divisional Magistrate of Aonla. The Magistrate recorded the evidence of some witnesses under S. 202 of the Code of Criminal Procedure. He then transferred the case to the Court of the Bench Magistrates of Aonla for disposal. The Bench Magistrates examined the accused and then asked the parties to adduce all their evidence. The complainant examined a certain number of witnesses and the accused also examined a certain number of witnesses. The hearing of the case was concluded on the 24th September, 1924. On that date they passed an order that judgment would be delivered on the 30th September, 1924. They directed the accused to be present on that date. On that date it was discovered that the complainant was present but the accused was absent. Then the Bench Magistrates ordered the complainant to file a process fee to secure the attendance of the accused on the 3rd October. The complainant did not file the process fee required. The case came on for hearing on the 3rd October, 1924. The following order was recorded on the order sheet on that date:—

"The case came up for hearing. The complainant has not filed process fee in spite of an order to this effect. It is hereby directed that the case be dismissed for default of prosecution and Pershadi accused be acquitted and the papers be consigned to records."

Against this order Bhimmi, the complainant, has filed this application for revision. This application has been sent to this Court for disposal.

Pershadi has entered appearance in this Court in response to the notice issued to him. It is contended on behalf of the applicant that the order of the Court below was absolutely illegal. It is contended that the Magistrates ought to have recorded a judgment in this case and if, as they found, the accused was absent on the date fixed for delivery of judgment, they ought to have secured the attendance of the accused in the manner laid

down in the Criminal Procedure Code. On behalf of Pershadi it is contended in reply that the order of the Court below was not illegal.

The question is, if the order of the Court below was illegal. Now there can be no doubt that the 30th September, 1924 was fixed for pronouncing the judgment in this case. The Magistrates ought to have recorded a judgment and if, as they found, the accused was absent, they should have enforced his attendance in a manner laid down in the Code of Criminal Procedure. They should have cancelled his bonds and should have issued a warrant for his arrest. But the Magistrates did not do this. They did not record any judgment. In my opinion they were not justified in ordering the complainant to file a process fee to enforce the attendance of the accused. Such an order was absolutely illegal. The complainant is generally ordered to file process fee when he wishes that a process should issue to the accused to attend the Court and answer the charge in a summons case as this particular case happened to be. But it is nowhere laid down in the Code that the complainant must file a process fee to enforce the attendance of the accused not on the date of trial nor on the date of arguments, but on the date fixed for delivery of judgment. It is thus clear that the order directing the complainant to pay process fee is absolutely unwarranted by law.

It follows then that the order dismissing the complaint for default of prosecution of the complainant is equally unwarranted by law. And the order of acquittal also is equally invalid.

It is contended on behalf of Pershadi that this Court cannot take cognisance of this petition for revision as it is a case of acquittal and the only Court that can revise an order of acquittal is the Hon'ble High Court. But this is not a case of acquittal on merits. In fact the order of acquittal is in the eyes of law no order at all. Uuder S. 435 of the Code of Criminal Procedure this Court is entitled to send for the record of a case and to examine whether the order passed was improper and illegal. As I have already said, the order is absolutely illegal. It cannot be allowed to stand and since it is not an order of discharge or an order under S. 203 of the Code of Criminal Procedure, no action can be taken under S. 436 of the Code of Criminal Procedure. I am, therefore, of opinion that this is a fit case to report to the Hon'ble High Court with a recommendation that the order in question be set aside and the case sent back to the Bench Magistrates for recording a proper judgment in the case and then to pronounce it. The record shall be sent through the District Magistrate to the Bench Magistrates asking them to submit such explanation as they like in regard to the order passed by them. On receipt of the explanation the record shall be submitted to the Hon'ble High Court for such action as the Hon'ble Court thinks fit.

Walsh, J.—I agree with the District Magistrate that it would be a pity to give the case a new lease of life, but the Sessions Judge is correct in his view that the proceedings of the Magistrates on the 30th September, the date fixed for judgment, were entirely illegal, and their order on the complainant was without jurisdiction. They ought to have disposed of the case on the merits. I accept the reference, without issuing notice to the parties as no question on the merits is before me, and remit the case to the Bench Magistrates, with a direction to fix a date for delivering judgment, and to deliver a judgment on that date, on the evidence already before them. Notice of the date fixed must be given to the parties, and the Magistrates may use their discretion as to hearing arguments before judgment. They are not obliged to do so, and they must not allow any further evidence but deliver judgment on the case as it stands.

Reference accepted.

★ 1925 ALLAHABAD 393

DANIELS, J.

Hakim Ullah—Applicant.

v.

Karim Bux—Opposite Party.

Revision No. 131 of 1924, Decided on 20th November 1924, against the order of the Judge, Small Cause Court, Dehra-Dun.

★ (*a*) *Civil P. C., 2nd Sch. paras* 14 *and* 15 *—Arbitrators not considering defendant's plea—Award can be remitted but not set aside.*

Where the defendant has put in a plea of payment which the arbitrators have not considered, it would not be a ground for setting aside the award but for remitting it for reconsideration

under R. 14 of Schedule II. The ground on which an award can be set aside is given in rule 15 and this is not such a ground. [P. 394, C. 1]

(*b*) *Provincial Small Cause Courts Act, S.* 25—*Award set aside—Revision does not lie until decree is passed.*

Until the case has been decided a party has no *locus standi* to apply in revision. So, where an award in plaintiff's favour is set aside and a decree is passed dismissing the suit, the plaintiff's application for revising the setting aside of the award cannot be made immediately after the award is set aside but only after the case has been decided. [P. 394, C. 1, 2]

Bhagwati Shankar—for Applicant.

Indu Bhushan Banerji—for Opposite Party.

Judgment.—This is an application in revision in a case in which a Court of Small Causes had set aside an award made in favour of the plaintiffs and after trying the case on the merits has passed a decree dismissing the suit. The plaintiff's case is that the Court below acted illegally in setting aside the award. A reference to facts appearing on the record will show that this was in fact the case. The ground on which the award was superseded was that the defendant had put in a plea of payment which the arbitrators had not considered. Now even if this was a valid plea it would not be a ground for setting aside the award but for remitting it for reconsideration under R. 14 of Schedule II of the Code of Civil Procedure. The ground on which an award can be set aside is given in rule 15 and this is not such a ground. But in fact the ground on which the learned Judge has proceeded has no substance in fact. As this ultimate judgment shows there was no dispute between the parties as to the amount paid by the defendant which was Rs. 340. The whole dispute was whether the first two of the items in respect of which the plaintiff's claim was dismissed had really been supplied by the plaintiff or not. Further more the issues on which the arbitrators decided the case were framed by the parties themselves. There was therefore no room for any suggestion that any issue had been left undecided. As the Court below acted illegally in setting aside the award I hereby set aside its decision and direct that a decree be prepared in acccordance with the award under rule 16 of the second schedule of the Code of Civil Procedure. The respondent has objected that the application in revision should have been made immediately after the award was set aside and without waiting for the case to be decided, This objection finds no support in the language of S. 25 of the Provincial Small Cause Courts Act, which says that a High Court may call for the record and pass orders "in any case decided by a Court of Small Causes". Until the case had been decided the applicant had no *locus standi* to apply in revision. The applicant will therefore get his costs in this Court. Costs of the Court below are provided for in the award.

Application allowed.

1925 ALLAHABAD 394

SULAIMAN AND BOYS, JJ.

Raghunath Prasad Singh—Appellant.

v.

Lachhmi Narain Singh—Respondent.

Ex. First Appeal No. 124 of 1924, Decided on 27th March 1925, from a decree of the Sub. J., Gorakhpur.

Limitation Act, Art. 182 (5) — *Application to send for records may amount to step-in-aid.*

Although every application to send for a record made by a decree-holder may not necessarily amount to a step-in-aid, if the Court before whom the application is made considers it necessary in order to get rid of the objections raised by the judgment-debtor, such an application may amount to a step-in-aid. 38 *Mad.* 695 *Rel. on.* [P. 395, C. 1]

B. E. O'Conor and *Ramnama Prasad*—for Appellant.

Wali Ullah and *Shiva Prasad Sinha*—for Respondent.

Sulaiman, J.—This is a decree-holder's appeal arising out of an execution of a decree. The application has been dismissed on the ground that it was barred by limitation. The only objection that was considered by the Court below and which has been argued before us is as to whether the step taken by the decree-holder on the 26th of April 1919, amounted to a step-in-aid of the execution of the decree within the meaning of Article 182, sub-clause (5) of the Limitation Act. The learned Subordinate Judge has come to the conclusion that it did not amount to such a step.

After much trouble we have been able to ascertain what exactly happened. The suit was one for partition of considerable properties and a final decree for partition was passed as early as 1912. About the

26th of April 1919, there were several objections raised by various judgment-debtors to the previous application for execution. On the 26th of April 1919, the decree-holder put in an application praying that the record of the original case should be sent for in order that the various objections may be disposed of. He stated that the record was necessary for the purposes of their disposal. We may mention that among the objections raised there were objections that the amount claimed in the decree was not proper and that for certain items at least the judgment-debtors should have been given credit for. On the 26th of April 1919, the Court first passed an order that it was necessary to examine the final decree which had been sent on to the Amin along with a *parwana* for delivery of possession and it ordered that the decree should be sent for from him. Later on the Court ordered that the record should also be sent for.

The question before us is whether the application of the decree-holder that the record should be sent for, which he filed on the 26th April 1919, was an application to take a step-in-aid of the execution. We are far from saying that every application to send for a record made by a decree-holder necessarily amounts to such a step, for every case must depend on its own facts and circumstances. If an application is not a *bona fide* one or is absolutely unnecessary and futile, it may fall short of amounting to such a step. But in this case in view of the objections which had been raised, it was essential that the record, or, at any rate, the final decree should be before the Court. The Court before whom the application was made considered that it was necessary, and actually granted the application. The step taken by the decree-holder was certainly in prosecution of his application for execution and in order to get rid of the objections which were an obstacle in the way. We, therefore, think that it did come under S. 182 (5) of the Limitation Act.

We may refer to the case of *Abdul Kadar Rowther* v. *Krishnan Malaval Nair* (1) which though not exactly similar to the present case is somewhat analogous. The present application was filed on the 26th of April 1922, just within three years of the step taken on the 26th of April 1919, and was, therefore, within limitation. The result, therefore, is that this appeal is allowed, the decree of the Court below is set aside, and the case sent back to the Court below for disposal according to law. In view of the trouble which has been caused to us in trying to ascertain for ourselves what the facts are, we direct that the parties should bear their own costs of this appeal.

Appeal allowed.

(1) [1915] 38 Mad. 695=1 L.W. 271=(1914) M. W.N. 563=26 M.L.J. 433=23 I.C. 533=15 M.L.T. 305.

1925 ALLAHABAD 395

DANIELS, J.

Gudri Singh and others—Applicants.

v.

Parsotam Das and others—Opposite Parties.

Revision No. 163 of 1924, Decided on 27th November, 1924, against the order of the Dt. J., Benares.

Civil P. C., O. 47, R. 7—Grounds of appeal are strictly limited to R. 7.

An appeal against an order granting a review of judgment is strictly limited to the ground set out in O. 47 R. 7. Allowing an appeal on grounds not covered by O. 47, R. 7 is open to revision. 40 *All.* 68 *Foll.* [P. 395, C. 2]

Harnadan Prasad and *K. Verma*—for Applicants.

Peary Lal Banerjee — for Opposite Parties.

Judgment.—This is an application in revision against an order allowing an appeal from a review of judgment. The review of judgment was granted by the Munsif on the ground of the discovery of new and important evidence which could not by the exercise of due diligence have previously been discovered. It is now settled law that an appeal against an order granting a review of judgment is strictly limited to the ground set out in order 47 rule 7, Civil Procedure Code. This was decided in *Khurshed Alam Khan* v. *Rahmat Ullah Khan* (1), and there are other cases of other High Courts to the same effect. The only ground alleged in the present case was that the application was in contravention of rule 4 in that it was not proved that the evidence could not have been produced at the original trial. Now

(1) 40 All. 68.

it is an admitted fact that the evidence in question was not within the knowledge of the plaintiff and could not by due diligence have been discovered by him earlier. The ground on which the learned Judge has allowed the appeal is that the plaintiff might by the exercise of due diligence have discovered other evidence, namely a khatauni for 1290 F. The respondents appear to have urged before the Judge that the wasil baqi was mainly wanted as furnishing a clue to this khatauni. The plaintiff himself has never admitted this and does not admit it now. It is the wasil baqi and not the khatauni which he claimed and claims to be entitled to put in. The only other ground given by the Judge for allowing the appeal was that the evidence would not, in his opinion, have altered the decision of the case. This is a point which will have to be determined when the evidence is considered in conjunction with the other evidence in the case. In my opinion, the learned Judge exceeded his jurisdiction by allowing the appeal on grounds not covered by order 47 rule 7, Civil Procedure Code. On this ground I allow the present application, set aside the order of the learned District Judge and restore the order of the Munsif granting the review. The applicant will get his costs in this Court from the respondents. Other costs will abide the result.

Application allowed.

★ 1925 ALLAHABAD 396

MUKERJI, J.

Babu Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Rev. No. 51 of 1925, Decided on 16th March 1925, from an order of S. J., Kumaun.

★ (*a*) *Penal Code, S. 336—Throwing bricks at the crowd and firing shots—Hurt caused to none—No offence is committed.*

At the time of a communal riot in the city of Pilibhit in different parts, the accused threw brick-bats at the Muhammedans who were passing by the land close to his house, he also fired two shots at them from his house. No one was hit by the bricks or the gun shot.

Held: that the accused had committed no offence. [P 397 C 2]

★ (*b*) *Arms Act, S. 19 (f) — Accused's brother holding licence—Accused firing blank shots to warn would-be mischief makers—Accused is not guilty.*

When communal riots were takeing place in different quarters of the town, the accused, brother of a licence holder, took out his brother's gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house,

Held: that the possession of the gun was on behalf of the brother and the accused was not guilty under S. 19 (*f*). 1925 *All.* 175 *Dist.* [P 395 C 2]

G. W. Dillon—for Applicant.

M. Wali Ullah—for the Crown.

Judgment.—This is an application in revision against a conviction of the applicant under S. 336 of the Indian Penal Code and another conviction under S. 19 (*f*) of the Arms Act. The sentence was one of two months' rigorous imprisonment and Rs. 50 fine under the former conviction and one of two months' rigorous imprisonment under the latter, the sentences of imprisonment running concurrently

The charge against the applicant under S. 336 of the Indian Penal Code, as it is to be found in the charge-sheet, is as follows :—"You on or about the 10th day of Mohurrum this year at 4 p. m. or after threw bricks from your roof and fired a gun from the same roof in such a rash manner that it endangered human lives of persons who were passing on the roads near about your mohalla."

The learned Magistrate, who convicted the applicant, in his judgment stated as follows :— "The evidence showed that there was a communal riot in the city of Pilibhit in different parts of it. The accused threw brickbats at the Muhammedans who were passing by the lane close to his house and not only this but he fired two shots at them from his house but fortunately no one was hit." At another place the learned Magistrate said :—"I am inclined to think that it was for these reasons only that the shot missed the aim and nobody was hit or killed."

The impression that I have gathered from reading the judgment of the learned Magistrate is that he found, on the evidence, that the appellant deliberately threw brickbats at Muhammedan passers-by and he deliberately aimed a gun and fired two shots at the said persons and that it was a matter of pure luck that nobody was injured. The learned Sessions Judge who heard the appeal does not clearly say what he found on examination

of the evidence. He contented himself with the following remark :—

"I am of opinion that the evidence fully substantiates the case againt the accused."

Now, if the case against the accused was what the learned Magistrate found to have been proved, the charge under S. 336 of the Indian Penal Code was an utterly insufficient and improper charge. S. 336 of the Indian Penal Code contemplates a lawful act. But it punishes the same act which is otherwise lawful only if it is exercised in a rash or negligent manner. If the finding be accepted that the applicant deliberately threw brickbats at passers-by and wanted to shoot them and for that purpose aimed a gun and fired shots, he was clearly guilty of an attempt at murder if not of an attempt to cause grievous hurt with a dangerous weapon of shooting.

It is for this reason that I have been utterly unable to understand the judgment of the Magistrate and the learned Sessions Judge.

To satisfy myself as to how the charge of such a light character, as a charge under S. 336 is, could be brought on the evidence accepted as true, I examined the statements of the witnesses myself. My examination of the statements and the remarks of the learned Magistrate and the learned Sessions Judge that allowance had to be made for communal bias and exaggeration and want of observation etc., satisfy me that the prosecution understood that nothing serious was really meant by whatever the applicant may have done and that all that was wanted to be punished was the firing of the gun at a time when possibly communal feeling was running high. If the evidence of some of the witnesses, *e. g.*, Kuttubuddin, Fazal Ahmad and Nur Ahmad is to be believed, the applicant deliberately wanted to shoot Muhammadans passing by his house. On the other hand, the evidence of the other witnesses would indicate that shots were fired in the air.

The position, therefore, is this. If the finding of the learned Magistrate is what he has mentioned in his judgment and if that finding has been upheld by the learned Sessions Judge, the trial must be quashed and the applicant should be ordered to be committed to the Court of Sessions so that he might undergo a trial by a superior Court of criminal jurisdiction with an appeal, (in a serious case like this) to this Court. On the other hand, if the charge was nothing but of firing a gun during communal tension, it can hardly be said that any offence has been committed. When riots were taking place, as the learned Magistrate has stated in the judgment, in different parts of the town, a man possessing a gun may very well fire shots just to indicate to the would-be mischief-makers that there were arms of defence in the house and anybody who might be mischievously inclined might take care of his safety.

The result, therefore, is that either the conviction should be set aside and a retrial ordered or the conviction should be set aside *in toto*.

As I have said, I have examined the evidence and I am of opinion that the latter course is the only course which is open to me. The evidence will not sustain a charge of an attempt at murder or attempt at causing grievous hurt with a gun.

I accordingly set aside the conviction and sentence under S. 336 of the Indian Penal Code and order that the fine, if paid, be refunded.

Coming to the charge under S. 19 (*f*) of the Arms Act, the position seems to have been as follows. Communal riots were taking place in different quarters of the town. A brother of a license-holder took out the gun and fired shots in the air so that people mischievously inclined might know that it was not safe for them to do any mischief to the people living in the house. The question would then be whether a temporary possession like that would come under S. 19 (*f*) of the Arms Act.

Cases must be decided on their own particular circumstances and unless a decided case lays down a general principle, it is no sure guide.

The charge against the applicant is that he was in possession of arms, in contravention of the provisions of S. 14 of the Arms Act. That rule of law lays down that it is unlawful to be in possession of any fire arms without a licence. It is common ground that the brother of the applicant, living in the same house as the applicant, held a license for the gun. Then the question arises, whether the gun, at the time the shots were fired, had ceased to be in the possession of the licence-holder and had passed into the possession of the applicant.

The answer to the question must be based on some definite principle. The word possession is a well known word in law, and a man may be in possession of a thing without being in physical touch with it. *A* locks up a vacant house. He will be deemed to be in possession of the same. *A*, a licence-holder of a gun living at Allahabad and holding a licence for that district, may go to Calcutta leaving his gun at his house in charge of the servants or his wife. The possession of the wife and the servants would be the possession of the licence-holder and it cannot be said that the wife and the servants are in possession of an unlicensed gun. Similarly, a sarvant cleaning a gun for his master or carrying it for him to the police office, for an inspection by an officer there, is not in possession of an unlicensed gun. But if the same servant takes out the gun without the permission of his master and commits an offence with it, or goes out for a mere show in a marriage procession his (the servant's) possession would be unlawful. The reason is that the possession is not on behalf of the master but on behalf of the servant himself.

Again, it has to be remembered that the licence for holding a fire-arm is a personal privilege, and the licencee is not entitled to use the gun as he may lawfully use any other article of his. The owner of a car may lend it to a friend, but he cannot lend his gun to him. In the former case the possession of the friend would be the possession of the owner, but the possession of the friend, in the case of the gun, may not necessarily be the possession of the licence holder. The reason is this. The law aims at the control of fire-arms in the country and the object of law would be defeated if the privilege granted to comparatively few people could be extended beyond its terms.

Bearing, then, the two somewhat antagonistic principles in mind, I have to see whether the possession of the applicant, at the time he fired the shots was on behalf of his brother who held a license or whether it was on his own behalf ? Further if it was on behalf of his brother, whether the applicant's possession was one which is not permitted by the principle underlying the Arms Act which I have to construe ?

It is to be remembered that mere firing a shot is not punishable. If, therefore, the applicant was within the law, in holding the gun in his hand at the time he fired the shots, he must be treated as innocent. The first of the two questions propounded above is one of fact. I have already stated the circumstances in which the shots were fired. I have found that the firing of the shots had the object of scaring away the mischief-makers. The use and object were both lawful. In the circumstances, it must be taken that the possession of the gun by the applicant was on behalf of and with the express or implied permission of the brother, the licence-holder. The next question is whether in the grant of the permission of the use of the gun given by the licence-holder, he in any way contravened the principle of 'personal privilege' ? I think he did not. I have already pointed out that the mere firing of a gun is not an offence. The personal privilege to possess a gun was not in any way abused by the licence-holder's brother firing a few shots with it, for a lawful purpose and for the benefit of the licence-holder or his family. If the licence-holder can ask his brother to clean his gun, he may ask him to fire a few shots to scare away, say, the crows. If these two acts be not unlawful, the licence-holder may lawfully ask his brother to scare away possible assailants by firing the gun.

I am, therefore, of opinion that no offence has been committed under the Arms Act, S. 19 (*f*).

The case of *Muhammad Husan* v. *Emperor* (1) is clearly distinguishable on the facts. The son of the licence-holder had taken the gun out of the house and was out for shooting. This was quite contrary to the spirit of the licence, though the possession of the son was the possession of the father, in the wider sense of the term.

The result is that I set aside the conviction under the Arms Act as well.

The convictions and the sentences are set aside and the applicant, who was admitted to bail by the learned Judge of this Court who admitted the application, need not surrender. The fine, if paid, will be refunded.

Convictions set aside.

---

(1) 1925 All. 175=22 A. L. J. 1095=6 L. R. A. Cr. 23.

★ 1925 ALLAHABAD 399

MUKERJI, J.

Kandhai Lal—Applicant.

v.

Debi Prasad—Opposite Party.

Civil Rev. No. 187 of 1924, Decided on 15th January 1925, from an order of the Small Causes Court, Cawnpore.

★ *Contract Act, S. 11—Minority—Burden of proof is on party setting up minority.*

The burden of proof should be laid on the party who says that at the date of contract he was a minor. Although it is for the plaintiff to prove the validity of a contract on which he relies, yet, the age of a person entering into a contract is not such an essential part of the contract as must be proved by the plaintiff. 34 *All.* 189 ; and 6 *A. L. J.* 693 *Not Foll.*; 1924 *All.* 730 and 45 *Cal.* 909 *Foll.* [P 399 C 2]

N. Upadhiya—for Applicant.

U. S. Bajpai—for Opposite Party.

Judgment.—This is an application to revise a judgment of the Court of Small Causes at Cawnpore. The plaintiff of the Court below is the applicant here. He brought the suit for recovery of money on foot of two promissory notes alleged to have been executed by the respondent. The suit was contested on several points, one of these being that at the date of execution of the promissory notes the defendant was a minor. The learned Judge found on all points in favour of the plaintiff. But on the question of defendant's minority he laying the burden of proof on the plaintiff, came to the conclusion that the plaintiff had failed to establish that the defendant was a major at the date of execution of the promissory notes. It appears that no satisfactory evidence was adduced on either side and the Court had to rely on the question of onus of proof. The learned Judge was of opinion that it was for the plaintiff to establish that the contract was a valid one and was entered into by people who were majors. Two cases of this Court would support the view taken by the learned Judge, *viz.*, *Chittar Kuar* v. *Gaura Rao* (1), following an earlier case of *Gaya Din* v. *Mt. Dulari* (2). On the other hand a Bench of two Judges of this very Court in the case of *Narain Singh* v. *Chiranji Lal* (3), laid down that the burden of proof lay on the party who asserts that he was a minor at the date of the contract. In the last mentioned case their Lordships purported to follow the case of *Jagannath Prasad Singh* v. *Abdullah* (4), a decision of the Privy Council.

I have myself considered the case decided by the Privy Council and am of opinion that it does support the view taken in the case in 22 A. L. J. In the circumstances, the case in 22 A. L. J. should be followed, not only because it is a later case but it is supported by the opinion of the Privy Council which was not available when the two earlier cases were decided by this Court. Speaking personally, with respect, I should think that the burden of proof should be laid on the party who says that at the date of contract he was a minor. There can be no doubt that it is for the plaintiff to prove the validity of a contract on which he relies. But the age of a person entering into a contract is not such an essential part of the contract as must be proved by the plaintiff. Take for example a case like this. A man apparently of the age of 60, borrows money from a money-lender. When a suit is brought to enforce the payment the borrower pleads that he is a minor. The plea may be ludicrous and may appear to be so to the Court who will see the defendant. But if the burden of proof, be laid on the plaintiff, he would be called upon to prove that his debtor was more than 18 at the date of the loan It would be impossible for the plaintiff to find out the witnesses who would be able to prove the date of the birth of the defendant. Medical evidence can be accepted only as a matter of expert opinion. But the question is whether it is desirable that the plaintiff should be called upon to prove such an obvious case. Question of age is eminently one which the party raising it alone can prove by satisfactory evidence, although he himself may not be able to swear to it with sufficient accuracy from personal knowledge.

When a party enters into a contract as a major he really makes an admission that he is of age. If, in spite of such an admission, he asserts that he was not of

(1) [1912] 34 All. 189=13 I. C. 320=9 A. L. J. 105.
(2) [1909] 6 A. L. J. 693=2 I. C. 839
(3) 1924 All. 730=46 All. 568=22 A. L J. 461=5 L. R. A. Civ. 353.
(4) [1918] 45 Cal. 909=45 I. A. 97=16 A. L. J. 516=5 Pat. L. W. 83=(1918) M. W. N. 406=22 C. W. N. 891=8 L. W. 163=24 M. L. T. 62=28 C. L. J. 192=20 Bom. L. R. 851=45 I. C. 770=35 M. L. J. 46. (P. C.)

age at the date of the contract, the burden of proof should be on him to establish the fact. In any view of the case, the burden of proof should lie on the party who asserts that he was a minor at the date of the contract in which he entered.

The result is that the judgment of the Court below should be set aside. I accordingly set it aside and decree the plaintiff's claim with costs throughout. I make no order as to interest after the institution of the suit.

Appeal allowed.

1925 ALLAHABAD 400

SULAIMAN AND BOYS, JJ.

Baijnath Pandan—Creditor.

v.

The Estate of E. C. Dennet — Insolvent.

First Appeal No. 14 of 1924, Decided on 20th April 1925, from an order of the Dt. J., Jhansi.

Usurious Loans Act, (1918) *S.* 2 (3) (*b*)—*Party liable as a surety—Act applies.*

If the creditor wishes to bind another and recover from him a sum of money said to be due on a transaction entered into between himself and the debtor the Usurious Loans (X of 1918) would be applicable irrespective of the fact whether that other is liable as a principal debtor or as a surety. S. 2 (3) (b) is wide enough to cover the case of a surety also. The Act makes no distinction on this account. [P 400 C 2]

A. Sanyal—for Appellant.

Lalit Mohan Banerjee—for Respondent.

Sulaiman, J.—This is a creditor's appeal arising out of an application in an insolvency case to be entered as a scheduled creditor in respect of an amount due on a promissory note, dated the 19th of July, 1922, executed by the insolvent along with two other persons for a sum of Rs. 800. The promissory note bore an interest at the rate of one anna per rupee per mensem, which works out at 75 p. c. per annum.

The learned District Judge came to the conclusion that the rate of interest was excessive and that the transaction was unfair as between the parties thereto. He accordingly reduced the rate of interest to 12 per cent. per annum simple interest which he considered to be adequate having regard to all the circumstances of this case.

The creditor has appealed.

The first point urged on his behalf is that the Act has no application to this case because the respondent, E. C Dennet, was not the principal debtor but a mere surety. In our opinion, this argument has no force whatsoever. If the creditor wishes to bind the respondent and recover from him a sum of money said to be due on a transaction entered into between the parties, the Usurious Loans Act (Act No. X of 1918) would be applicable irrespective of the fact whether the respondent is liable as a principal debtor or as a surety. Section 2 (3) (b) is wide enough to cover the case of a surety also. We think that the Act makes no distinction whatsoever on this account.

The next point urged is that the rate of interest was not excessive. We think that it was not only excessive but was extortionately high, and the learned District Judge was perfectly justified in reducing the amount as it would have been grossly unjust to allow a claim for such a high rate of interest to succeed in a Court of law.

It is lastly urged that 12 per cent. per annum simple interest which has been allowed by the District Judge is too low. The learned District Judge had before him several circumstances. It was not only one person but three persons who joined in executing the promissory note. The promissory note was for Rs. 800 and was payable on demand and the creditor was not bound to wait for any long period. One of executants, namely the present respondent, was employed on the Railway and was earning from Rs. 155 to Rs. 100 a month as pay. No other circumstances were brought before the Court to show that the creditor was running any serious risk in advancing the money to these three persons who had been held jointly and severally responsible. Having regard to all the circumstances of this case, he arrived at the conclusion that the rate of interest at 12 per cent. per annum was a proper and fair rate of interest. We find it impossible to differ from the view which he has taken. The result is that the appeal fails and we dismiss it with costs.

Appeal dismissed.

★ 1925 ALLAHABAD 401

STUART, J.

Ram Ghulam Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 76 of 1925, Decided on 4th March, 1925, by the Addl. S. J., Cawnpore.

★ *Penal Code S.* 186—*Resigning membership of Panchayat and instigating others not to accept the membership—No offence under S.*186 *is committed.*

The accused a member of a village Panchayat when asked to sit with a member of the depressed classes, refused to do so and told the S. D. O. that the Panchayat would cease to exist and instigated his fellow Panches and other persons not to sit with the members of the depressed classes in the Panchayat.

Held; that though the Sub-Divisional Officer was no doubt hampered in the performance of his public duty by the refusal of the applicant and by his instigations, the applicant's conduct did not amount to voluntary obstruction within the meaning of S. 186. [C. 402, C 1]

Uma Shankar Bajpai—for Applicant.

M. Wali Ullah—for Opposite Party.

Referring Order.—This is an application for revision against the order of the District Magistrate. Hamirpur, dated the 10th November, 1924, convicting the applicant under S. 186, Indian Penal Code and sentencing him to pay a fine of Rs. 50 in a summary trial.

The prosecution was started on the written complaint of B. Bhagwati Prasad Sinha, Sub-Divisional Officer who is said to have been obstructed by the applicant in his attempts to re-organise and reconstitute the Korara panchayat according to the orders of the District Magistrate.

The Sub-Divisional Officer in his complaint Exhibit D says that he called the Panches with their records at his camp in Damar and they came as instructed. He proposed to them the inclusion of a member of the depressed classes in the Panchayat but this displeased Ram Ghulam applicant who is one of the Panches and he eyed the other Panches and declared that the Panchayat would cease forthwith. He, the Sub-Divisional Officer, argued with him for a while but this only increased his defiance and the other Panches remained sullen. Then Shiam Sunder, the brother of the Sarpanch, who had brought the papers, was asked to keep the papers with him and he took them away but shortly after he returned and threw the basta containing the papers and went away and when he was sent for he came with Ram Ghulam applicant and when asked to explain his conduct, Ram Ghulam replied that the Panchayat had ceased to work and Shiam Sunder repeated the same. Then next morning when he (the Sub-Divisional Officer) went to Korara to ascertain the local feelings about the present Panchas, he discovered that Ram Ghulam had been instigating others not to work in the Panchayat and as a result of it the Sarpanch refused to work and the other Panches gave only a half-hearted consent.

Nothing more than what is stated in the complaint appears to have been stated by the Sub-Divisional Officer in his deposition before the District Magistrate because the District Magistrate in his judgment says: "Under the Government orders the Magistrate had to see if a member of the depressed classes could also be appointed to the new Korara Panchayat. Accused took offence at the order of sitting with a low caste man and declared that the panchayat would cease to function forthwith. He spoke for himself and for his brother Panches. The Magistrate tried to expostulate but the accused evidently mistook it for weakness and showed more defiance. His fellow Panches taking their cue from him sulked and sullenly stood by his side in his mischievous attempt at obstruction. The accused and Shiam Sunder, brother of the Sarpanch Gopi Nath, went away after throwing the books and register upon the Magistrate. They had to be sent for again and then they came and insulted the Magistrate. The following morning the Magistrate went to ascertain the local feeling but to his natural surprise he discovered that his apology notwithstanding. the accused had been instigating his people and arranging that nobody should accept the membership of the newly constituted Panchayat."

The District Magistrate appears to be wrong in saying that the accused threw the basta on the magistrate because the complainant says that Shiam Sunder threw the basta and went away and then returned with the applicant.

The Sub-Divisional Officer no doubt in his complaint says that he was thwarted, opposed and obstructed by the applicant in discharging his public duties and was insulted by him after he came with Shiam Sunder and the District Magistrate also finds that he was obstructed and insulted

but what took place appears to be simply this that the accused, when asked to sit with a member of the depressed classes, refused to do so and told the Magistrate that the Panchayat would cease to exist and instigated his fellow Panches and other persons not to sit with the members of the depressed classes in the Panchayat. He had not thrown the basta upon the magistrate and his merely telling the magistrate in reply to a question put to Shiam Sunder that the Panchayat had ceased to exist, insulting though it was, would not make him criminally liable because mere abuses have been held not to constitute obstruction (Ratan Lal, 9th Edition, page 375). The Sub-Divisional Officer was no doubt hampered in the performance of his public duty by the refusal of the applicant and by his instigations but I do not think that the applicant's conduct amounted to voluntary obstruction within the meaning of S. 186, Indian Penal Code. In order to constitute voluntary obstruction within the meaning of S. 186, Indian Penal Code there must be the commission of some positive overt act of obstruction and not merely a sort of passive resistence and refusal to carry out orders as would appear from 15 Mad.,221.

There is no legal evidence to support the conclusion that the accused had been instigating others not to act in the Panchayat after his apology of the first day because the Sub-Divisional Officer is the only witness examined in the case and he could not have seen or heard anybody being instigated in his absence in Korara. He must have come to know of these instigations the next day from others who have not been examined as witnesses in the case. Persuasions addressed to tenants in the absence of a receiver not to pay rent to him were held not to constitute obstruction : 29 Cal. 236 and in 73 I. C., page 338 although the accused had beaten the Lambardar who was helping a Naib Tahsildar in performance of his duties and as the result of that beating the Lambardar refused to help the Naib Tahsildar, the accused was held not to have committed any criminal offence. A person spreading false reports and thereby preventing persons from taking their children for vaccination was held not to have committed any offence under S. 186, Indian Penal Code : 15 Mad., 93.

Under the Village Panchayat Act the Collector or with his permission the Sub-Divisional Officer could have appointed any member of the depressed classes to be a Panch. The applicant might have been left free to sit with him or not. He need not have been consulted or argued or expostulated with but if the Sub-Divisional Officer consulted him or wanted to bring him round to his own view, the applicant could very well express his own opinion and I think he could induce his fellow panches also to hold the same opinion. To hold him criminally liable would be unduly widening the scope of S. 186, Indian Penal Code.

In my opinion the conduct and the acts of the applicant, however, blameworthy, do not fall within the meaning of S. 186 and he does not appear to me to have voluntarily obstructed the Sub-Divisional Officer within the meaning of that section. I would, therefore, submit the record to the Hon'ble High Court with a recommendation that the conviction and sentence of the applicant be set aside.

The judgment of the High Court was as follows :—

Stuart, J.—I have read the order of the District Magistrate and his explanation. I am unable to support his order. I see his point of view. The applicant undoubtedly behaved very rudely. His manners were bad and he was clearly determined to be offensive but I cannot find that there is anything upon which a conviction can be based for an offenceunder S. 186. The applicant was at perfect liberty to resign from the panchayat and there is nothing in the law to prevent his advising whomever he may meet not to serve on the panchayat.

He no doubt is not good citizen or a useful member of the community in so far as his actions in this matter are a guide but I cannot find anything which to my mind can support a conviction of voluntarily obstructing a public servant in the discharge of his public functions.

I accordingly accept the reference, set aside the conviction and sentence and direct that the fine if paid be refunded.

Reference accepted.
Conviction set aside.

★ 1925 ALLAHABAD 403

WALSH AND RYVES, JJ.

Firm Ram Gopal-Mool Chand—Applicant.

v.

Income-Tax Commissioner — Opposite Party.

Mis. Case No. 403 of 1924, Decided on 8th December, 1924.

★ *Income Tax Act (II of 1922) S. 66 (6)—Costs cannot be reduced after final order has been passed.*

By S. 66 (6) costs are in the discretion of the Court. The Court after having exercised its discretion is *functus officio* and cannot re-open the matter. All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of the hearing and before a final order is drawn up. [P 402 C 2]

A notice was issued to the Income-Tax Commissioner to show cause why he should not state a case. The Commissioner showed cause and in the result the application was dismissed on the ground that it was impossible to frame a question of law on which a case could be stated and the Court hearing the matter directed the applicant, after hearing both parties, and for reasons which it considered adequate at the time, to pay the costs of the application. An application was afterwards made to reduce the amount after issuing notice to the Government Advocate on a sort of re-hearing.

Held: that the High Court could not grant the application. [P 403 C 2]

G. Agarwala—for Applicant.

The Opposite party was not represented.

Walsh, J.—In this case notice was issued to the Income-Tax Commissioner to show cause why he should not state a case. The order was made *exparte* on the application of the applicant. In future when the new rules come into force the applicant will have to establish a good ground on a point of law before the Court to whom he applies, before notice is issued to the Income-Tax Commissioner at all. The result of the procedure was that the Commissioner had to show cause on the merits and to instruct the Government Advocate for that purpose, and the hearing was really such as would have taken place if the Commissioner had been required to state a case. In fact, the matter was gone into as though a case had been stated in order to ascertain whether there was a point on which a case could have been stated. In the result the application was dismissed on the ground that it was impossible to frame a question of law on which a case could be stated and on the application of the Government Advocate the Court hearing the matter directed the applicant to pay the costs of the application including the fees certified by the Government Advocate. The Court did that after hearing both parties for reasons which it considered adequate at the time.

An application is now made to us to reduce the amount after issuing notice to the Government Advocate on a sort of re-hearing. We cannot do that. By S. 66 (6) costs are in the discretion of the Court. The Court having exercised its discretion is *functus officio* and cannot re-open the matter. All questions relating to costs and all submissions in which costs are involved must be argued and decided at the time of the hearing and before a final order is drawn up.

The learned Counsel suggested that there was a special ground for exercising the discretion, because under S. 66 (2) his client had been compelled by the Act to deposit another sum of Rs. 100 at an earlier stage when he required the Commissioner to refer the question of law to the High Court. The High Court has no jurisdiction, of course, over this sum of Rs. 100 which the Commissioner has received. He has, no doubt, full power to deal with it in his own way and in accordance with the rules of his office. Any application in *misericordiam* must be made to the Income-Tax Commissioner if any rebate of this sum is desired. No doubt, in the exercise of its discretion under S. 66 (6) the High Court could take into account the fact that the assessee had had to pay Rs. 100 to the Income-Tax Commissioner, but in the great majority of cases it would appear to be quite irrelevant to the question of the costs of disposing of the matter by the High Court as it relates to something antecedent and the effect of taking it into account would really be indirectly to reduce the fee which the Government Advocate may have certified or which is really payable to him under the Act and Rules. We see no reason to interfere and dismiss the application.

Appeal dismissed.

1925 ALLAHABAD 404

SULAIMAN AND DANIELS, JJ.

Jagat Pande—Plaintiff—Appellant.

v.

Sarawan Pande and others — Defendants—Respondents.

First Appeal No. 7 of 1924, Decided on 16th April, 1925, from an order of the First Addl. J., Gorakhpur.

Civil P. C., S. 104 *(f) and Sch.* 2 *Para* 21—*No order for filing award and no decree thereon separately passed—Single order disposing of whole case—Appeal is competent.*

Where an order directing an award to be filed and a decree in accordance with the award were not separately passed but the Court disposed of the whole case by a single Order,

Held: that the appeal was in substance an appeal from an order directing the award to be filed, and as such was competent. 38 *All.* 380 *and* 42 *All.* 185 *Ref.* [P 404 C 2]

Sankar Saran and *Brajmohan Lal Dave* — for Appellant.

Haribans Sahai—for Respondents.

Daniels, J.—This first appeal from order arises out of an arbitration award made without the intervention of the Court. The plaintiff-appellant came into Court with an application which is very inartistically drawn, but which has been treated throughout and is now treated by him as in substance an application to file an award under paragraph 20 of the second schedule of the Civil Procedure Code. In paragraph 6 of the plaint he stated that his object was to get the award filed, and to obtain a decree upon it. In the course of the proceedings a plea was taken before the learned Munsif that the defendant was a lunatic and incapable of representing his own interests. The learned Munsif ultimately, however, disposed of the matter by an *ex parte* order in these terms :—

"Judgment. Suit for the enforcement of an award. Defendant's pleader states that he has no instructions. Suit is heard *ex parte*. Claim is proved. Decreed with costs.

The defendant went in appeal to the learned District Judge. The learned District Judge held that the question of the defendant's capacity had not been properly disposed of in the proceedings. He, therefore, set aside the order of the learned Munsif and remanded the whole case for trial *de novo*. The plaintiff comes here in appeal from that order. His contention is that the appeal was one from a decree passed in accordance with the award, and that, therefore, under para. 21 (2) of the second schedule of the Code of Civil Procedure, the appeal to the District Judge was incompetent.

The law governing the right of appeal in these cases is contained in section 104 (1) (f), S. 104 (2), and para. 21 (2) of the second schedule of the Civil Procedure Code. An appeal is allowed from an order filing or refusing to file an award, but no further appeal is allowed from an order passed on such an application. On the other hand, when an award has been filed and a decree is made in accordance with it, no appeal lies from such decree except in so far as it is at variance with the award. In this case the appellant's contention is that the respondent should have appealed from the separate order directing the award to be filed. The difficulty is that no such separate order is to be found on the record. Instead of passing an order directing the award to be filed and proceeding to pass a decree upon it in accordance with law. the learned Munsif disposed of the whole case by the very brief order which has been quoted above. This was the only order from which it was possible for the respondent to appeal. We think, therefore, that the appeal was in substance an appeal from an order directing the award to be filed. It is established by ample authority that the right of appeal is not taken away by the fact that the decree has subsequently been passed in accordance with the award. We may refer to *Hari Kunwar* v. *Lakhmi Ram Jain* (1) and *Lachmi Narayan* v. *Sheonah Pande* (2). The appeal to the Court below having been one from an order directing an award to be filed, no further appeal lies to this Court. We accordingly dismiss the appeal with costs.

Appeal dismissed.

---

(1) (1916) 38 All. 380=35 I. C. 833=14 A. L. J. 481.

(2) (1919) 42 All. 185=54 I. C. 443=18 A. L. J. 78.

★★ 1925 ALLAHABAD 405

WALSH AND SULAIMAN, JJ.

Laijam Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 526 of 1924, Decided on 24th November, 1924, from an order of the S. J., Mainpuri..

(a) *Evidence — Identification Parade — Garb different—Identification is not sufficient evidence.*

An identification made of a man, who is said to have been wearing a beard at the time of offence and whose beard is concealed or absent at the time of identification, is by no means convincing, and when it stands alone, must be regarded as an unstable piece of evidence.

[P 407, C 1]

★★ (b) *Evidence—Admissibility—Judge should decide summarily—Inadmissible evidence should not be read out to assessors—In doubtful cases Court should decide against admissibility.*

Matters tendered in evidence by the prosecution affecting case, must be dealt with summarily and instantly by the Judge at the trial when they are tendered. Judges, in a Court of appeal, are apt sometimes to attach weight to the opinion of the assessors, and although their opinion does not have any legal effect, the Judge ought to guard very carefully against allowing a discussion in Court, of the reading of a document in Court in the presence of the assessors injurious to the accused, when it is by law inadmissible. The benefit of a reasonable doubt ought to be given from the Bench, even to the admission of evidence particularly documentary evidence, during the trial, and when the Judge is unable to make up his mind about admissibility, the proper course for him is, either to direct the prosecution to keep back the documents until he has an opportunity of looking into the law, or to reject them altogether. No Judge in a doubtful case of admissibility ought to allow the evidence first to be given, and then in his judgment give a decision about their admissibility. Doubtful or inadmissible documents ought not to be admitted in criminal trials. [P 409, C 1, 2]

The Government Advocate — for the Crown.

Walsh, J.—This is an appeal by one Laijam Singh against a conviction for dacoity, which, if true, discloses a bad case, inasmuch as he was apparently one of the ring-leaders in a dacoity in which something like 15 men are alleged to have taken part, in which a considerable amount of loot was obtained, and in which one prominent man was possessed of a gun. Three out of the four assessors thought the case was proved, but in a case of this kind they are not unlikly to be influenced by the view of the learned Judge who was satisfied with the evidence. Together with the appeal, an application in revision has been filed by the Government Advocate raising the question of the section under which the conviction was passed, and of the comparatively light sentence having regard to the fact that the accused was armed with a gun which he fired during the dacoity if his guilt is established. It is possible that the learned Judge was inclined to take a lenient course, because, as he expressed it, it was a pity that a pensioned havildar licensed to carry arms, should have gone out of his way to rob people in this way, and it is just possible that the learned Judge was also influenced by the difficulty of the case. But it cannot be denied that the view taken by the Government Advocate in submitting the revision is a sound one, and that if the accused was guilty, he was guilty of a serious crime against the public peace.

The case was an extremely difficult one as is indicated by the length of the learned Judge's judgment, in which he felt compelled to discuss various matters, which in our view do not really strengthen the case against the accused. The case against the accused, when the matter is clearly understood, is reduced to a small compass, and although he has not been represented by a trained lawyer in the appeal before us, he has submitted a petition of appeal quite contrary to the ordinary jail petitions to which one has become accustomed, in which he raises on his own behalf at least two if not more points, which are calculated, when one compares them with the evidence, to raise a doubt in one's mind.

The story of the dacoity is a little out of the common. It took place at a village about 40 miles from the village of the accused. The owner of the house Jawahir was absent from home. He had a brother named Putti Lal, and he had recently purchased a horse and was in possession of the receipt which had been made out to him on a piece of white paper. He does not say where the receipt was kept and when he saw it last, and curiously enough nobody was struck at the trial by the obvious question where the receipt was eventually found, if at all, after the dacoity. On the night of the 6th of January during Jawahir's absense while members of his family were in the house, a man came in and asked for fire and was allowed to sit down and to have

it, and at some later stage he was joined by four other men, who were also allowed to sit down and have the fire, and it therefore happened that the inmates of the house found themselves sitting over the fire with five complete strangers who were making preparation to commit this dacoity. As regards these five, they must have had ample opportunity of identifying them if they ever saw them again. Shortly afterwards other men arrived upon the scene and proceeded to ransack the house. They were protected, if not led, by a man who stalked up and down outside carrying a gun, and who was said at the trial to be wearing a beard. As the accused also wears a beard, this fact becomes an important item in the evidence against him. But it so happens that according to the diary, which it had become in this case important to examine with care, nobody told the police, although they did say they could identify the men, that there was one dacoit stalking about with a gun wearing a beard. It is, therefore, doubtful whether the beard connecting the man with the gun is not an after-thought. The dacoity took about an hour, and the man with the gun eventually warned the gang that they were being pressed and had better be off, and away they went, and except for the accused have never been seen so as to be recognized again. The first question which arises is whether it can be said without doubt that the prosecution has proved satisfactorily that the accused was the man with the gun. The accused does in fact carry a gun under a licence.

Continuing in chronological order, the other important point against the accused is this. Two witnesses, Putti Lal the brother of Jawahir, and Bhajan say that the next morning they picked up outside the door, just at the spot where the accused was stalking about with a gun, a letter in an envelope, and a witness summons to attend at the hearing of a case, which were undoubtedly the property of the accused, and which should have been in his possession at the time of the dacoity. The fact is in itself only a piece of circumstantial evidence that they were dropped by him when he was stalking about with a gun. It is important to bear in mind that this is only a matter of inference, because it is natural to wonder if the dacoit, who was stalking about with a gun so as to be clearly recognizable, did drop the documents belonging to him, he was not seen to drop them at the time. At any rate if he left two important documents, such as a stamped post office letter and a badami paper snmmons bearing the well-known, almost majestic indication of an official document, on the ground where it would be easy to see them, one would have thought that they would have been immediately discovered in the general hue and cry after the dacoits had gone and all personal risk was at an end. The case, therefore, stands against the accused in this way: that he being a licensed gun-holder and a pensioned havildar, being fired with the spirit of adventure and greed joined an unknown band of dacoits who came from no one knows where, and between whom and the accused the prosecution have been unable to establish any previous connection; that he travelled 40 miles to this village with a gun returning to his own village with the gun, and took with him on this dangerous adventure a postal letter and a legal summons, which would be certain to lead to his identification if he happened to have an accident, and that although they had travelled on his person safely for 40 miles, they happened to drop at the very place where he was committing this crime, when so far as the evidence shows, no personal struggle between him and anybody else, which might have led to the disarrangement of his clothing and the loss of these documents, took place. One can only say that the crime itself strikes one as *prima facie* improbable in the way in which it is alleged to have been committed by this man, and that the evidence by which it is made out is far from strong. When that evidence turns out to be considerably shaken in strength as the result of a close scrutiny of it, the case becomes not merely not strong, but so weak as to be one which no Court ought to accept.

First, therefore, as regards the identification. We have said that the dacoit with the gun was wearing a beard. The accused himself wore a beard, and, perhaps not unnaturally, thinking that that might be an important weapon against him if anybody should want—as he believed at the time somebody did want—him to be falsely identified for the crime requested the Magistrate to cover his

beard and to cover the beards of any others who were put up with him for identification. The Magistrate no doubt from excellent motives yielded to this request. We are bound to point out that the decision was a mistake. In such a case it is easy to be wise after the event, but it is always possible for a Magistrate to arrange for two identifications. A man who wears a beard, even if he is falsely charged, cannot help it if the witnesses are satisfied that one of the dacoits also wore a beard. It is a piece of misfortune no doubt, but it is only one of the elements which have to be taken into account in deciding identifications. Beards differ like noses or the mouths which they cover, and in an honest case it does not in the least follow, if a suspected person is put up with several other persons also wearing beards, that he will be identified unless he was really there, and in order to test an honest case and in the interests of the investigation of crime, a Magistrate should insist, if the accused has a beard and whether or not a witness has already described a man as wearing a beard, that the accused should be put up with others of similar appearance, if possible, as he is, and not as a different person. If the Magistrate thinks it fair to the accused to yield to his request, he can at another identification cover up all the beards including the accused's, and try the witnesses in that way also. That method, however, is just as unfair to the witnesses as the proper presentation of the accused appears to be to the accused himself. But it is no good crying over spilt milk as the saying goes. We have to deal with facts as they are proved at the trial, and in this case it is undoubtedly proved that, whereas the identifying witness in jail, Ram Sahai, says at the trial that he was able to identify the man stalking with the gun as the man who wore a beard, he undoubtedly identified somebody who for the moment had no beard. How he was able to do it, is mysterious. One can only say that an identification made of a man who is said to have been wearing a beard at the time, and whose beard is concealed or absent at the time of identification, is by no means convincing, and when it stands alone, must be regarded as an unstable piece of evidence. The learned Judge, after promising to discuss the identification at the proper place, did not completely do so, and he has failed to appreciate this difficulty. The only other attempt at identification is quite worthless. Putti Lal, the other witness, who was relied upon by the prosecution and by the Judge as having identified the accused, failed to do so in jail when the accused's beard was covered up, and this is not to be wondered at. He identified the accused in Court, but as he had already said that the man he saw wore a beard, and as the accused was the only man in the dock, and was also wearing a beard, this was quite easy and not convincing. We, therefore, feel bound to say that so far as the identification was concerned, the case breaks down. We are inclined to think that if the Judge had taken this view, he would have given the accused the benefit of the doubt.

We now turn to the question of these compromising documents the evidence about which is even more difficult. We are by no means satisfied that the whole truth about their discovery has been disclosed. The learned Judge has devoted a very exhaustive investigation to the question whether these documents were brought home to the accused. By an error of judgment at the trial, the defence insisted on fighting this point. We think it fair to the accused to say that we doubt whether he approved of this course being taken. At any rate the case must be examined upon the assumption that the documents are proved to be his, and it is fair to him to say that without any attempt at changing his ground, or in any way fencing with the case against him he discussed the matter in his petition as though they were his. There are reasons, we cannot say more, for distrusting to some extent the evidence of Jawahir and his friends, so far as it bears upon the case. The accused makes a great point in his petition of appeal that his enemy Gangu is responsible for this charge. It is not necessary to prove it. The learned Judge has given reasons why he was unable to accept the defence set up on this point. But there are certain admitted facts which no Court ought to ignore. Gangu is related to Jawahir on the maternal side. He is at enmity with the accused, and although he, like the accused, lives some 40 miles from the place of the dacoity, he was present throughout the trial and undoubtedly interesting himself conspicuously in the prosecution of the

case, and in spite of this Jawahir said on oath that he did not know him. We can only say that these admitted facts produce an uncomfortable feeling that there may be something in what the accused states. The history of the documents, from the time they were found until the time they became a weapon in the hands of the police, is open to grave suspicion. Working backwards the case stands thus. Bishambhar Singh the Sub-Inspector, who came upon the spot as a kind of interregnum between Salamat Ali the Head Constable who first took up the investigation, and the Sub-Inspector belonging to the proper thana, knew nothing about these documents until the morning of the 9th. Salamat Ali, who changed his evidence on this point at least once, is positive that he handed them, or showed them, to Bishambhar Singh on the night of the 8th. The learned Judge has chosen to believe Salamat Ali. But it does turn out that the diary tends to confirm Bishambhar Singh, because the first official mention of these documents is the entry in the diary on the morning of the 9th, and one is bound to say that whether one has a preference for the evidence of one or the other of these two police officials, the result is to leave the question of the first official possession by the police of these documents in the dark. But whether they reached Salamat Ali on the evening of the 8th or on the morning of the 9th, there is a long unexplained gap between their alleged discovery and their custody by the police. In a story so strange one would like to be fully convinced that these documents can be trusted to be the documents which were picked up from the ground on the morning of the 7th. If they are, the absence of any mention of them in the diary before the 9th is a matter for unfavourable comment. But the difficulties do not stop there. The two men who found them, Putti Lal and Bhajan, have told their story, and they agree in saying that they handed them to Jawahir, who in his turn handed them to Salamat Ali. Bishambhar Singh on the other hand makes the significant statement that when they were handed over to him by Salamat Ali, Salamat Ali told him that Bhajan had given them to him. If this is true, the evidence at the trial about the way in which they were handed to Salamat Ali is untrue. If it is untrue, Salamat Ali has been contradicting himself in a way which makes it difficult to rely upon his evidence. This point has been entirely overlooked by the Judge. Further the prosecution must have felt uncomfortable about the treatment of these documents when they were first picked up. When they were first picked up, presumably amongst the refuse remaining from the dacoity, they obviously attracted no particular attention according to the two witnesses who found them, and were put away in a niche in the house. The explanation of this treatment of them can only be described as somewhat feeble and far-fetched.

It is true that the witnesses are illiterate. Upon the assumption that the accused is guilty, it is just possible that they attributed no importance to their discovery. But we find it difficult to believe, what they are so anxious to convince the Court, about namely, that two illiterate witnesses, who presumably had some conversation about the matter, should both agree, in thinking that a badami summons was a receipt for a horse which was certainly known by them to be white, if they had previously seen it; that they should happen to make the same mistake, and while thinking it necessary to explain away the indifference with which they treated the summons, should offer no explanation of their treatment of the letter. To sum up this second head of evidence, assuming that these documents belonged to the accused, we are not satisfied that they were dropped on the ground during the dacoity and found the next morning. The result is that we are in doubt about both points upon which the prosecution rely, points unfortunately the significance of which the learned Judge has rather overlooked in the very full consideration which he has given to other matters in the case, and which do not seem to us to be worth further discussion, with one exception.

A letter which the learned Judge is satisfied was written by a relation of the accused referring to an attempt to raise money so buy off the prosecution, and assuming the guilt of the accused, rather than stating any positive reasons for thinking him guilty, has been much discussed in the judgment and improperly used by the prosecution. We hope we are not doing the learned Judge an un-

justice when we say that in regard to this document he failed to make up his mind, as a Judge should do. At one portion of his judgment he says that the statements in them cannot be used as evidence against the accused, because they might be no more than heresay, so far as they connected him with the dacoity. We are not sure whether he used them or whether he did not. It is very dangerous to discuss at elaborate length, not merely the nature of proof of documents, but also their contents from the point of view of the use which is being made of them by the person who tenders them in evidence, namely, the prosecution, and at the same time to say that they cannot be used as evidence. We are afraid that the learned Judge in the ordinary course of human nature must have been influenced adversely to the accused by these documents. We will merely point out the legal aspect bearing upon them, and what we think the proper course for the Court when such documents are tendered in evidence. Matters tendered in evidence by the prosecution affecting a case, must be dealt with summarily and instantly by the Judge at the trial when they are tendered. These documents ought to have been atonce rejected by the Judge as inadmissible and the Government pleader rebuked for attempting to get them in for the following reasons:—

Assuming that they were proved to have been written by one of the witnesses who was called, with the authority of a relation of the accused, they were written after the crime, and could never be used in any sense, except as an admission by the accused himself, and before the Judge allowed himself to look at them, or to receive any evidence relating to them, he ought to have called upon the Government pleader to prove, if he could, that they were written with the knowledge and direct authority of the accused. If he had stopped to consider it for one moment, it was impossible to prove anything of the kind. They were written when the accused was in the custody of the police after he had been arrested. This is no hypercriticism. It is clear law, as the Judge ought to have realised if he had given himself time, and while on the one hand one has the advantage in a Court of appeal in the case of an experienced Judge like this of knowing his reasons for his ultimate conclusion, on the other hand Judges, in a Court of appeal, are apt sometimes to attach weight to the opinion of the assessors, and although their opinion does not have any legal effect, the Judge ought to guard very carefully against allowing a discussion in Court, or the reading of a document in Court in the presence of the assessors injurious to the accused, when it is by law inadmissible. No great harm has been done in this case except that the matter has caused us additional trouble. But it is desirable to impress upon Criminal Courts that the benefit of a reasonable doubt ought to be given from the Bench, even to the admission of evidence, particularly documentary evidence, during the trial, and where the Judge is unable to make up his mind about admissibility, the proper course for him is, either to direct the prosecution to keep back the documents until he has an opportunity of looking into the law, or to reject them altogether. No Judge in a doubtful case of admissibility ought to allow the evidence first to be given, and then in his judgment give a decision about their admissibility. Doubtful or inadmissible documents, ought not to be admitted in criminal trials. In this case there was no doubt and it would have been better if these documents had been rejected when they were first offered in evidence. For these reasons we give effect to the appeal, acquit the accused, and direct him to be discharged. Under the cricumstances the very natural application by the Government falls to the ground.

Appeal allowed.

★ 1925 ALLAHABAD 409

MUKERJI, J,

Kishori Lal and others—Applicants.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 400 of 1924, Decided on 29th August, 1924, against the order of the Addl. S. J., Meerut.

★ *Penal Code, S. 186—Patwari refusing to allow Kanungo to examine his books—No offence is committed.*

The refusal of a patwari to allow the Kanungo to go through his books and to check them is only an act of insubordination and is not a criminal act. [P 410 C.1, 2]

C. Ross Alston—for Applicants.

The Asstt. Govt. Advocate—for Opposite Party.

Judgment.—The original charge under which the applicants were tried was one under S. 353 of the Indian Penal Code. The applicants were convicted of that offence and were sentenced each to rigorous imprisonment for 9 months; and were besides ordered to pay a fine. There was an appeal to the learned Sessions Judge and he disbelieved that any offence had been committed such as is defined in S. 353. But he held that there was an obstruction in the discharge of the duty of the Kanungo within the meaning of S. 186 of the Indian Penal Code and he convicted the applicants of an offence under S. 186 and reduced the sentence of imprisonment for two weeks. In this Court it has been contended that there was really no case under S. 186 of the Indian Penal Code and the appellants were entitled to an acquittal.

The facts of the case, as found by the learned Sessions Judge, were these:—The Kanungo, Amiruddin, went to a village of which the applicant, Kishori Lal, was the newly appointed patwari. He took out the patwari for *parthal*. After that he sent for him to check his books. The Kanungo suggested that he should have his customary present, locally known as "*fasilana*", of the sum of Rs. 14. The patwari said that he was too young to know of these things and he had better consult his father who was a retired patwari; the father, namely, the applicant Munshi Lal came and did not agree to the payment of the sum demanded. There was thereupon an exchange of hot words and ultimately Kishori Lal went away with his books.

Now the question is whether on this finding a case under S. 186 has been made out.

I am clearly of opinion that S. 186 was never enacted to meet a case like this. The most that can be said is that the patwari was grossly insubordinate. But it was not a case of voluntarily causing obstruction to any public servant in the discharge of his public functions. Supposing that no bribe had been demanded by the Kanungo, all that happened was that the patwari refused to help the Kanungo in going through or checking the books kept by him. The learned Judge clearly finds that the provocation for hot words came from the Kanungo. Even if there was no provocation from the Kanungo, the refusal of the patwari to allow the Kanungo to go through his books and to check them was only an act of insubordination and was not a criminal act.

I allow the application, set aside the conviction of the applicants and the sentence. They are on bail and they need not surrender.

Application allowed.

1925 ALLAHABAD 410

MUKERJI, J.

Moti Ram—Applicant.

v.

King-Emperor—Opposite Party.

Criminal Rev. No. 440 of 1924, Decided on 28th August, 1924, against the order of the S. J., Budaun.

(*a*) *Criminal P. C., S. 476—Case heard by Hon. Mag.—Dt. Magistrate can take action.*

Where the prosecution instituted by the applicant was heard by a Bench of Honarary Magistrates and ended in failure,

Held: that under S. 476 A, the Dt. Magistrate could order the prosecution of the applicant under S. 193 of the Penal Code. [P 410, C 2]

(*b*) *Penal Code, S. 193—No oath administered to accused by Court—Accused's offence is not negatived.*

The fact that no oath was administered to the accused is no bar to his prosecution under Penal Code, S. 193. [P 411, C 1]

N. C. Vaish—for Applicant.

Opposite party was not represented.

Judgment.—Two points have been urged in this application for revision.

It appears that the applicant prosecuted somebody on a charge under S. 498 of the Indian Peneal Code. The prosecution failed. It was before a Bench of Honorary Magistrates. The learned District Magistrate to whom an appeal would ordinarily lie from the orders of the Court of the Bench of Honorary Magistrates, took up the matter under S. 476A of the Criminal Procedure Code and ordered the prosecution of the applicant under S. 193 of the Indian Penal Code. The applicant went to the learned Sessions Judge in appeal and his appeal has been dismissed.

It is urged that the learned District Magistrate had no jurisdiction to take up the matter as the original complaint was not heard by him. The point, however, cannot be maintained in view of the new law, *viz.*, 476 (A) of the Criminal Procedure Code.

The second point is that as a matter of fact no oath was administered to the applicant. Assuming that such was the case the applicant was bound to state the truth before a Court of justice.

I reject the application.

Application dismissed.

1925 ALLAHABAD 411

BOYS AND BANERJI, JJ.

Raja Devi and another—Plaintiffs—Applicants.

v.

Muhammad Yaqub and another—Defendants—Opposite Party.

Mis. Case No. 76 of 1925, Decided on 14th April 1925, reference by the Sub. J., Saharanpur.

(a) *Registration Act, S. 2 (9)—Growing crops—Crops not actually in existence but would afterwards be in existence are growing crops.*

The fact that the crop was not actually in existence at the time a contract for its sale is made does not take it out of the category of "growing crops". [P 411 C 2]

(b) *Registration Act, S. 17 — Contract to sell — Mangoe crop not in existence—Contract need not be registered.*

A contract for sale of mangoe and other fruit crop not in existence at the time of contract is indubitably a contract with regard to moveable property only and as such does not require registration.]P 412 C 1]

M. L. Agarwala—for Applicants.

Shiv Prasad Sinha—for Opposite Party.

Boys, J.—This is a reference by the Judge of the Court of Small Causes at Saharanpur under Order 46, rule 1 of the Civil Procedure Code asking this Court to express its opinion in regard to two questions which are set out in the order of reference. The matter is really a very simple one. The plaintiff was the owner of a mangoe grove of which she gave the crops to the defendants for three years at an annual price of Rs. 400. The defendants took the crops for the first year and paid the price. They took the crops for the second year but did not pay, with the result of a suit by the plaintiff for a sum of Rs. 400 and Rs. 31 interest.

The first question that we are asked is whether a contract for sale of a crop of mangoe fruit not in existence at the time of the contract is a contract relating to moveable or immovable property ?

We have not the smallest hesitation in holding that it is a contract in reference to moveable property and as such did not require a registered document. Growing crops are excluded by S. 2, sub-S. 6 of the Registration Act from the term "immovable property" and are similarly included by sub-S. 9 in the term "growing crops". The only suggestion made to us on behalf of the defendants is that the crop was not, in fact, growing at the time the arrangement was entered into. This seems to us a purely artificial distinction. To allow it any force at all would be to create a situation in which no one could ever possibly know whether a particular agreement dealt with moveable property or whether it did not. This is sufficiently plain from the consideration that it is entirely impossible to know exactly at what moment a crop comes into existence or whether it was or was not in existence at any particular moment or on any particular tree. We are quite satisfied that the fact that the crop was not actually in existence at the time does not take it out of the category of a "growing crops"; it would of necessity be a growing crop at the time the contract took effect; and, therefore, the subject of the contract was moveable property. We have considered those of the cases quoted by the learned Judge of the Court of Small Causes which are in the least degree relevant. Of these there are only two cases which are really in point. The learned Judge quotes *Mathura Das* v. *Jadubir Thappa* (1), as being a case relied upon by the defendants. It is admitted here that, in fact, no reliance can be placed on it on behalf of the defendants. It is directly in favour of the plaintiff. The other case is *Sukry Kuddeppa* v. *Goondakull Nagireddi* (2), a case in which the dispute was about an agreement providing for the drawing of toddy from palm trees. We need not deal with that case any further than to say that we are unable to appreciate the distinction between the fruit of a tree and the juice which is drawn from the trunk of that tree. In both cases there is obviously a question of the produce of the tree and in both cases the tree is left standing after the removal of the produce. Further, it appears to us that the decision in *Sukry Kuddeppa* v. *Goondakul Nagi-*

(1) [1906] 28 All. 277=3 A. L. J. 138=(1906) A. W. N. 4.
(2) [1871] 6 M.H.C. 71.

reddi (2) was directly in the teeth of the Registration Act (No. 20 of 1866), S. 2 which was then in force and which was not referred to. There again we have moveable property declared to include growing crops and fruit upon trees. We have already said that we fail to see any distinction between the fruit of a tree and the juice of a tree and moreover in sub-S. 9 of S. 2 of the present Registration Act (Act No. 16 of 1908) the words "juice in trees" have been expressly added to the definition of moveable property. It is not necessary to deal further with either of these cases. We answer the first question of the learned Judge of the Court of Small Causes by saying that a contract for sale of mangoe and other fruit crop not in existence at the time of contract is indubitably a contract with regard to moveable property only and as such does not require registration.

The second question is whether an agreement in writing, but unregistered, executed by the purchaser of the crop binding himself to pay the price of future crops, which he might have purchased through an oral agreement, is binding on him, and can be proved against him?

We have had the document in question read to us. It is certainly in no sense a formal document at all. There is a complete absence of any words of actual transfer. The nearest approach to those words is that there is a statement that *bag hamare pas rahega*. But reading the document as a whole we have no hesitation in saying that it was in no sense a formal agreement but that it merely contains a brief memorandum of notes of what was agreed between the parties.

Under these circumstances we hold that there was no need for the document to be registered and that the contract could be proved *aliunde*. With this answer let the reference be returned. The costs will be costs in the cause.

Reference answered.

★ 1925 ALLAHABAD 412

BOYS, J.

Firm Bisesar Ram-Dassi Ram—Petitioner.

v.

Firm Har Kishen-Pahlad Rai—Opposite Party.

Civil Rev. No. 226 of 1924, Decided on 20th March, 1925, from an order of the Judge, Small Cause Court, Azamgarh.

★ *Provincial Small Causes Courts Act, S. 17—"Amount due under decree" refers to amount due at date of decree.*

The words 'the amount due from him under the decree" mean "due under the decree at the date it was passed". [P 412, C 2]

Mukhtar Ahmad—for Applicant.

Shiva Prasad Sinha—for Opposite Party.

Judgment.—In this case a decree was passed *ex parte* on the 4th of August, 1924, for a sum of Rs. 174-7-9 with six per cent. interest. On the 16th of August, 1924, the defendant applied for restoration under S. 17 of the Provincial Small Causes Courts Act. When he applied for restoration, the defendant deposited the sum of Rs. 174-7-9, which was the amount due under the decree at the date of the decree, the 4th of August, 1924. The Judge of the Court of Small Causes dismissed the application for restoration on the ground that the application should have been accompanied by a deposit of the amount due from the judgment-debtor under the decree. So far he was clearly correct. But he went on to interpret these words to mean the amount entered in the decree plus the future interest at 6 per cent. from the 4th of August to the 16th of August 1924, and here by the respondent an attempt is made to suggest that the words "at the time of presenting the application" in S. 17 govern not only the action to be taken by the applicant, namely his making a deposit or giving security but that they govern also the words "the amount due" and that, therefore the amount to be deposited is the amount due under the decree at the time of presenting the application. I do not think that this is so. The words "the amount due from him under the decree", are certainly capable of two interpretations and may mean "due under the decree" as entered in the decree or due under the decree at the time of presenting the application. To my mind the words mean "due under the decree at the date it was given". The case is quite different from other cases where the person who has to make a deposit must know the exact amount to a fraction of an anna which he has to deposit. In this case, under S. 17 of the Provincial Small Causes Courts Act, if the Court of Small Causes is correct, he would have to deposit not only the sum of Rs. 174-7-9, but would have to calculate the exact amount of

interest that was due and, if in making that calculation he was subsequently found to have been short in the amount deposited by half an anna, he would, according to the view that has been taken by the lower Court, necessarily have his application rejected. I do not think that this is so. I think that in depositing Rs. 174-7-9 the defendant-applicant did all that he was called upon to do.

I, therefore, set aside the order of the lower Court and remand the case to the Court of Small Causes to restore it to its original number and dispose of it in accordance with law. Costs will follow the event.

Order set aside.

★ 1925 ALLAHABAD 413

SULAIMAN AND MUKERJI, JJ.

Mohan Singh—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 658 of 1924, Decided on 15th September, 1924, from an order of the S. J., Aligarh.

★ *(a) Evidence Act, S. 35 — Record of First information report is corroborative and not substantive evidence*

The contents of the first information report may be used only as corrobroative piece of evidence but not as a substantive piece of evidence. [P 414 C 1]

(b) Evidence Act, S. 32 (2) — Section applies to Post mortem *report.*

Where the Civil surgeon who conducted the *post mortem* examination had since died,

Held: that the *post mortem* report would be admissible under S. 32 (2) of the Evidence Act as being a statement made by a dead person in the ordinary Course of business and in the discharge of his professional duty. [P 414 C 1]

G. P. Boys—for Appellant.

The Government Advocate—for Opposite Party.

Judgment.—This is a criminal appeal from a conviction under S.302 of of Indian Penal Code, sentencing the appellant to death. The case is also before us for confirmation.

The murder is said to have taken place on the 7th of February, 1916, but it is the prosecution case that the accused has been absconding all this time and hence the delay to bring him on his trial.

The case for the prosecution is that there was enmity between the appellant Mohan Singh and the deceased Baldeo Singh ; as well as between the deceased and one Bhagwant Singh. Bhup Singh was a distant relation of these people, and it is said that his wife or mistress had died shortly before the murder and there was a *shradh* ceremony going to be performed. Bhup Singh had invited these men, and Mohan Singh and Bhagwan Singh had refused to join the cremony unless Baldeo also went there. Ultimately Baldeo consented to go to the ceremony. Mohan singh, Bhagwan Singh and Baldeo Singh started together, accompanied by Shib Singh, who was then a boy of 14 years. When they got near the village in question they met Bhup Singh and also one Purni barber and Jiawan, a washerman. It is said that in anticipation of the ceremony they had to get their heads shaved. While Baldeo Singh was being shaved Mohan Singh got up and struck lathi blows on his head which felled him to the ground. Bhagwan is also said to have given some lathi blows; and ultimately Mohan and Bhagwan both ran away. Baldeo Singh died very probably on the spot.

Bhagwan Singh was arrested and put on his trial and was convicted and sentenced to transportation for life, and his conviction and sentence were on appeal upheld by the High Court.

On the day in question a report was made at the Police Station by a man named Shibni, who is now dead, to the effect that he actually saw lathis being used, and that Mohan Singh, Bhagwan Singh and Gulab (who is a witness for the prosecution in the present case) were striking Baldeo Singh Thakur, with lathis and that Baldeo Singh was lying on the ground. This witness was accompanied by a chaukidar, named Dhan Singh, who is also now dead. It is also a fact that the head constable, who took down the report, is now dead. The Sub-Inspector, who investigated the original case, has now retired and the prosecution has not been able to find out where he now lives.

It is also unfortunate that some of the witnesses who were examined in the case against Bhagwan Singh are also dead. There are Shibni, Rajwa, Jiawan and Fariduddin who recorded the first information report.

It is necessary at the out set to consider the admissibility of some pieces of evidence, which were brought on the record in this case.

As to the first information report, it may be noted that the general diary, having been destroyed, was not formally proved in this case. Reliance on behalf of the prosecution was placed on the first information report, recorded by the head constable. Under paragraph 90 of Chapter IX of the Police Regulations the officer in charge of a police station is required to take down in triplicate in the check receipt book (first information report) any information relating to the commission of an offence. One of these three records is the document which has been brought on the record in this case. It is clear to us that it will be very difficult to exclude it from the scope of section 35 of the Evidence Act as being an official record made by a public servant in the discharge of his official duties. But this report would at the very best only prove that a certain person since dead had made that statement. The contents of the report may therefore be used as a corroborative piece of evidence, to show that the implication of the appellant in the murder is not an after-thought. It certainly will be relevant to establish that he was named at the very start. Beyond this it is difficult to rely on it, and the probative value of this document does not go further. It certainly cannot be used as a substantive piece of evidence.

The next piece of document is the *post mortem* report made by the Civil Surgeon, who is also unfortunately now dead. This was done at the hospital when the dead body of the deceased was taken there. The evidence of the witness Nawab Singh proves that he had accompanied the dead body to the hospital and it was the body of the deceased Baldeo Singh which was examined by the Civil Surgeon. Thus there can be no question as to its identity. This report would be admissible under S. 32 (2) of the Evidence Act as being a statement made by a dead person in the ordinary course of business and in the discharge of his professional duty. As we shall show later, even independently of this report, there is plenty of evidence to show that the head of the deceased was smashed and he died in consequence of these injuries.

The statements of other alleged eye-witnesses made in the previous trial, who are now dead cannot now be adduced in evidence against the appellant, who had no opportunity to examine them, nor can the judgment delivered in that case be admissible in this case.

We may also note that it has not been proved satisfactorily that any proclamation under S. 88 of the Criminal Procedure Code had been issued against the appellant. The evidence in support of this consisted of the statement of Mahmud Husain, constable, who was examined only in the Magistrate's Court and not examined before the Sessions Judge.

Excluding the evidence which is inadmissible, we find, however, that there is plenty of evidence to bring home to the accused the guilt with which he is charged.

As to the actual motive which may have led him to join with Bhagwan Singh in the crime, the evidence of Nawab Singh is very clear. It appears that Mohan Singh and Baldeo Singh were on very bad terms. One Bhajan Brahman who had been an absconding offender was sheltered by Mohan Singh, Baldeo had him arrested at Mohan Singh's *chaupal* and had given information to the police about it. This was some five months before the murder. Bhajan was ultimately sentenced to imprisonment.

The second incident is that there was a dacoity at a village some six miles from the village of these persons, and Baldeo Singh gave information which led to the arrest of Mohan Singh and others. The witness Nawab Singh has stated that when arrested Mohan Singh said openly that Baldeo had given that information and he would have revenge on him. Nawab Singh also stated that Baldeo gave evidence against Mohan Singh. Then again there was a quarrel between Mohan Singh and Baldeo Singh as regards some wall between their houses which Baldeo wanted to repair but Mohan Singh would not let him. It is also stated that Mohan Singh had admitted that he gave information that Baldeo Singh and another person had stolen the bricks for building the wall in dispute from a Railway bridge, on which Baldeo was prosecuted for theft but was ultimately acquitted. This was some 7 or 8 months before the murder. Lastly there was some dispute as regards the occupancy tenancy left by one

Mt. Ramuda. Mohan Singh was anxious that Baldeo Singh should not take it and he declared openly that if Baldeo did receive it he would not long survive it. It is therefore apparent that there must have been more than one reason why the accused might have committed the assault on the deceased.

We may at the outset say that we find it difficult not to reject the evidence of Gulab altogether. If the first information report is legally acceptable, then it may be used to shake the credibility of the witness Gulab Singh in this way, that he was also one of the persons on whom suspicion had fallen as being one of the three assailants. If this be so, then his state ment can not be safely accepted.

As against the evidence of Nainsukh which is to the effect that he saw from a distance Mohan Singh running away with a lathi in his hand, and that when he went to the spot from where he had heard the noise, he found the deceased lying on the ground unconscious, it is alleged that in the first information report Gulab was actually named as one of the assailants, whereas according to the evidence of Nainsukh as given now, he and Gulab were at the field of Gulab together.

Even rejecting the evidence of Gulab and Nainsukh there still remains the statement of the lad Shib Singh and the barbar Purni. It is strongly urged on behalf of the appellant that Shib Singh has not told the whole truth and that his evidence shows that there has been an attempt on his part to shield Gulab Singh and minimise the complicity of Bhagwn inasmuch as he had said that Bhagwn hit him afterBaldeo had died—and he also said that Gulab was not there at all. Whether this contention is well-founded or not, we have no doubt in our mind that the story told by Shib Singh is substantially true. There is no doubt that he was in the company of these persons on the day in question, and therefore must have been an eye witness to what happend. His evidence is further corroborated by the barbar Purni, who has also stated that he saw Mohan Singh who struck the first blow on the head of the deceased. What actual part Bhagwan Singh took it is not now necessary for us to say ; but there can be no doubt that Mohan Singh struck the first blow, and this blow fell on the head. The evidence of Shib Singh is that the deceased began to bleed from the nose and mouth and collapsed on the ground and died, and his head was smashed to pieces. This is corroborated by the medical report which we have already held to be admissible.

Having regard to this evidence we have no doubt in our mind that the accused was guilty of the offence of murder. From the nature of injuries inflicted, even if there had been no intention of causing the death of the deceased, which we are far from saying that it was not, the accused must have known that the injuries were imminently dangerous and likely to cause death.

The only other matter which remains for consideration is the question of sentence. We have already mentioned that the other assailant Bhagwan was transported for life and that sentence was confirmed by the High Court on appeal. The present accused attacked the deceased in the presence of a number of persons, and it is unfortunate that those persons did not come to the rescue of the deceased in time so as to save him from receiving the fatal injuries.The accused has been absent from the village for a long time and according to the Sub-Inspector, even though search was made for him he was not found. His trial therefore has come on after several years. Having regard to the special circumstances of the case we are of opinion that it would serve the ends of justice if we impose a senter ce of transportation for life on the appellant. We may add that we do not think that this would in any way be putting a premium on absconding.

We accordingly uphold the conviction of the appellant but allow the appeal to this extent, that we set aside the sentence of death passed on him and direct that in lieu thereof he be transported for life.

Sentence reduced.

1925 ALLAHABAD 415

SULAIMAN, J.

Munno Devi—Applicant.

v.

The Municipal Board, Agra—Opposite Party.

Criminal Reference No. 69 of 1925, Decided on 4th March 1925, by the S. J., Agra, D/- 20th December 1924.

U. P. Municipalities Act (1919) *S.* 185—*Offence technically committed—Municipal board also not taking prompt action on notices given under S.* 178 *—Nominal fine was levied.*

Where the accused commenced work of repairs in anticipation of sanction of the Board but the Board also was not prompt in taking action upon notice given to them under S. 178.

Held, that though technically an offence was committed a nominal sentence was enough.

[P 471 C 2]

The parties were not represented.

Sulaiman, J.—This is a reference by the Sessions Judge of Agra recommending that the convictions of Mt. Munoo Devi, a school teacher, under Ss. 185 and 307 of the Municipalities Act (Local Act No. II of 1916 as amended by Act No. II of 1919) and the sentences of fine of Rs. 10 on each Count be set aside.

The facts are not in dispute. The lady applied to the Municipal Board on the 29th of July 1924, for permission to rebuild certain parts of her house, but in her application she did not clearly specify the extent of the proposed building. On the 30th of July the municipal draftsman prepared a map showing the western side of the building only. Acting probably on the approval of the Ward Member she began to build in anticipation of sanction. On the 25th of August she applied for the preparation of a new plan including both the western and eastern sides. The Board ordered a new plan to be prepared and the applicant to deposit the necessary fees. On the 2nd of September before any final orders had been passed on her application the Board served a notice on her to remove the building already constructed. Later on namely on the 6th of September the Board sanctioned permission to build the western half of the building. She stopped going any further with the construction and applied to the Board stating that she had constructed the building in anticipation of sanction because her house was cracked and was in danger of falling down if she did not repair it. On the 19th September she was prosecuted for building without permission and also for failing to comply with the orders of the Board.

The learned Magistrate came to the conclusion that she did begin to construct parts of the building before leave was granted to her. He also found that the leave was confined to the construction on the western side only and that no order on her application to build on the eastern side had yet been finally passed. Her application for such a permission is still pending. As to the construction on the eastern side the learned Magistrate on inspection has found that the old *chhajja* projecting on this side has been enlarged and now extends as far as her *chabutra*. The evidence of the Chief Sanitary Inspector was to the effect that a varandah and a latrine were being built in August and that the said latrine was in the balcony. He further stated that the balcony was covered with tin. In this he was supported by another witness who occupies an adjacent house. On the day when the Magistrate inspected the locality he, however, did not notice any tin covering. The construction had apparently been partially removed though perhaps not completely.

The learned Magistrate justly commented on the unsatisfactory way in which the Municipal Board acted in the matter. On the 2nd of September notice to remove the construction was issued which included constructions on both sides. On the 6th of September sanction to construct the western portion was actually granted. Nevertheless on the 19th she was prosecuted with regard to both portions. The Municipal Board also does not seem to have acted promptly on her application of July when the rainy season was on and her house must have been in some danger. The Board certainly cannot be congratulated on the way in which it proceeded against the applicant.

Technically speaking the applicant was guilty of beginning to make her construction even on the western side before formal sanction had been granted. Though the subsequent grant of the sanction ought to have deterred the Board, if it had acted reasonably from prosecuting her for building without permission, it cannot obviate the fact that she did begin to build before any sanction had been granted. Furthermore no sanction has yet been granted for the construction on the eastern side.

S. 178 of the Municipalities Act requires that before beginning within the limits of the municipality to erect a new building or new part of a building or to re-erect or make a material alteration in a building *etcetera* a person shall give notice of his intention to the Board. Under S. 179 sub-clause (1) the Board may require further information and plans to be furnished. Under S. 180 sub-

clauses 3 and 4 if the Board neglect or omit for one month after the receipt of a valid notice under S. 178 to make and deliver to the person who has given such notice an order of the nature specified in sub S. (1) of S 180 such person may by a written communication call the attention of the Board to the omission or neglect, and, if such omission or neglect continues for a further period of ifteen days, the Board shall be deemed to have sanctioned the proposed work absolutely, provided that he does not act in contravention of the Act or any bye-law. In this S 180 a fifth clause has been added which is as follows :—"No person shall commence any work of which notice has been given under S. 178 until sanction has been given or deemed to have been given under this section". Under S. 185 of the Amended Act 'whoever begins, continues or completes the erection or re erection of, or any material alteration in a building or part of a building..... ....without giving the notice required by S. 178 or in contravention of the provisions of S. 180 sub-S. (5) or of an order of the Board refusing sanction or any written directions made by the Board under S. 180 or any bye-law, shall be liable upon conviction to a fine which may extend to Rs. 500.

It is therefore clear that she should not have commenced that work until sanction had been granted. The Board had not neglected or omitted to take steps on her application for one complete month nor did she by written communication call the attention of the Board to any such omission or neglect and then wait for a further period of 15 days. No sanction therefore can be deemed to have been given. The offence mentioned under S. 185 was therefore technically committed.

As to the notice to remove the constructions made by her it is to be noted that before the period of the notice had expired the Board sanctioned permission to build the western half of the building. There was therefore no disobedience so far as this part of the construction was concerned. With regard to the eastern portion the Board had apparently issued notice for demolition on the strength of its bye-law No. 19 which provides that no erection or construction will be allowed over any existing *chabutra* situated in any road or lane less than 16 feet wide. The Board had power under S. 198 of the Act to make such a bye-law. But she apparently did remove the tin covering though possibly not within the time fixed by the notice, if the evidence of the Chief Sanitary Inspector is to be believed. As the tin covering did not exist when the Magistrate inspected the locality it does appear that she has at any rate partially removed the construction leaving very little of it still in existence Under these circumstances an offence under S. 307 has been technically committed

In view, however, of the conduct of the Municipal Board itself which has been adversely commented upon both by the Magistrate and the learned Sessions Judge and in view of the fact that she did stop further construction of the building after receiving the notice for demolition I do not think that this is a fit case in which anything more than a nominal fine should be inflicted on her.

Accordingly while upholding the conviction I reduce the fines to nominal ones of rupee one each on the two counts, In other respects the order is upheld,

Sentence reduced.

1925 ALLAHABAD 417

SULAIMAN, J.

Ram Prasad Singh and others—Defendants—Appellants.

v.

Babu Lal Sonar and others—Plaintiffs—Respondents.

Second Appeal No. 723 of 1924, Decided on 21st November, 1924, against the Decree of the Sub., J., Jaunpur.

(a) *Hindu Law—Succession — Step-mother and step son.*

Obiter: A step-mother cannot inherit from her deceased step-son. 28 *All.* 187; 16 *All.* 221; 37 *Mad.* 256 *Foll.* [P. 418, C. 1]

(b) *Civil P. C., S* 11—*Mortgage by Hindu widow—Mortgagor held entitled to mortgage during her life-time—Question is* res-judicata *in subsequent suit.*

A mortgage was executed by a Hindu widow. A suit for possession brought by the reversioner during the widow's life-time, against the mortgagee on the ground that the mortgagor was only the mistrees of the previous full owner's father and was not the full owner's true mother, and so was not entitled to succeed to his estate was dismissed on the ground that the woman was his true mother and that the suit was premature.

Held; that in a subsequent suit after the mortgagor's death, the plea that the mortgagor had no right to the property as she had been only the step-mother of the previous owner could not be raised. [P 418 C 2]

Haribans Sahai—for Appellants.

S. D Sinha—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for recovery of possession by means of redemption of a mortgage, dated the 10th of January, 1912, executed by one *Mt.* Bhagwanti. The plaintiff claimed to be the nearest reversioner of *Mt.* Bhagwanti's son Ram Nandan. The property in dispute is a fixed rate tenancy which would devolve as land. Both the Courts below have decreed the claim. I am not now concerned in appeal with the question as to how much of the mortgage money was for legal necessity.

The main point which has been urged in the course of argument by the learned Vakil for the appellants is that the lower appellate Court has conceded that *Mt.* Bhagwanti was the step-mother of Ram Nandan. His argument, therefore, is that she was not the legal heir under the Hindu Law of the estate of Ram Nandan and the estate in her hands was not a Hindu widow's estate. It is, therefore, urged that the mortgage made by her was made by a trespasser and the plaintiff cannot succeed as an heir to the estate after her death, nor can he succeed unless he comes within 12 years of the date of the death of Ram Nandan himself.

The abstract point of law which has been urged before me certainly has great force. According to the ruling reported in *Ramanand* v. *Surgiani* (1) under the Mitakshara School of Hindu Law a step-mother not being one of the females expressly named in the Mitakshara and not being included under the term "mother" in Chapter II S. 3, cannot inherit from her deceased step-son. This case has so far not been dissented from in this Court. On the other hand its principle has been accepted in the case of *Nanhi* v. *Gauri Shanker* (2). The Madras High Court where the Mitakshara law prevails has also held in the case of *Seethai* v. *Nachiar* (3) that a step-mother cannot inherit an estate of her step-son

(1) [1894] 16 All. 221=(1894) A. W. N. 47
(2) [1905] 28 All. 187=2 A. L. J. 654=(1905) A. W. N. 242.
(3) [1914] 37 Mad. 236=26 M. L. J. 10=14 M. L. T. 597=(1914) M. W. N. 28=22 I. C. 18 =1 L. W. 11.

This legal aspect of the case would have caused some difficulty in the way of the plaintiff but for the circumstances which I am going to mention now.

In the year 1912 Babu Lal the present plaintiff brought a suit for possession of the property in question against the present defendants by avoidance of the mortgage-deed on the ground that *Mt.* Bhagwanti was only a mistress of the father of Ram Nandan and not his wife and that she was not an heir of Ram Nandan at all. The District Judge in that case in his judgment dated the 2nd of June, 1913, although he wrongly conceded that even if she were the step-mother of Ram Nandan she would succeed to a life interest in the property, found that on the evidence on the record it was satisfactorily proved that Ram Nandan was a son of *Mt.* Bhagwanti and that she was the married wife of his father, that is to say, that he was not her step-son but her true son. On that finding the suit was obviously premature and was accordingly dismissed.

In the face of that finding and the dismissal of that suit on that ground, it is not open to the defendants to say that Ram Nandan was a step-son and that *Mt.* Bhagwanti was not the heir to his estate. That finding and the dismissal operate as *res judicata* between the parties, and it is not open to any party to go behind it. If such a thing were allowed the result would be that the previous suit was dismissed on the ground that it was premature and the second suit would have to be dismissed on the ground that it is barred by limitation. It must, however, be conceded that all this trouble has been caused by the fact that in paragraph 4 of the plaint the plaintiff in spite of the contrary position which he had taken up in the previous litigation admitted that *Mt* Bhagwanti was the step-mother of Ram Nandan. The lower appellate Court naturally, therefore, took it for granted that she was the step-mother. For this error it is the plaintiff himself who is to blame.

On the other hand it is also to be borne in mind that the question that as step-mother *Mt.* Bhagwanti could not succeed to the estate of Ram Nandan, was never raised by the defendants anywhere in the course of these proceedings, nor was a plea taken that the claim was barred by time. There was no such plea taken

before either of the Courts below, nor in fact is any such ground taken in the memorandum of appeal which is filed in this Court.

The defendant Ram Prasad being a mortgagee cannot deny the title of the mortgagor or plead adverse possession. The other defendants are members of his joint family. Under the circumstances, no question of the suit being barred by six months rule of limitation under S. 79 of the Tenancy Act, can arise.

I accordingly dismiss this appeal but order that the parties do bear their own costs of this appeal.

Appeal dismissed.

★ 1925 ALLAHABAD 419

RYVES, J.

Daulat Ram—Applicant.

v.

Kanhaiya Lal—Opposite Party.

Criminal Rev. Nos. 668 and 664 of 1924, Decided on 1st January, 1925, from an order of the S. J., Meerut.

★ *Limitation Act, S. 12—Proceeding under Criminal P.C., S. 476 treated as separate case—Formal order separately drawn up—Time taken in getting copy of the order should be excluded.*

Where an application, under S. 476 of the Criminal P. C. was treated as a separate miscellaneous civil case, and given a separate number and was treated quite distinct from the civil suit which gave rise to it and when the Court passed its order, according to the approved practice, a formal order was drawn up on the printed form provided for such formal order in miscellaneous cases, embodying the result of the judgment passed in the case.

Held: that the time taken for obtaining a copy of the formal order should be deducted under the provisions of S. 12 of the Limitation Act. 1920 *P. H. C. C. 75 Foll.* [P. 419, C 2]

Panna Lal and *Kailas Chandra Mital*—for Applicant.

Nehal Chand and *Saila Nath Mukerjee*—for Opposite Party

Judgment.—These applications in criminal revision arise under the following circumstances:—

The plaintiff in a suit in the Munsif's Court at Meerut applied to that Court under S. 476 of the Criminal Procedure Code to prosecute the two defendants. The learned Munsif rejected the application. The plaintiff thereupon filed an appeal in the Court of the Sessions Judge of Meerut under S. 476 (b) of the Criminal Procedure Code. The order of the Munsif was passed on the 21st of May, 1924. The appeal was filed in the Court of the Sessions Judge on the 24th of July, 1924. The learned Sessions Judge held that the appeal was time-barred and declined to hear it. He says: "In a case of this nature I hold that limitation begins to run from the date of the order appealed against.

There was no need to file a copy of the final order in this matter. I, therefore, hold that the appeal is time-barred.,,

Article 154 of the First Schedule of the Limitation Act applies to an appeal of this kind and under that article 30 days are allowed from the date of the sentence or order appealed from.

The application by the plaintiff under S. 476 of the Criminal Procedure Code was treated as a seperate miscellaneous civil case, and given a separate number and was quite distinct from the civil suit which has been decided. When the Court passed its order, according to the practice approved of by this Court, a formal order was drawn up on the printed form which is provided for such formal orders in miscellaneous cases, embodying the result of the judgment passed in the case.

The plaintiff before presenting his appeal in the Court of the Sessions Judge applied for and obtained a copy of this formal order and filed it along with his memorandum of appeal.

According to the rules of this Court an appeal filed from a miscellaneous order of this kind on the civil side, at any rate, must be accompained by a copy of the formal order which the Courts are directed to draw up.

If the time taken for obtaining a copy of this formal order can be deducted under the provisions of S. 12 of the Indian Limitation Act, then admittedly the appeal was within time.

The question is whether the learned Judge was right in holding that in this case limitation began to run from the date of the order and that there was no necessity to file a copy of the formal order.

S. 12 clause (2) of the Indian Limitation Act provides: "The time requisite for obtaining a copy of the.....order appealed from shall be excluded."

I think, therefore, that the Court below should have held that the appeal was filed within time.

It is argued that it was unnecessary to make a final order in such a case and, therefore it was unnecessary to file a copy of such an order, if made. In the case of *Mahesh Kant Choudhry* v. *Ram Prasad*

Rai (1), it was held that in a case in which it was not necessary to prepare a decree but where one is actually prepared, the time for obtaining a copy of the decree should, under S. 12 of the Limitation Act be excluded in computing the period of limitation for appeal. In principle I agree with that ruling. Here, under the rules, a formal order was drawn up embodying the decision of the Munsif. A copy of that formal order was promptly applied for and when obtained, an appeal was promptly lodged. I think the plaintiff was quite justified in thinking that it was necessary for him to file a certified copy of the formal order against which, in fact, he was appealing. I think, therefore, that lower Court should have heard the appeal.

The learned Sessions Judge has gone on leave and his successor is as ignorant of the merits of the case as I am. As the record is here, instead of sending the case back, I propose to decide the matter myself.

I have heard the learned counsel on behalf of the applicant and have examined the record and the order of the Munsif.

The plaintiff sued for the removal of a tin shed which it was alleged had been partly inserted into the western wall of the plaintiff's house.

The two defendants verified a written statement in which it was in the first place denied that the shed penetrated into the wall of the plaintiff at all and, secondly, it was stated that the wall did not belong to the plaintiff alone but was the joint property of the plaintiff and the defendants. Neither of the two defendants gave evidence in the case.

The suit was heard and decreed and on appeal that decree was upheld.

The reafter the plaintiff applied to the Munsif for an order under S. 476, Criminal Procedure Code, to prosecute the two defendants for having falsely varified their written statement with reference to the two matters above mentioned.

The learned Munsif issued notice to the defendants and examined them. He also inspected the locality and he found that from external appearance it was impossible to say that the shed in any way penetrated into the wall. On removal of the plaster, however, it was found that in some places the tin penetrated into the wall for about two inches. This was only here and there. On that ground he held that nobody could say what really was the position of affairs until the plaster had been removed as nothing was visible from the outside.

On the second point I am told that there is strong evidence to prove that the statement in the written statement that the wall was a party wall was false and must have been false to the knowledge of the defendants. It is stated that they did not produce, when called upon, the sale-deed of their house, and if they had done so, this would have shown conclusively that the western boundary of their house was the plaintiff's house and that this proves conclusively that no part of that wall belonged to the defendants. This may be so but, after all, the written statement is drawn up by legal practitioners on instructions received and it may be really that the mistake was made by them and possibly the defendants were not careful enough to verify the accuracy of the statement before signing it. But the learned Munsif has found that this was not done deliberately in order to deceive the Court. Had this been the case, I would have expected the defendants to have come into the witness-box and sworn in support of their statements. I am not prepared to hold that the Munsif was wrong in his opinion. I think that under the circumstances if the defendants have been guilty of carelessness, and I do not think it can be said that it is proved that they have been guilty of much more, they have already been sufficiently punished by having to defend this case in three Courts. I, therefore, reject the applications.

Applications rejected.

(1) [1920] 1 P. L. T. 33=54 I. C. 630=(1920) P. H. C. C. 45.

1925 ALLAHABAD 420

MEARS, C. J. AND PIGGOTT J.

Ram Prasad Singh—Plaintiff—Appellant.

v.

Nepal Singh and another—Defendants—Respondents

Letters Patent Appeal No. 122 of 1924, Decided on 13th March, 1925, from the judgment of Neave, J., reversing a decree of Sub. J., Jaunpur.

Agra Tenancy Act, S. 22—Mortgage of property by female absolute owner—Mortgage is valid and husband's heirs cannot oust mortgagee after her death.

Plaintiff sought recovery of possession as the usufructuary mortgagee of certain plots mortgaged to him under a deed executed in 1914, by a Hindu widow who was the absolute owner of

the property mortgaged. She put the plaintiff into possession, and he remained in possession for six years. On the lady's death, the defendants, her heirs being the nearest reversioners of her late husband, succeeded in ejecting the plaintiff.

Held: that plaintiff was entitled to recovery of possession. [P 421, C 2]

Held further that ex-proprietary tenancy in favour of the lady did not necessarily come into existence from the date of the mortgage but if it did, it was certainly surrendered by her to the only person who could be treated as the land-holder that is, the plaintiff mortgagee, and if any ex-proprietary tenancy did continue up to the date of her death, it certainly did not devolve on the defendants. 1924 *All.* 737 *Foll.* [P 421, C 2]

Shiva Prasad Sinha—for Appellant.

S. D. Sinha—for Respondents.

Piggott, J.—This was a suit by which the plaintiff sought recovery of possession as the usufructuary mortgagee of certain plots mortgaged to him under a deed of November 12 1914. The mortgage was effected by a Hindu widow of the name of Mt. Gaura, but it has been found as a fact that she was the absolute owner of the property mortgaged. She purported to mortgage with possession three specified plots of land. She put the plaintiff into possession, and he remained in possession for six years. He neither received any rent from Mt. Gaura and still less did he pay any rent to her. On the lady's death, the defendants, who are her heirs, being the nearest reversioners of her late husband, succeeded in ejecting the plaintiff. Hence the present suit. It was dismissed by the first Court, but a decree for recovery of possession was given by the learned Subordinate Judge in a carefully reasoned judgment with which we find ourselves in substantial agreement. A learned Judge of this Court in second appeal has reversed that decision and restored the decree of the first Court on the strength of certain reported cases referred to in the judgment now under appeal, dealing with the rights of the mortgagee in respect of ex-proprietary holding which has come into existence from the date of the mortgage by operation of law. There has been quoted to us in argument the case of *Tolai Misir* v. *Muneshar Koeri* (1), which is substantially on all fours with the case now before us and is entirely in the plaintiff's favour. With regard to the rulings relied upon by the learned Judge of this Court in the present case, we are content to say that they are all distinguishable on the facts. We do not desire to stand committed to the opinion that an ex proprietary tenancy in favour of Mt. Gaura necessarily came into existence from the date of the mortgage in the present case; but if it did, it was certainly surrendered by her to the only person who could be treated as the "landholder," supposing an ex-proprietary tenancy to have come into existence, that is, the plaintiff-mortgagee. Moreover, if any ex proprietary tenancy did continue up to the date of Mt. Gaura's death, it certainly did not devolve on the present defendants (*vide*: S 22 of the Local Tenancy Act), and it must be held to have escheated in favour of the landholder, that is to say, in favour of the present plaintiff. We have no doubt that in this case the lower appellate Court was right in holding that the plaintiff was entitled to succeed in his claim for possession. We allow this appeal and, setting aside the decree of the learned single Judge of this Court, restore that of the lower appellate Court. The plaintiff is entitled to his costs of both hearings in this Court.

Appeal allowed.

(1) 1924 All. 737=22 A. L. J. 463.

★ 1925 ALLAHABAD 421

SULAIMAN AND RYVES, JJ.

Gajadhar Singh—Plaintiff—Appellant.

v.

Hari Singh and others — Defendants—Respondents.

Second Appeal No. 142 of 1923, Decided on 8th January, 1925, from a decree of the Sub. J., Muttra.

(a) *Limitation — Starting point — Civil Court's decree favouring plaintiff within 6 years of denial of plaintiff's title — Subsequent denial of plaintiff's title—Limitation starts only from later denial.*

Where within six years of the denial of the plaintiff's title there is an adjudication by a Civil Court deciding against the defendant, a subsequent denial of the plaintiff's title is a fresh denial and not necessarily in continuation of the preceding one. Time must be calculated only from the later denial. [P 423, C 1]

★ (b) *Specific Relief Act, S. 42—Suit by mortgagor to declare his title—Time for redemption not expired—Prayer for redemption is not essential.*

If long before the expiry of the period for redemption the mortgagees are denying the title of the mortgagor and are casting a cloud on his

title and there is a danger that by lapse of time reliable evidence may disappear, it is open to the mortgagor to bring a suit for a mere declaration even though he is not prepared to pay the mortgage money at that time and his suit for a mere declaration of his title without a prayer for redemption is not incompetent. 20 *A. L. J.* 557 *Dist.*; 18 *All.* 320 *Fol.* [P. 423, C. 2]

★ (c) *Hindu Law—Alienation—Joint family—Revenue partition binding on father binds also son.*

Where the effect of a revenue partition is to bind the father of a Hindu joint family conclusively, his son will be equally bound although his name may not have been entered in the revenue papers. [P. 424, C. 2]

M. L. Agarwala—for Appellant.

Narain Prasad Asthana—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff is the owner of the property in suit and that the defendants have no right therein except as representatives of the mortgagee.

The Court of first instance decreed the claim and disallowed the various objections raised by the defendants.

On appeal the learned Subordinate Judge has allowed the appeal and dismissed the suit on three grounds :—

(1) That the suit was barred by time ;

(2) That the suit was barred under S. 42 of the Specific Relief Act ; and

(3) That the claim was barred by the provisions of S. 233 (K) of the Land Revenue Act.

The facts of this case are slightly complicated and it is necessary to refer to them briefly.

Dilsukh and Mansingh were two brothers and in 1876 they made a mortgage of their 3/16th share each in favour of the plaintiff's ancestor for a sum of Rs. 700 each. Subsequently Dilsukh died and in 1896, his widow, Mt. Phulo, and Mansingh made a second mortgage of their 6/16th share in the village to the same mortgagee for another sum of Rs. 1,400. In 1910 Mansingh purported to sell the entire 6/16th share to the defendants. By that time Mt. Phulo had died. When the defendants applied to the Revenue Court for entry of their names by virtue of this last sale-deed, the daughters of Dilsukh raised certain objections but their objections were disallowed and the names of the defendants were entered in the revenue papers in 1911. In 1915 the two daughters proceeded to sell their 3/16th share to the plaintiff.

The defendants made a deposit under S. 83 of the Code of Civil Procedure to redeem the previous mortgages and the plaintiff submitted to redemption of the second mortgage which had been executed by Mt. Phulo and Mansingh jointly and also of Mansingh's half share in the first mortgage but they declined to allow redemption of the alleged half share of Dilsukh under the earlier mortgage of 1876.

Accordingly in 1916 the present defendants instituted a suit for redemption against the plaintiff. In that suit the defendants put forward two alternative claims. They said, that in the first place, they had acquired the interests of Dilsukh by virtue of the sale-deed of 1910 inasmuch as Dilsukh and Mansingh were really joint and in the alternative they alleged that in any case as they had redeemed the second mortgage of 1876, they were entitled to redeem the first mortgage as persons who had stepped in the shoes of the subsequent mortgagees. The Court tried the question of title and recorded clear findings that Mansingh and Dilsukh were really separate and that Mansingh had no right to Dilsukh's share in 1910. It accordingly held that the present defendants had no right to redeem the mortgage of 1876 as proprietors and representatives of Dilsukh but it held that inasmuch as the defendants had been allowed to redeem the second mortgage of 1896 made by Mt. Phulo and Mansingh, they had stepped into the shoes of the subsequent mortgagee and in that way they were entitled to redeem the first mortgage as subsequent mortgagees. A decree for redemption was accordingly passed.

We may note that all this time the names of the defendants had been recorded in the revenue papers as mortgagees. They after the redemption, applied that their names should be recorded as proprietors inasmuch as the mortgage had been satisfied in or about 1917. After the redemption decree they were actually entered as full proprietors.

In 1921 the present suit was instituted for the declaration mentioned above. The lower appellate Court has held that the present claim is barred by limitation because the cause of action in favour of the plaintiff arose in 1911, when the objections of the daughters of Dilsukh, the predecessor-in-title of the present plaintiff, were disallowed. It has thought that the subsequent proceedings of 1917 in the Reve-

nue Court were in continuation of the previous proceedings and did not give a fresh cause of action to the plaintiff. In our view this view is clearly erroneous. The lower appellate Court has ignored the fact that in between 1911 and 1917 there was an adjudication by a Civil Court by which it was clearly held that the present defendants had not acquired the proprietary interest of Dilsukh and that they were merely in the position of subsequent mortgagees. After that adjudication it is difficult to hold that it was still the duty of the present plaintiff to bring a suit for a declaration to the same effect within 6 years of 1911. The proceedings of 1917 in the revenue Court were taken in spite of and subsequent to the adjudication by the Civil Court.

The denial of the plaintiff's title was, therefore, a fresh denial and not necessarily in continuation of the preceding one. Under the circumstances the present suit having been instituted within six years of 1917 was not barred by time.

The learned Subordinate Judge seems to have been of opinion that inasmuch as it was open to the present plaintiff to bring a suit for redemption on payment of the mortgage money, but he has chosen merely to ask for a declaration, he has omitted to claim a consequential relief which he was entitled to claim and his suit for a mere declaration is, therefore, not maintainable. In support of this view he has relied on the case of *Mufti Ali Jafar* v. *Fazil Husain Khan* (1). In that case all that was held was that a relief by way of a declaration regarding the validity or invalidity of an alienation made by a trustee comes within the provisions of clause (*h*) of S. 92 of the Code of Civil Procedure and a suit in respect of it must be brought in conformity with the provisions of that section and that, therefore, a mere suit for a declaration that the transfer was invalid without the sanction of the Legal Remembrancer was not maintainable. On the other hand, the appellant relied on the case of *Nathu Singh* v. *Gumani Singh* (2) which is directly in point. It seems to us that the suit cannot fail on the technical ground that a further consequential relief has not been asked for. The plaintiff has sixty years from the time of the mortgage to redeem the property by tendering the mortgage money. If long before the expiry of that period it turns out that the defendants are denying the title of the mortgagor and are casting a cloud on his title and there is a danger that by lapse of time reliable evidence may disappear, it is open to the plaintiff to bring a suit for a mere declaration even though he is not prepared to pay the mortgage money at that time. This was the view clearly expressed in the case last quoted with which we fully agree. The suit, therefore, cannot fail on this technical ground.

The last point taken by the learned Subordinate Judge was that the claim was barred by S. 233 (K) of the Land Revenue Act. The Courts below have proceeded on the assumption that Inderjit, the plaintiff's father, was somehow or other bound by the partition proceedings, and if he had been alive, he himself would not have been entitled to maintain the suit. They have then proceeded to consider whether the present plaintiff could also be bound. This they have held to be so even though his name was not actually entered in the revenue papers. On the abstract question of law it is impossible to differ from the view taken by the Courts below. If the effect of the partition proceedings was to bind Inderjit conclusively, it seems to us that the present plaintiff who is a member of a joint Hindu family with him would be equally bound even though his name was not actually entered in the revenue papers. If Inderjit as the head of the family and as the recorded proprietor had full opportunity to object, then the other members of his family may be equally bound. The Courts below, however, have not set forth the necessary facts which would enable us to dispose of this point finally as to whether the effect of the partition proceedings was really such as to operate as a bar to the present case. All that appears at present is that some co-sharers had applied for the partition of the original mahal, Himmat Singh, in which the property now in suit was then situated in khewats Nos. 1 and 7. Inderjit, the father of the plaintiff, was made a party to the partition proceedings. He died during the pendency of the proceedings and the plaintiff was brought on the record in his place at some, probably late, stage in the case and the only other thing that is known is that the property now in dispute was, as a result of the partition,

(1) 1922 All. 349=44 All. 6[illegible] =20 A.L.J. 557.
(2) [1896] 18 All. 320=(1896) A. W. N. 86.

allotted in mahal Bhanwar Singh which we understand belongs to the defendants. It is not quite clear whether Inderjit Singh had any share in the original mahal independently of the mortgaged property nor is it clear whether Inderjit was arrayed on the side of the applicants for partition or was on the side of the non-objectors It is further not clear whether the result of the partition was that Inderjit's separate property, if any, (other than the property in suit) went out of Bhanwar Singh mahal. Without these facts having been made clear, it is impossible to say whether there was or was not any express or implied conflict of interest between the plaintiff's predecessor in-title, Inderjit, and the present defendants. It is, therefore, impossible to decide this appeal without clear findings on the following points :—

We accordingly send down the following issues to the lower appellate Court for determination :—

(1) Did Inderjit possess any share in mahal Himmat Singh other than the properties mortgaged which are not in dispute ?

(2) If so, did any property of Inderjit go out of a mahal other than mahal Bhanwar Singh ?

(3) Did Inderjit die before the expiry of the time fixed for filing objections ?

The counsel for the parties are agreed that only fresh documentary evidence should be allowed and no oral evidence be permitted. The lower appellate Court will allow parties to produce documentary evidence only. The findings should be returned preferably within one month but if that be not possible then two months. On return of the findings the usual ten days will be allowed for filing objections.

Issues remitted.

1925 ALLAHABAD 424

LINDSAY AND KANHAIYA LAL, JJ.

Amir Haidar and another—Plaintiffs—Appellants.

v.

Ali Ahmad and another—Defendants—Respondents.

Second Appeal No. 411 of 1924, Decided on 27th March 1925, from a decree of the Dt. J., Farrukhabad.

Mahomedan Law—Pre-emption—Guardian de facto cannot consent to a sale so as to affect minor's right to pre-emption.

Paternal uncle cannot, as *de facto* guardian consent to a sale so as to affect the rights of his minor nephew to claim pre-emption of the property sold. [P 425 C 1]

Kailas Nath Katju—for Appellants.

Peary Lal Banerjee—for Respondents.

Lindsay, J.—This is a somewhat peculiar case. The suit was a suit for pre-emption and was brought by two persons, Sh. Amir Haidar and Ahmad Raza. Sh. Amir Haidar was the uncle of Ahmad Raza, who in the plaint, was described as being a minor 7 years old.

The person who sold the property was a lady named *Mt.* Nawis-un nissa, who was the step sister of Sh. Amir Haidar, the first plaintiff.

The purchasers were the defendant Nos. 1 and 2.

The Court of first instance decreed pre-emption on payment of a sum of Rs. 650.

The lower Court has dismissed the suit entirely.

The reason why the lower Court has dismissed the suit is this In the trial Court it was asserted by the purchasers that the negotiations for sale had taken place through the first plaintiff, Sh. Amir Haidar, who had consented to the sale both on his own behalf and on behalf of his minor nephew, Ahmad Raza.

The Subordinate Judge, who tried the suit, did not believe this evidence and held that consent was not proved and consequently he gave a decree for pre-emption. The lower appellate Court, however, does find that the first plaintiff, Sh. Amir Haidar, did consent to the sale and consequently he had no right to maintain the suit for pre emption.

We are bound by the finding of fact of the lower appellate Court, but the question still remains whether, if it is taken that Amir Haidar consented to the sale, the right of the minor to pre-empt has been lost. The argument before us is that Sh. Amir Haidar had no power to bind the infant by his consent. It has been pointed out that Amir Haidar was the paternal uncle of the minor and as such was not a guardian under the Mohammadan Law, nor is he a testamentary guardian. nor has he been appointed a guardian by the Court. In fact, so far as the Mohammadan Law is concerned, he has no status of a guardian as regards the

minor Amir Haidar, and so the argument, is that the only find ng being that Amir Haidar consented for himself and purported to consent on behalf of the minor, the minor cannot be bound and was entitled to a decree for pre-emption. On the other hand, it is argued that inasmuch as Amir Haidar was allowed to bring this suit for himself and as the next friend of the minor, the minor should be held bound by the act of Amir Haidar. That reasoning does not appeal to us. It seems to us that if Ahmad Raza is entitled to a right of pre emption, as is admittedly the case, then it must be shown that something in law was done which would be a bar to Ahmad Raza seeking pre-emption in this case. The bar which is held up against him in the consent given by his uncle, and if that consent is not valid in law, then we think it cannot be pleaded as a bar to Ahmad Raza's right to have pre-emption.

We hold, therefore, that nothing is shown to stop the claim for pre-emption being enforced on behalf of the second plaintiff, the minor Ahmad Raza, and we think that he was entitled to a decree accordingly. We, therefore, allow this appeal, set aside the decree of the Court below and give the minor, Ahmad Raza, a decree for pre-emption on payment of Rs. 650. We allow a period of two months for payment of this sum. If the money is deposited into Court within this period then the plaintiff will be entitled to his costs here and hitherto. If the plaintiff fails to deposit the money within the time so limited then his suit will stand dismissed with costs in all Courts.

Appeal allowed.

★★ 1925 ALLAHABAD 425

KANHAIYA LAL, J.

Parbhu Dayal Singh and another — Plaintiffs-Appellants.

v.

Tirbhuwan Singh and others—Defendants—Respondents.

Second Appeal No. 320 of 1923 Decided on 4th August 1924, from the decree of the Dt. J., Ghazipur, D/- 1st December 1922.

★★ *Civil P. C., O. 9, R. 3—Suit against several defendants—One defendant only present—Plaintiff and other defendants absent—Suit dismissed for default—Plaintiff can bring fresh suit against absent defendants for whole amount if cause of action be joint and several—Contract Act, S. 43.*

Where on the day fixed for hearing only one of several defendants appears and the plaintiff also fails to appear, and the suit is consequently dismissed for default, the plaintiff can bring a fresh suit on the same cause of action against the absent defendants and can get a decree for the whole amount if the cause of action be joint and several against all defendants. 10 *N. L. R.* 39 *Foll.* [P 426 C 1]

U. S. Bajpai—for Appellant.

P. L. Banerjee—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent for 1326 to 1328 F. A previous suit was brought for arrears of rent for the same period against the present defendants. One of the defendants, Tirbhuwan Singh, attended on the date fixed for its hearing but he filed no defence and was not examined. The plaintiffs and the other defendants were absent. The suit was therefore dismissed for default.

The sole question for consideration in this case is whether the present suit is maintainable in respect of the same cause of action under O. IX r. 9 of the Code of Civil Procedure. The Courts below have dismissed the claim, holding that the plaintiff was precluded from bringing a fresh suit in respect of the same cause of action, because one of the contesting defendants had attended, when the suit was dismissed for default. O. IX r. 3 lays down that where neither party appears, when a suit is called on for hearing, the Court may make an order that the suit be dismissed. But such a dismissal does not preclude the plaintiff from bringing a fresh suit for the same relief subject to the law of limitation against the same defendant. So far as the defendants, Mukundi Singh and Dip Narain Singh, were concerned, it may well be said that neither party appeared when the suit was called on for hearing; and as against them the dismissal was one for default of both the parties. As regards Tirbhuwan Singh, the Court ought to have either taken his defence or asked him whether he admitted the claim or denied it. The rent claimed was fixed in a previous proceeding between the parties under S. 36 of the Agra Tenancy Act (U. P Act II of 1901). If Tirbhuwan Singh ad

mitted his liability, it was open to the Court under O IX r. 8 C. P. C. to have decreed the claim as against him in accordance with that admission. If he denied it, the suit was liable to be dismissed against him for default with the consequence mentioned in O. IX r. 9 of the Code of Civil Procedure. The law contemplates a partial or a total dismissal of a suit for the default of the plaintiff under r. 8 and in either case it precludes the plaintiff from bringing a fresh suit in respect of the same cause of action. But as pointed out in *Bukharam* v. *Ramji* (1), a fresh suit in respect of the same cause of action against the defendants, who were absent, is not barred

The rent claimed was due in respect of the joint tenancy and could have been recovered under S. 43 of the Indian Contract Act (IX of 1872) from any one or more of the joint promissors. As laid down in *Muhammad Askari* v. *Radhe Ram Singh* (2), the effect of S. 43 is to exclude the right of a joint contractor to claim to be sued along with his co-contractors ; and a judgment, obtained against some only of the joint contractors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. In *Abdul Aziz* v. *Basdeo Singh* (3) it was similarly held that the liability of the joint holders of a fixed rate tenancy for the payment of rent was joint and several ; and the failure of a plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record representatives of a deceased tenant was no bar to the continuance of the suit against the remaining defendants. In *Joy Gobind Laha* v. *Monmoth Nath Banerji* (4) and *Mool Chand* v. *P. Alwar Chetty* (5) a similar view was taken. In fact it was held in the latter case that a release by the decree-holder of some joint debtors from a liability under the decree did not operate as a release of the other judgment-debtors from their liability.

The plaintiff is, therefore, entitled to recover the whole rent from the remaining defendants, Makundi Singh and Dip Narain Singh, each of whom was jointly and severally liable for the whole arrears claimed as much as the defendant Tirbhuwan Singh, against whom the claim was somehow or other dismissed for default. This appeal must therefore be allowed and the claim of the plaintiff will stand decreed with costs here and hitherto against the defendants, Makundi Singh and Dip Narain Singh, who will bear their own costs throughout. The defendant Tirbhuwan Singh against whom the claim stands dismissed, will get his separate costs, if any from the plaintiff-appellant in all the Courts.

Appeal allowed.

(1) [1914] 10 N.L.R. 39=24 I.C. 878.
(2) [1900] 22 All. 307=(1900) A.W.N.73.
(3) [1912] 34 All.604=17 I.C. 89=10 A.L.J.183.
(4) [1906] 33 Cal. 580.
(5) [1916] 39 Mad. 548=29 I.C. 303=17 M.L.T. 449.

1925 ALLAHABAD 426

MUKERJI AND BOYS, JJ,

Babu Ram—Decree-holder—Appellant.

v.

Banke Behari Lal—Judgment-debtor—Respondent.

Second Appeal No. 424 of 1923. Decided on 20th February 1925, from a decree of the Dt. J., Mainpuri.

Civil P. C., S. 105—Interlocutory order—Appeal from decree—Interlocutory order cannot be attacked unless affecting merits of the case.

Unless the interlocutory order affects the merits of the case, it cannot be challenged in an appeal against the decree in the case. [P 427 C 1]

Where a final decree was challenged on the sole ground that the order setting aside the abatement of the suit which (the order) preceded the decree was unjustifiable :

Held : that the order did not affect the merits of the case and that it could not be challenged in an appeal from the decree in the case. 13 *A. L. J.* 1089 *Foll.* [P 427 C 1]

Shambhu Nath Chaube—for Appellant.

N. C. Vaish—for Respondent.

Mukerji, J.—The following facts may be stated in order to make the judgment intelligible.

The appellant obtained a decree for sale which was affirmed on appeal on the 29th of November, 1917. When he made an application for a final decree, about three years after the passing of the appellate decree, it was discovered that two of the defendants in the suit had died more than 90 days before the making of the application. The Court of first instance declared that the suit had abated. The appellant, thereupon, filed an application to have the abatement set aside. The respondents were heard and an order was made setting aside the abatement. Then

followed, in due course, a final decree for sale. Against that final decree for sale, the respondents appealed and the sole ground that they took for challenging the decree was that the Court of first instance was not justified in setting aside the abatement.

The learned District Judge was of opinion that the Court of first instance should not have set aside the abatement and, decreeing the appeal, set aside the order making the decree final.

In this Court two grounds have been urged :—

The first is that it was not open to the respondents to appeal against the final decree on the sole ground that the order setting aside the abatement was unjustifiable.

The second ground is that the order setting aside the abatement did not touch "the decision of the case", and the lower Court was, therefore, not justified in setting aside the final decree passed in the case.

We have considered both the points. We think that we can satisfactorily dispose of this appeal on the second ground and in this view we need not decide the first point urged.

It appears that S. 105 of the Civil Procedure Code allows a party, who is not entitled to appeal against an interlocutory order, to challenge that order, when he is appealing against the decree in the case. But the interlocutory order, unless it affects the merits of the case, will not be allowed to affect the decree. In other words unless the interlocutory order affects the merits of the case, it cannot be challenged. In the case of *Puran Mal* v. *Tarif* (1), an *ex parte* decree had been passed. It was later on set aside and when an appeal was filed against the decree in the suit, the order setting aside the *ex parte* decree was challenged. On the question whether it was open to the party appealing to attack the order setting aside the *ex parte* decree, the following remarks were made :—

"In our opinion the question of propriety of setting aside the *ex parte* decree was a matter which could not be considered by the learned District Judge in appeal. No appeal is given by the Code from an order setting aside an *ex parte* decree. It cannot be taken exception to later on in a regular appeal *because it did not affect the merits of the case.*"

(1) [1915] 13 A. L. J. 1089=30 I. C. 2.

We are also of opinion that the order setting aside the abatement did not affect the merits of the case. As we read S 105 of the Civil Procedure Code the words "affecting the decision of the case" are equivalent to "affecting the merits of the case".

The orders setting aside the abatement brought on the record the proper parties. The merits of the case had nothing to do with the array of the parties. The merits of the case related to the correctness or otherwise of the contentions of the parties placed before the Court. If this view be correct, the final decree could not be challenged on the sole ground that the order setting aside the abatement and trying the suit on its merits was a wrong order.

We allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. The respondents will pay the appellant's costs in this Court and in the Court below. The counsel's fee in this Court will be calculated on the higher scale.

Appeal allowed.

★★ 1925 ALLAHABAD 427

MUKERJI AND SULAIMAN, JJ.

Parmanand Pandit and others—Plaintiffs—Appellants.

v.

Mata Din Rai and others—Defendants—Respondents.

Second Appeal No. 449 of 1923, Decided on 4th March 1925, from a decree of the Dt. J., Ghazipur.

★★ (a) *T. P. Act, S. 60 — Clause entitling mortgagee to retain possession after redemption is clog.*

A covenant under which the mortgagee, even after redemption, is entitled to retain the property on payment of a fixed rent, is a clog on the equity of redemption and unenforceable in a Court of equity. 9 *Bom.* 524 *Foll.*

[P 428 C 2]

(b) *T. P. Act, S. 40 — Covenant running with the land—Contract to grant lease is not — Specific Relief Act, S. 27,*

A contract for the grant of a lease does not run with the land and cannot, therefore, bind the representatives of the original parties thereto.

[P 429 C 1]

(c) *T. P. Act, S. 63—Grove is accession and is incapable of separate enjoyment.*

Where a mortgagee planted grove on the property with express consent of mortgagors,

Held: that the grove was an accession and incapable of separte enjoyment and that mortgagors must pay compensation for the grove at the time of redemption. 43 *All.* 638 (*F. B.*) *Dis'*. [P. 429, C. 1]

M. L. Agarwala—for Appellants.

Uma Shankar Bajpai — for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage, dated the 18th of February 1878, executed by the predecessors-in-title of the plaintiffs in favour of the ancestors of the defendants. The mortgage was for a sum of Rs. 160 and was usufructuary. Among other conditions, it provided that the mortgagees would be entitled to appropriate the profits in lieu of interest and that at the time of redemption, there would be no accounting between the parties. There was a further provision that if in Jeth of any year the principal sum was paid, then the property would be redeemed. There was a clause that even after redemption the mortgagees would not be ejected but they would hold on the land as lessees on payment of annas 8 per bigha annually. There was a further provision that the mortgagees would be entitled ei her to cultivate the land or to plant a grove on it. The mortgagees, some time after the mortgage, it is not quite clear when but at least more than 25 years before the suit, did plant a grove consisting of numerous fruit trees like mangoes, jamun, mahua, guava etc., as well as a large number of shisham trees.

The plaintiffs claimed that they were entit ed to actual possession on payment of the principal sum only. The defendants contested the claim and pleaded that even after redemption they were entitled to hold on payment of the fixed rent. They further claimed that if possession was to be given to the plaintiffs, they must get full compensation for the grove which stands on the mortgaged land.

The Court of first instance was of opinion that in spite of the clause entitling the mortgagees to remain in possession as lessees, the plaintiffs were entitled to actual possession of the land but that they must pay compensation. It, however, assessed the compensation on the actual costs incurred which it fixed at Rs. 100. On appeal the learned District Judge agreed with the view of the first Court that the plaintiffs were entitled to actual possession of the land but thought that the compensation awarded was not fair. The value of the grove, in his opinion, ought to have been taken into account. He accordingly remanded the case, and, after the findings were returned, he fixed the compensation at Rs. 1,800.

The plaintiffs have come up in appeal to this Court and the defendants have filed cross objections In fact both the parties had also filed an appeal and cross-objections in the lower appellate Court.

On the appeal and the cross-objections two points arise for our determination. The first is whether the plaintiffs are entitled to actual possession of the leased land on redemption or whether the mortgagees should be allowed to retain possession as lessees even after the redemption. The second point is whether the plaintiffs are bound to pay any compensation, and, if so, how much.

As to the first point, it seems to me that the condition that even after redemption the mortgagees would hold on the land, was a clog on the equity of redemption. Conditions which prevent or impede the right of redemption even after redemption, if such conditions are entered into at the time when the mortgage is made, must be taken to be a clog on the equity of redemption. On the other hand, a subsequent contract which modifies the right of redemption may not be such a clog. Although the principle underlying the rule of a clog on redemption is very old yet it still prevails and will not permit any device or contrivance, being part of the mortgage transaction or contemporaneous with it, to prevent or impede redemption. It follows that any covenant under which some right to retain possession is reserved to the mortgagee even after the property is redeemed is a clog on redemption as it both prevents and impedes redemption That such a clause amounts to a clog on redemption is covered by authority. In the case of *Mahomed Muse* v. *Jijibhai Bhagwan* (1), which was followed by a learned Judge of this Court in the case of *Sheo Singh* v. *Birbahadur Singh* (2), and has been subsequently followed by the Madras High Court in the case of *Ankinedu* v. *Subbiah* (3), a covenant under which the mort-

(1) [1885] 9 Bom. 524.
(2) [1910] 6 I.C. 707.
(3) [1912] 35 Mad. 744=21 M.L.J. 1010=10 M.L.T. 253=12 I.C. 382=(1911) 2 M.W.N. 231.

gagee, even after redemption, was entitled to retain the property on payment of a fixed rent, was considered to be a clog on the equity of redemption and unenforceable in a Court of equity. I am accordingly of opinion that the clause cannot bind the mortgagor's representatives and that, therefore, if they have paid the entire amount due, they are entitled to take possession of the land unencumbered of any contract for the grant of perpetual lease.

There is another ground on which the clause allowing the mortgagees to remain in possession as lessees is not enforceable. There was no perpetual lease granted at the time when the mortgage was made and the clause can at best amount to a contract for the grant of a perpetual lease after redemption. It is apparent that if owing to failure of the mortgagors to redeem within 60 years there was no redemption, the perpetual lease would not come into existence. As a mere contract for the grant of a perpetual lease after an uncertain period of time, if any at all, the clause is no longer enforceable because the original parties to it are all dead and the present plaintiffs and defendants are their representatives. A contract for the grant of a lease does not run with the land and cannot, therefore, bind the representatives of the original parties thereto.

The next question involves a consideration, in the first instance, of the question as to whether the grove is an accession within the meaning of S. 63 of the Transfer of Property Act and whether, if an accession, it is or is not capable of separate possession or enjoyment. I am of opinion that the grove as a grove is both an accession and is incapable of separate possession and enjoyment. The grove, in order to be enjoyed as a grove, has to be maintained and the fruits and produce of it are to be enjoyed. This cannot be done without detriment to the land on which the grove stands. On the other hand, if the grove were to be cut down, the timber can be removed and is capable of separate enjoyment. The case therefore, in my opinion, is a case of an accession which has been acquired at the expense of the mortgagees, and if it is to be put to its full use, it is incapable of separate possession or enjoyment without detriment to the principal property. I have already referred to the clause in the mortgage-deed under which express power or consent was given to the mortgagees to plant a grove if they liked. In pursuance of that assent of the mortgagors the mortgagees have planted a grove which they were perfectly entitled to do. It is immaterial whether the assent was obtained previously or whether it was obtained just at the time when the grove was being planted. There was clearly an original assent given to the mortgagees within the meaning of S. 63. It follows, therefore, that the grove as a grove has been acquired at the expense of the mortgagees, is not capable of separate enjoyment, and its accession has been made with the assent of the mortgagors. Under these circumstances the mortgagees are entitled to insist that the plaintiffs-mortgagors must take the land with the grove and pay to the mortgagees the costs thereof.

The learned Advocate for the appellants contends that the Full Bench case of *Raghunandan Rai* v. *Raghunandan Pande* (4) is an authority for the proposition that a grove is capable of separate enjoyment. It is urged that unless it be supposed that that was held by the Full Bench, it is not easy to see how the decree in that case could have been passed under which the mortgagor did not get the grove or timber but the mortgagee was allowed to remove the timber and appropriate it. It is urged that if the Full Bench thought that a grove is incapable of separate enjoyment, then in the event of there being no assent of the mortgagors, the accession ought to have gone to the mortgagors with the land under the first paragraph of S. 63. The learned Judges who formed the Full Bench, however, have nowhere said that a grove as a grove is capable of separate enjoyment. I am not, therefore, bound to assume that this must have been their view simply because a contrary result might appear to logically follow from a contrary hypothesis. That decision might have been based on the broad equitable ground that mortgagors are at best entitled to have the land restored in its previous condition and without the acquired accession which can be removed without detriment to the land. The Full Bench case is distinguishable from the present case because in that case the alleged contract that the mortgagee would be entitled to plant a

(4) [1921] 43 All. 638=61 I.C. 812=19 A.L.J. 573 (F.B.)

grove, which had been pleaded in the written statement, was not proved to the satisfaction of the Court below nor pressed before the Full Bench. In my opinion the present case comes exactly within the second clause of S. 63 and the plaintiffs, therefore, are bound to take the land with the grove and pay for it.

As regards the amount of compensation, the learned Judge has fixed Rs. 1,800 as a proper estimate He has calculated the total amount that would have been spent for all these years in rearing up this grove and has come to the conclusion, to use his own words, that "it is impossible to make a very accurate estimate of the expenditure which the defendants have incurred, but it seems to me that a sum of Rs 1,800 would be a fair estimate. As I have already remarked, the expenditure was incurred upon the faith of a promise made by the plaintiffs If the present value of the grove is Rs 2,300, it is a fair estimate to say that Rs. 1,800 was the capital spent upon it". It is clear, therefore, that his estimate of Rs. 1,800 is of the total amount spent on the grove and does not include the value of the timber or the interest on the amount spent It may be that in calculating the amount the learned Judge has included some interest though not full interest because the profits made by the mortgagees had been practically very little. The learned Judge had in his mind the principles which ought to govern the calculation of the estimate and, in my opinion, his estimate must be accepted as a finding of fact.

I would, therefore, dismiss both the appeal, and cross objections.

Mukerji, J.—I entirely agree with my learned brother that both the appeal and the cross-objections must be dismissed

As pointed out by my learned brother, there are two points in the case. (1) whether the agreement that the mortgagees were to continue in possession of the mortgaged land inspite of the receipt of the mortgage money was a clog on redemption and, therefore, must be disregarded and (2) whether the mortgagors should get the trees without payment.

In pursuance of an agreement in the mortgage-deed, the mortgagees planted the grove. The question is whether in spite of their planting the grove, the agreement that the mortgagees were to continue in possession must be treated as unenforceable in law. The principle on which the doctrine of clog on redemption is based has its origin in the law of England, but it has been recognised by British Indian Legislature, and, although the English law as such is not applicable to this country, the law enacted in India is to be enforced. That law is to be found in S. 60 of the Transfer of Property Act. It is significant that the usual words to be found in so many sections of the Transfer of Property Act, namely 'in the absence of a contract to the contrary', do not find any place in S. 60 of the Transfer of Property Act. The rule enacted thereby is this. Whenever the principal mortgage money has fallen due, the mortgagor on payment to the mortgagee may require the latter (*a*) to deliver the mortgage deed, (*b*) to deliver possession, (*c*) to re-transfer the property. This S. 60 came in for interpretation by their Lordships of the Privy Council in the case of *Mohammad Sher Khan* v. *Raja Seth Swami Dayal* (5) and their Lordships remarked that the language of the section was unqualified. It seems to me to be clear, both on the language of the law and on authority, that any agreement contained in the mortgage-deed which prevents the mortgagor from acquiring possession of the property on payment of the mortgage money is not enforceable, and must be disregarded. The mortgagor has an absolute right to set back the property on payment. Of course where there is a subsequent transaction which extinguishes or modifies the right to redeem which the mortgagor possesses, the matter would be different. Such a case is provided for by the second paragraph of S. 60 The first question, therefore, must be answered in favour of the mortgagors.

The second question is whether the mortgagors ought to have the grove without payment. S. 63 is the law on the point. The grove is an accession and, therefore, under the general law as enacted in paragraph 1 of S. 63, it ought to go with the land to the mortgagors. There are, however, certain exceptions enacted. The first one is that where the

(5) 1922 P. C. 17=14 All. 185=49 I. A. 60=9 O. L. J. 81=42 M. L. J. 584=25 O. C. 8=20 A. L. J. 476=35 C. L. J. 468=(1922) M. W. N. 378=24 Bom. L. R. 695=30 M. L. T. 220 (P.C.)

mortgagee has spent money to acquire an accession and the accession is capable of separate enjoyment without detriment to the principal property, the mortgagor cannot have it without paying for the same. The question is whether a grove is a property which is capable of separate enjoyment. If it be capable of seprate enjoyment without detriment to the principal property, the mortgagor must pay for it if he wants to get it. There can be no doubt that there are two uses of the grove. A grove involves the right to maintain the trees on the spot. It also includes a right to remove the timber. Of the two rights that exist in the holder of the grove, one is capable of separate enjoyment and the other is not. If the owner of the grove wants to enjoy it with the trees standing on the spot, he cannot enjoy the trees as apart from the land. On the other hand, if he wants to cut down the trees, he can separately enjoy the timber. That being the case, it must be taken that the question is not capable of an answer without losing sight of the fact that a grove can be put to two uses. It is no doubt open to the person occupying the grove to say that he would not enjoy it as a grove but he would enjoy the timber. In the latter case, it would be open to the mortgagee to remove the timber if the mortgagor is not willing to pay for the same. This was held by me to be the law in *Chhakauri Singh* v. *Ram Brichh Singh* (6), decided on the 27th of November, 1924 A similar view was taken in the F. B. case of *Raghu Nandan* v. *Raghu Nandan* (4).

In this particular case, the mortgagees say that they are not disposed to cut and remove the timber and they want to enjoy the grove as a grove. Now the question is whether they can do so, if the mortgagors are unwilling to pay for it. I agree with my learned brother that the mortgagees cannot enjoy the grove apart from the land itself That being the case, the grove must go with the land. I have already stated that here the mortgagees are unwilling to cut and remove the timber.

The next question is whether we can compel the mortgagors to pay for the grove, that is to say, the trees as they are standing on the spot. There are two cases in which the mortgagor can be compelled to pay for the accession, namely (1) where the accession is necessary for the preservation of the property and (2) where the accession was acquired with the assent of the mortgagor. This is a case in which the accession was acquired with the assent of the mortgagors. The mortgagors not only said that the mortgagees might plant a grove but they promised that they would not take back the land at all. In the circumstances, the mortgagors must pay compensation.

By the Court.—The decree of the Court below is maintained and the appeal and the cross-objections are dismissed with costs.

Appeal dismissed.

(6) S. A. No. 770 of 1923.

1925 ALLAHABAD 431

SULAIMAN AND DANIELS, JJ.

Motilal—Appellant.

v.

Bishambhar Nath—Respondent.

First Appeal No. 219 of 1923, Decided on 15th April, 1925, from an order of the Small Cause Court, Agra.

Civil P. C., O. 22, Rr. 3, 4 and 10, S. 141 and O. 9, R. 13—Applicant to set aside ex parte decree dying—No appeal lies from order substituting legal representative.

No appeal lies from an order, bringing a certain person on the record as the legal representative of a deceased party, which was passed on an application to set aside an *ex parte* decree

[P 432, C 1]

Shiam Krishna Dar—for Appellant.

Kailas Nath Katju and *G. Agarwala*—for Respondent.

Sulaiman, J.—This is an appeal by the plaintiff from an order dated the 16th of November, 1923. The plaintiff had instituted a suit against Chhunnu Lal and obtained an *ex parte* decree. Chhunnu Lal applied to have that *ex parte* decree set aside, and while that application was pending, he died. His son, Bishambhar Nath, applied to continue the application as the legal representative of the deceased applicant. Moti Lal, on the other hand, objected to the application on the ground that the right to sue did not survive, and that, therefore, Bishambhar Nath, though the son of the deceased, was not his legal representative so far as this case was concerned. In support of his contention Moti Lal relied on an alleged oral will said to have been made by the deceased

Chhunnu Lal under which he is said to have directed that this litigation should be put an end to and that the decree passed against him should be accepted.

The learned Subordinate Judge in disposing of the application of Bishambhar Nath, which professed to have been made under O. 22, rule 4 (1) of the Code of Civil Procedure, proceeded to consider, first, whether the right to sue did or did not survive. In this connection he felt himself called upon to go into the question of the alleged will and came to the conclusion that this will had not been established. He, therefore, held that the right to sue did survive to the son. He has accordingly passed an order granting the application of Bishambhar Nath.

An appeal has been preferred from this order. On behalf of the respondent a preliminary objection is taken that no appeal lies. It is conceded by the learned vakil for the appellant that, if the case had fallen under Order 22, rules 3 and 4, the order passed would have been final and no further appeal would lie. His contention, however, has been twofold : first, that the case fell under Order 22, rule 10, and that, therefore, an appeal lies, and, secondly, that it is in effect a case where the Court below has refused to record an adjustment of the claim. We are of opinion that it is impossible to hold that Order 22, rule 10, has any application to this case. That rule only applies to cases other than those previously mentioned. In cases of deaths of parties, the rules applicable are rules 3 and 4, which would, therefore, exclude the operation of rule 10 altogether. Furthermore, it is only by analogy or by applying S. 141 of the Civil Procedure Code that we can bring in these rules, for the proceeding pending before the Court below was not the suit itself but an application to set aside an *ex parte* decree. When in an original suit no appeal is provided from an order bringing a certain person on the record as the legal representative of a deceased party, much less would an appeal lie from such an order passed on an application to set aside an *ex parte* decree.

The other contention also, in our opinion, has no force. There was no suggestion anywhere in the objections filed by Moti Lal that the claim itself has been adjusted, compromised, or settled. These words are not to be found in the order appealed from. The Court below has considered the question of the will merely in connection with the question as to whether the right to sue did or did not survive. It is in that connection that the evidence has been discussed. The finding of the learned Judge that the right to sue did survive and that the respondent as his son is the legal representative of the deceased Chhunnu Lal must be accepted as final for the purpose of this case, and the order cannot be set aside in appeal.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 432

MUKERJI AND DANIELS, JJ.

Mt. Bhuta—Appellant.

v.

Bisheshar Singh—Respondent.

E. First Appeal No. 513 of 1923, Decided on 15th December, 1924, against the order of the Sub J., Benares.

Civil P. C., S. 60 —Agriculture the only source of livelihood—S. 60 applies.

A person who has no other source of livelihood than agriculture is an agriculturist and houses in his occupation are exempt from attachment.

Per Daniels, J.—The burden of proving that the case falls under S. 60 Civil P. C., lies on the person objecting to the attachment. 41 *Bom.* 475 *Fol.* [P. 433, C. 2]

Kailas Nath Katju—for Appellant.

Harendra Krishna Mukerji — for Respondent.

Mukerji, J.—The appellant in this case was a judgment-debtor in the lower Court. There is a decree for money against her, and in execution of it, her two houses were attached. She came to Court with the allegations that she was an agriculturist and the houses were occupied by her and that therefore, these were exempt under S. 60, clause (c) of the Civil Procedure Code from attachment. The decree-holder in his reply did not state at all what was her occupation, if the judgment debtor was not an agriculturist. He simply stated that the judgment-debts were due and she was bound to pay. The learned Subordinate Judge examined evidence and came to the conclusion that the appellant had ceased to be an agriculturist inasmuch as she had sold her fixed rate tenancy in 1919.

In this Court it has been urged that the evidence has been wrongly weighed by the lower Court and that it does establish that the appellant is an agriculturist.

It appears that the decree-holder himself was examined at a previous stage in this very litigation. This was on the 11th of November, 1922. It further appears that somebody else had laid claim to one of three houses originally attached. Then the decree-holder stated the whole history of the residence of the appellant in the village Kanta. He said that the appellant was unhappy in her husband's house and came to live in her father's village Kanta. There she was given some land to live on, and her father built these houses for her. He also stated that the appellant owned to pairs of bullocks for cultivation Besides this admission of the decree-holder, there is evidence of the appellant herself and some patwari's papers. Two patwaris were examined and they said that in their papers the appellant was still recorded as a fixed rate tenant of certain lands and as a *shikmi* tenant of three years standing of others. The appellant also summoned one Jageshar, who deposed that she had 18 or 20 bighas of land of her own and had taken some *shikmi* land from him on rent. But when the appellant was asked by the decree-holder if she knew Jageshar, she denied. From this fact an inference has been drawn that the story of the Jageshar's sub-letting any land is untrue. I am unable to agree with this view. It is admitted that although the appellant belongs to an agricultural caste, namely, Kurmi, she lives more or less in seclusion and her son looks after her cultivation. On evidence, I am satisfied that the only means of livelihood of appellant is agriculture and she has no other means of livelihood.

The suggestion of the decree-holder that the appellant may be living on the charity of her son has neither been alleged nor proved. The evidence is all one way and should be accepted.

The exemption that is granted is based on the language of law and, if the case comes within the language of the law, the exemption must be granted. The question is whether the appellant is an agriculturist and whether she occupies these houses. The Bombay High Court in the case of *Devare Hedge* v. *Vaikunt Subaya* (1), held that although a certain person had lost his agricultural land, he did not cease to be an agriculturist if he was cultivating soil for remuneration. As the appellant has got no other source of livelihood, as she did cultivate land and as she has still got some *shikmi* land, I think she must succeed. I would, therefore, allow the appeal, set aside the decree of the Court below and exempt houses from attachment.

Daniels, J.—I concur with considerable hesitation. The burden of proving that the case falls under S. 60 Civil Procedure Code lies on the objector. It is not for the decree-holder to prove what her occupation is. It is for her to show that she is an agriculturist. I do not like reversing the decree of the Court below on a question of fact when the evidence adduced by the objector that she still has cultivation has been found by the Court below to be false and that finding is not seriously challenged in this appeal. If the oral evidence is false the entries in the patwari papers can carry very little weight.

The only fact which induces me to agree to the decree proposed by my learned colleague is the admission of the zamindar made in answer to a previous objection, It may be that the statement was made for the purpose of the objection which was then pending, but this cannot be assumed and the decree-holder cannot complain if it is used as strong evidence against him.

If it were proved that the applicant had no cultivation at all her house would not be the house of an agriculturist within the meaning of S. 60 (c) Civil Procedure Code merely because she had a fixed rate holding up to the year 1919, four years before the period to which the present objection relates.

By the Court.—We allow the appeal, set aside the decree of the Court below and dismiss the application of the decree-holder so far as it goes for the attachment of the houses objected to. The appellant will have her costs in both the Courts. In this Court, having regard to the fact that the value of the houses attached is not much we assess the counsel's fee for the successful appellant at the sum of Rs. 20. *Appeal allowed.*

(1) [1917] 41 Bom. 475=39 I.C. 639=19 Bom. L.R. 281.

1925 ALLAHABAD 434

WALSH AND BOYS, JJ.

Emperor—Appellant.

v.

Kutroo—Accused.

Criminal Appeal No. 71 of 1925, Decided on 5th March 1925, from an order of the S. J., Kumaun.

Arms Act, S. 30—Search illegal yet if evidence is conclusive conviction is proper obiter ; *Two persons must be the present at the search—One making the search and the other officer specially appointed.*

Although the search is illegal, a person can be convicted where the evidence against him is conclusive. 35 *A.* 75 *Foll.* [P 434 C 2]

The ordinary meaning of " in the course of any proceedings instituted " in S.30, ' is in the course of any legal proceedings which have already begun,

Obiter : The words " in the presence of some officer specially appointed " mean that there must be at least two persons, namely the person making the search, and the officer specially appointed, within the meaning of S. 30 who is present at the search. [P 434 C 2 ; P 435 C 1]

Lalit Mohan Banerji—for the Crown.

Hamid Hasan—for Accused.

Walsh, J.—In our view this appeal succeeds on the merits, but not upon the point of law upon which the Government sought by the appeal to challenge the decision of the learned Judge. This miscreant, as he appears to be, having the reputation of a *badmash* likely to be engaged in dacoities, was suspected of having arms and ammunition in his house. Thereupon a patwari, who, by the rules applicable to Kumaun, entitled to exercise the powers of a police officer, searched his house with witnesses and found gun-powder, some dynamite, and a detonator and fuse. He was thereupon convicted and sentenced to nine months rigorous imprisonment and a fine of Rs. 50. He appealed and took the point that there had been no proper search because there had been no order under S. 25 of the Arms Act, and because the search was not made in the presence of an officer specially appointed or by virtue of his office under S. 30. We agree with this view for reasons which we will state in a moment, but the learned Judge overlooked the fact that in spite of the search having been made under circumstances which rendered it not lawful, the appellant had nonetheless been found guilty on perfectly plain evidence of the offence with which he was charged. In allowing the appeal and quashing the conviction the learned Sessions Judge, although he did not say so, by implication committed himself to the further proposition, namely that where the search is illegal, a person cannot be convicted even though the evidence against him is conclusive. This is not the law. The point is covered by authority, particularly in this Court in the case of *Emperor* v. *Syed Ahmad* (1), a decision of a single Judge with which we agree. In that case the search was illegal. Cocaine was found in the house of the accused and he was properly convicted. In this case the appellant was properly convicted, even although, for reasons which I am about to give, the search was illegal. In my view the argument upon which the appeal on behalf of Government has been based overlooks the significance of the term " in the course of any proceedings instituted." I think it better not to speculate as to why these words are there, except to say that possibly the legislature thought that where an act, like the possession of arms, was equivocal, and might be innocent or might be unlawful, that question depending on the existence of a license, unlimited right of search ought not to be conferred on the police. But I entertain no doubt that their effect is to cut down the general power of search under S. 165 by a police officer. The provision is applicable where a search is to be made under the Code of Criminal Procedure, in respect of such an offence as this, in the course of any proceedings instituted in respect of such offence. The ordinary meaning of that language is, in the course of any legal proceedings which have already begun. The use of the expression " instituting proceedings " in this Act is made plain by the preceding section, where it is clearly used in reference to the commencement of some legal proceeding in a Court. That this view is the ordinary meaning of the English legal terminology is supported by the decision in *Thorpe* v. *Priestnall* (2). Under these circumstances I am clearly of opinion—no proceedings have been instituted—that the patwari who made the search in this case, was not legally authorised to make it. I may add, although it is not necessary for our decision, that in my opinion the words " in the presence

(1) [1913] 35 All. 575=11 A. L. J. 933=22 I. C. 163=15 Cr. L. J. 19.

(2) [1897] 1 Q. B. 159.

of some officer specially appointed " mean that there must be at least two persons, namely the person making the search, and the officer specially appointed within the meaning of S. 30 who is present at the search.

The appeal must, therefore, be allowed and the conviction restored, but inasmuch as the Government in the special circumstances of this case does not press for further imprisonment than that already undergone, we inflict punishment of one month and uphold the fine of Rs. 50. The accused having already served one month, need not surrender.

Boys, J.—I agree. The first section to which reference has been made is S. 25 of the Arms Act. I entirely agree with the view of Mr. Justice Piggott in the case of *Babu Ram* v. *Emperor* (3), that that section is intended to apply to the particular class of cases where there is some unlawful purpose alleged regardless of whether or not the person whose house is to be searched has a license for the possession of the arms. In this case, however, it is not even suggested that any action was taken under that section. It is necessary, therefore, to look elsewhere for other powers of search if actually the search is to be justified. It is clear that S. 30 of the Arms Act does not itself give any power of search to anybody. It is confined to a statement that when a seacrh is being conducted under the Code of Criminal Procedure or the Presidency Magistrates Act " in the course of any proceedings instituted in respect of an offence punishable under S. 19 (*f*), such search shall be conducted in the presence of a particular officer :" it merely places certain restrictions on such powers of search as may otherwise exist under the provisions of the Code of Criminal Procedure. We are not concerned with the Presidency Magistrates Act and we have, therefore, to turn to the Code of Criminal Procedure. Ss. 105 and 96 relate to the powers of a Court and it is not suggested here that any Court conducted or caused to be conducted any search. The Crown have, therefore, to fall back upon S. 165 of the Code of Criminal Procedure. There is nothing in the Arms Act to limit the powers of an investigating officer under S. 165 except the two qualifications introduced by S. 30 by the words " in the course of any proceedings instituted in respect of an offence punishable under S. 19 (*f*) " and by the requirement of the presence of a particular officer.

It is clear that in the case to which I have already referred, *Babu Ram* v. *Emperor* (3), no reference was made to the words " in the course of any proceedings instituted." I should be prepared to hold that those words, even if the section stood by itself, meant that the officer appointed by Government could only search when some case had already been instituted in Court. It is the ordinary meaning of the language. But we are further confirmed in that conclusion, and it is rendered inevitable, by the use of similar words in S. 29 drawn to our attention by Mr. Hamid Hasan on behalf of the accused. The same meaning, must, in the absence of any strong reason to the contrary—and there is no such reason,—be given to similar words in two contiguous sections of the same Act ; and as to the meaning of the words in S. 29 it is even more clear that there can be no doubt, for if a proceeding can be said to have been instituted within the meaning of S. 30 as claimed by the Crown when nothing has happened beyond a report to the police (in this case the patwari having the powers of a police officer) as to the suspected possession of arms, that meaning must be also given to the words in S. 25 and would result in holding that section to enact that no report must be made of an offence under S. 19 (*f*) without the previous sanction of the District Magistrate. Further it is clear that the language of S. 30 is analogous to that of the last clause in S. 108 of the Code of Criminal Procedure " no proceedings shall be taken "; in S. 132 of the same Code " no prosecution shall be instituted "; in S. 188 " any proceedings taken." I agree with Mr. Justice Walsh that it seems likely that the words " in the course of any proceedings instituted " were inserted with the intention of restricting the powers of an investigating officer in making searches for arms where, even particularly where, there was no known unlawful purpose. Such restriction does not wholly deprive the authorities of power to search or to cause a search to be made merely because there is no known " unlawful purpose " bringing the case within S. 25 and no proceeding already instituted in Court bringing the case within S. 165

(3) [1918] 16 A. L. J. 721=47 I. C. 801=19 Cr. L. J. 949.

of the Code of Criminal Procedure controlled by S. 30 of the Arms Act. A Magistrate acting as a Court could proceed under Ss. 96, and 105. This is sufficiently clear from the Privy Council case : *Clarke* v. *Brajendra Kishore Roy Chowdhuri* (4).

That is, however, in any case a question only of expediency. I agree with the order proposed by Mr. Justice Walsh.

Appeal allowed.

(4) [1912] 39 Cal. 953=39 I. A. 163=(1912) M. W. N. 760=12 M. L. T. 171=10 A. L. J. 193=16 C. L. J. 231=16 C. W. N. 865=23 M. L. J. 32=14 Bom. L. R. 717=16 I. C. 501=13 Cr. L. J. 693 (P. C.)

★ 1925 ALLAHABAD 436

MUKERJI AND BOYS, JJ.

Ramzan Baksh and others—Defendants—Appellants.

v.

Muhammad Ishaq—Plaintiff—Respondent.

Second Appeal No. 506 of 1923, Decided on 26th February 1925, from a decree of the Dt. J., Allahabad.

★ *Limitation Act, S. 12—Total period to be allowed is period as shown in Sch. I, plus time taken for copy of judgment and time taken for copy of decree.*

An appellant would be within time, according to S. 12 if his appeal is filed within the total amount of periods granted to him, namely, the initial period granted by Schedule 1, plus the time requisite for obtaining a copy of the decree, plus the time requisite for obtaining a copy of the judgment. Of course, if any of the two periods requisite for obtaining copies over-lap each other, one of the overlapping periods has to be left out of account. 42 *All.* 230 *not Foll.* [P 436 C 2]

Haribans Sahai—for Appellants.

Zamirul Huq—for Respondent.

Mukerji, J.—The sole question for determination in this appeal is whether the appeal presented before the lower appellate Court was within time. That Court dismissed the appeal on the ground that it was time-barred.

The facts briefly are these :—The decree sought to be appealed against was passed on the 22nd of September 1922. The appeal was filed on the 27th of November 1922. A copy of the judgment was applied for on the 23rd of September 1922 and a notice was given of the copy being ready on the 23rd of October of the same year. The decree was for partition and had to be engrossed on a stamped paper. The successful plaintiff did not provide the stamp paper till a very late date. On the 15th of November 1922, an application was made for a copy of the decree to be appealed against. As a matter of fact, the decree was not signed by the learned Subordinate Judge who passed it till 25th of November 1922. A copy was made of the decree on the same date and was handed over to the appellant. Twenty-sixth of November was a sunday. As we have already stated, the appeal was filed on the 27th of November 1922.

The learned Judge, in dismissing the appeal as time-barred, has not given his reasons very clearly. As we take it, it appears that he was of opinion that an application for a copy of the decree ought to have been made while the period of limitation, initially granted by the First Schedule of the Limitation Act, was yet unexpired.

To find out whether the appeal before the lower appellate Court was within time or not, we have to look for guidance to S. 12 of the Limitation Act. Under that Act we have got three periods for computation of limitation.

The first period is the initial period granted by the several articles of Schedule 1 ; the second period is granted by paragraph 2 of S. 12 which says that the time requisite for obtaining a copy of the decree will be excluded ; then the third period is granted by paragraph 3 of the same section ; the time requisite for obtaining a copy of the judgment on which the decree is founded shall also be excluded. Giving the language its general and ordinary meaning, it would appear that an appellant would be within time, if his appeal is filed within the total amount of periods granted to him, namely, the initial period granted by Schedule 1, plus the time requisite for obtaining a copy of the decree plus the time requisite for obtaining a copy of the judgment. Of course, if any of the two periods requisite for obtaining copies over-lap each other, one of the over-lapping periods will have to be left out of account.

The authorities on the point do not seem to be quite agreed. In *Din Dayal* v. *Rameswar* (1), it was held by Mr. Kanhaiya Lal (as Mr. Justice Kanhaiya Lal, then was) that it was open to an appellant to make his application for the second

(1) [1914] 18 O. C. 74=28 I. C. 366=2 O. L. J. 159.

copy within the period of limitation as extended by his obtaining the first copy. The same view was taken in *Rajani Kanta Kapali* v. *Kali Mohan Das Kapali* (2). Coming to our High Court, in *Mulraj* v. *Niadar Mal* (3), it was remarked that an appellant was bound to apply for a copy of the decree and a copy of the judgment at one and the same time at any rate, within the initial period of limitation. So far as we have been able to examine actual dates involved in the case, the appeal was entirely time-barred at the date it was presented. In these circumstances, it was not necessary for their Lordships to say that it was incumbent on an appellant to apply for copies at one and the same time and within the period provided by the first schedule. Indeed there is no clear provision of law to that effect to be found in S. 12 of the Limitation Act. There can be no doubt that on the merits, the decision of this Court was perfectly right.

Coming back to the facts of the case before us, the appellant had 30 days, plus 31 days, plus 11 days ; total 72 days from 22nd of September 1922, within which to appeal. The appeal, filed on the 27th of November 1922, was well within these 72 days. The appeal was, therefore, presented within the period of limitation.

We allow the appeal, set aside the decree of the Court below and remand the appeal to the lower appellate Court for disposal according to law. The costs in this Court will be paid, at all events, by the respondents. The costs in the Court below will be within its discretion.

Appeal allowed.

(2) [1916] 21 C. W. N. 217=38 I. C. 66.
(3) [1920] 42 All. 260=55 I. C 315.

★ 1925 ALLAHABAD 437

SULAIMAN AND BOYS, JJ.

Ghumna and another -- Defendants--Appellants.

v.

Ram Chandra Rao and another—Plaintiffs--Respondents.

Second Appeal No. 595 of 1923, Decided on 19th March, 1925, from a decree of the Dt. J., Benares.

★ (a) *T. P. Act, S. 126—Gift voidable by donor--Donor's heirs can avoid after donor's death.*

A gift voidable at the option of the doner can be avoided after his death by his heirs.

[P. 438, C.2]

★ (b) *Contract Act, S. 23—Gift in consideratim of future illicit intercourse—Gift is void.*

Where the donor made a gift of the property to a husband and wife, on condition that he should have physical enjyoment of the latter,

Held: that the consideration for the transfer, being the future illicit connection, the agreement was obviously both immoral and opposed to public policy within the meaning of S. 23. 28 *Mad.* 413 *Rel. on.* [P. 438, C. 2]

Surendra Nath Sen—for Appellants.

Tej Bahadur Sapru, Peary Lal Banerjee and *Gadadhar Prasad*—for Respondents.

Sulaiman, J.—This is an appeal by defendants Nos. 4 and 5 who are transferees *pendente lite* arising out of a suit brought by the plaintiffs as the heirs of one Rama Kant for possession of a house by avoidance of a deed of gift dated the 21st of November, 1921. The plaintiffs claimed that the deed of gift had been obtained by fraud and was also void as being for an immoral and illegal consideration. They further alleged that their father, Moreshwar Rao, who would have been the heir to the deceased Rama Kant, had become a *sanyasi* and, therefore must be treated as civilly dead and the plaintiffs' were the real heirs. The claim was contested by the transferees and the plaintiffs right to maintain the suit or to challenge the relation was disputed.

Both the courts below have given the plaintiffs a decree.

The facts as found are as follows:—

Rama Kant deceased became infatuated with Musammat Prabhawati, defendant No. 2, who is at present undergoing a sentence of transportation for life. She and Gobind, defendant No. 1, (who has since been hanged and who was passing as her husband) along with another person entered into a conspiracy to obtain the house by way of gift from Rama Kant and then to murder him. In order to obtain their object, they got a deed of gift executed by him and assured him that Mt. Prabhawati would live with him and in fact they executed a contemporaneous agreement under which it was agreed that they all would live and mess together and no one would be able to dispose of his or her property in the life-time of the other and that after Gobind Rao's death, if the two other persons disagreed or separated they would have certain specific shares in the property and that if any two died, the third would be the complete owner. The

deed of gift and the agreement were registered on the 25th of November, 1921, and within a month of their registration, Rama Kant was murdered by the donees. The donees and the other conspirator were put up on their trial and convicted. While the criminal case was pending, the present plaintiffs instituted the suit, and it was during the pendency of the suit that the donees purported to make a gift of this house to the two persons whom the present appellants represent.

The plaintiffs' right to maintain the suit in view of the fact that their father has become a *sanyasi* has not been challenged in second appeal.

The main point urged before us is that the Courts below were wrong in holding that the said gift can be avoided by the present plaintiffs. The contention before us has been that the gift, if voidable, could only have been avoided by the deceased Rama Kant, if he exercised his option during his life-time, and that if for any reason he failed to exercise such option, that right did not survive to his heirs, the present plaintiffs.

We are quite unable to accept this contention. It is not quite correct to say that the right of exercising such an option is like a personal contract which does not survive to the heirs of the promisor. The right is given to the promisor under statute. Furthermore, a deed of gift is more than a mere contract. It is a conveyance. The present plaintiffs can claim that there was no absolute transfer of the property at all but it was a qualified transfer *i. e.*, subject to the right of the trnsferor to avoid it if he chose to do so. The plaintiffs, therefore, can claim the property by avoiding the deed of gift which could have been avoided by their predecessor. There does not seem to be any valid ground for saying that the right does not survive to the present plaintiffs. This is specially so in the case where the donees themselves have prevented the transferor, by murdering him, from exercising his right of option. It seems to us that the plaintiffs can claim the property and ignore the gift because it was not absolutely binding on Rama Kant provided of course they come within the period of limitation as they have done in this case.

In analogous cases it has been held that in case where an immediate reversioner who has a right to aviod an alienation made by a Hindu widow without legal necessity, dies before he exercised his option, his heir can maintain a suit, *vide*: *Sarju Prasad Raut* v. *Mangal Singh* (1), decided by a Bench of which one of us was a member. In the case of *Muhammad Muzammilullah Khan* v. *Mithu Lal* (2), a Full Bench of this Court held that even a transferee of joint family property can avoid an alienation which was voidable on the ground of want of legal necessity. On principle, therefore, there seems to be no good ground for holding that the present plaintiffs as heirs of Rama Kant cannot avoid the gift which was voidable at the option of Rama Kant merely because Rama Kant was murdered before he could avoid it. The view taken by the Court below was, therefore, correct.

We would go further and hold that in this case, on the findings of the lower appellate Court, the deed of gift was not only voidable but was void *ab initio*. The learned District Judge has found that the donor made a gift of the property to a husband and wife on condition that he should have physical enjoyment of the latter. The consideration for the transfer, therefore was the future illicit connection between the donor and *Mt.* Parbhawati. Such an agreement was obviously both immoral and opposed to public policy within the meaning of S. 23 of the Indian Contract Act. Accordingly it is altogether unlawful. Being unlawful, it could not be a valid considertion for the gift at all. The result, therefore, is that the deed was not only voidable but was absolutely void from the very beginning and it was not even necessary for Rama Kant to have it avoided by a suit. He could have merely ignored it In this view of the matter the question whether such a right survived to the present plaintiffs, the heirs, does not arise.

The learned Advocate for the appellants has contended that the condition that Rama Kant should have the physical enjoyment of *Mt.* Parbhawati was in itself void, but the gift would not be void. He has stronly relied on a remark in the judgment of their Lordships of the Privy Council in the case of *Ram Sarup* v. *Bela* (3), where

(1) 1925 All. 339=23 A.L.J. 254=6 L. R. A.Civ. 201.
(2) [1910] 33 All. 783=11 I. C. 220=8 A. L. J 901.
(3) [1884] 6 All. 313=11 I. A4. 4=4 Sar. 493 (P. C.)

their Lordships said that an immoral condition attached to a gift would be void itself but the gift itself would not be so. But the facts of that case were quite different. There, as their Lordships found, the gift as originally made was absolutely unconditional and was complete at the time when the actual transfer took place, but the parties subsequently tried to import into the gift a condition which was immoral. That is why their Lordships spoke of a condition being attached to the gift. It is obvious that there is a clear distinction between an immoral consideration for a gift and an immoral condition which is subsequently attached to a gift. If the consideration itself is immoral, the transfer falls to the ground. On the other hand, if a subsequent condition is tried to be attached to a perfectly valid gift, then the condition, if immoral, is void, but the gift remains unaffected. That a transfer in consideration for future immoral connection is vitiated, is fully borne out by authority, *vide* the case of *Thasi Muthukannu* v. *Shunmugavelu Pillai* (4).

On the findings, therefore, the transfer was for an immoral and illegal consideration and was absolutely void and was not binding either on Rama Kant or his heirs, the present plaintiffs.

The appeal must be dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(4) [1905] 28 Mad. 413=15 M.L.J. 286

1925 ALLAHABAD 439

PIGGOTT AND MUKERJI, JJ.

Sahu Raghunath Singh and others—Plaintiffs—Appellants.

v.

Mahabir Prasad—Defendant—Respondent.

Second Appeal No. 174 of 1923, Decided on 4th February, 1925, from a decree of the Dt. J., Budaun.

Landlord and tenant—Government—Possession of owner in his own right—Wajib-ul-arz *definitely asserting their right—Holders of grove recorded as occupancy tenants in ordinary village papers—Grove holders are not liable to be ejected.*

The zamindar sought to eject the plaintiffs from a grove situated on two specified plots of land within the area of his mahal. Plaintiffs pleaded full proprietary title in the grove and were consequently required to establish their title in the Civil Court. The *wajib-ul-arz* of the village recognised the existence of two different kinds of groves (1) groves in which the holders were the owners of the trees alone but had no rights over the land and (2) groves that were in possession of the persons other than the proprietors of the mahal, and in respect of which the possession of the owner (*malik*) was in his own right, and the zamindar had no right to interfere. The plots over which the grove in dispute was standing were included in the latter class.

Held: that the plaintiffs had full proprietary title in the grove, although in the ordinary village papers the plaintiffs and their predecessors-in-title were recorded only as occupancy tenants. [P. 440, C. 1]

Kailas Nath Katju—for Appellants.

Narain Prasad Asthana & S. B. Johari—for Respondent.

Piggott, J.—This suit arises out of an attempt made by the defendant, who is the zamindar of a mahal, to eject the plaintiffs from a grove situated on two specified plots of land within the area of the mahal of which the defendant is zamindar. On being sued for ejectment, the owners of the grove pleaded full proprietary title in the same, whereupon they were required to establish the alleged title by suit in the Civil Court. The present suit has, therefore, been brought by the persons in possession of the grove whose ejectment was sought by the defendant-zamindar.

The trial Court decreed the suit for the relief sought. The learned District Judge has set aside the decree of the trial Court and has granted a declaration to the effect that the plaintiffs are the owners of the trees and enjoy the status of grove-holders, but are not proprietors.

In second appeal we have to deal in the main with two contentions. One is that the decision of the District Judge is based upon a misreading of the most important documentary evidence in the case, *viz.*, the *wajib-ul-arz* prepared in the year 1865. Secondly, it is contended before us that the learned District Judge has nowhere dealt with the results of a previous litigation between the predecessor-in-title of the present parties and that the effect of that litigation is to establish the plaintiffs' title as owers of the land and of the trees. There is force in both these contentions. The *wajib-ul-arz* distinctly recognises the existence in this village of two different kinds of groves. In Chapter 4 of this record of rights it is stated that, in

respect of the ordinary groves in the village, the persons who planted the same are the owners of the trees, but have no rights over the land. The zemindar has a right of re-entry as soon as the land loses the character of a grove and, what is more, he can interfere to prevent the planting of new trees. In substance, this clause recognises in favour of the persons who have planted groves in the village what is ordinarily described as the status of grove-holders. In chapter 3 of the same document there is a passage, the correct interpretation of which should determine the result of the present suit. It purports to give a list of certain detached plots of land in respect of which it is noted that they are in possession of persons other than the proprietor or proprietors of the mahal. These plots of land are stated to be groves or flower gardens. In respect of these it is definitely stated that the possession of the owner (*malik*) of such a grove is in his own right and that the zamindars have no right to interfere with him. It has not been denied in argument that the plots of land with which we are now concerned are referred to in the list of detached plots of land to which the above-mentioned clause of the *wajib-ul-arz* refers. On a fair interpretation of the clause it seems to us that it recognises full proprietary rights in respect of these detached plots of land in favour of the persons recorded as being in possession of the same. The learned District Judge has refused to interpret the *wajib-ul-arz* in this sense because in the ordinary village papers the present plaintiffs and their predecessors-in-title were recorded as occupancy tenants. We do not think that this fact can either overrule the provisions of the *wajib-ul-arz*, or be pressed into service so as to put upon those provisions an interpretation which seems to us strained and contrary to the plain intention of the document. Apart from these considerations, we think that the lower appellate Court has gone even more seriously astray in its reference to a certain previous litigation of the year 1908. In that year the proprietor of the mahal, who was the father of the defendant-respondent now before us, sued the father of the plaintiffs in the Revenue Court for assessment of rent. We have not got the pleadings before us, but we have got the judgment delivered by the Revenue Court in which this suit was brought. That judgment referred to the provisions of the *wajib-ul-arz*, laid stress upon the long continued possession of the holders of the grove and distinctly found that this possession had for many years been adverse to the zamindar. It dismissed the suit for assessment of rent upon this finding, and not upon a mere finding that the persons upon whom rent was sought to be assessed were not liable to such assessment by reason of their status of grove-holders. A curious point was taken in the lower Court, to the effect that this decision had no force against the present defendant because the father of the said defendant, shortly before instituting these psoceedings for assessment of rent, had executed a deed of gift by which he purported to convey the land appertaining to this grove to his son, the defendant. This plea has been sufficiently dealt with by the learned Munsif in his judgment. In any case it seems to us that from the date of this decision the present plaintiffs were beyond question holding the land in suit adversely to the zamindar in the fullest sense of the word and, even if they had no valid title before that date, they had perfected a title by adverse possession for the full statutory period before these present proceedings were instituted in the Revenue Court. What the learned District Judge has in effect done is to degrade the plaintiffs from their position of owner of the grove (*malik bagh*) as defined in chapter 3 of the *wajib-ul-arz* to that of grove-holders as defined in chapter 4. For the reasons which we have given, we are satisfied that the learned District Judge was wrong.

We set aside the decree of the lower appellate Court and restore that of the court of first instance with costs throughout.

Decree set aside.

1925 ALLAHABAD 440

SULAIMAN, J.

Nagar and others—Appellants.

v.

Khase and others--Respondents.

Second Appeal No. 779 of 1923, Decided on 25th November, 1924, against the decree of the Dt. J., Meerut.

(a) *Hindu Law—Re-marriage — Widow allowed to marry husband's brother by caste—Widow can inherit both brother's property.*

Where the widow of one brother married the second brother, according to the custom prevalent in her caste,

Held; that she was entitled to inherit the property left by both the brothers. 32 *All.* 489 *Ref.* [P 441 C 1]

(b) *Practice—New plea—Plea of legal necessity cannot be raised in Second Appeal.*

When the point as to the existence of legal necessity was not taken expressly before the lower appellate Court,

Held; that it could not be taken in second appeal. [P 441 C 2]

Jang Bahadur Lal and *Shiva Prasad Sinha*—for Appellants.

N. C. Vaish and *K. N. Katju*—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for recovery of possession filed by the plaintiffs who alleged themselves to be the reversioners of the last male owner.

The facts found by the Court below are that the property belonged half and half to two brothers Gopal and Dewan. Mt. Nanhi was first the wife of Gopal. Gopal died some 30 or 32 years ago. On his death Mt. Nanhi became the karao wife of his brother Dewan. The Judgments do not exactly say when Dewan died but the oral evidence is that he died one or two years after the death of Gopal. It therefore seems that the death of Dewan must have taken place not later than 1889 when certain compromise was arrived at between the reversioners. Mt. Nanhi made two mortgages in 1890 which the present plaintiffs now seek to avoid on the ground that they were not binding on them for want of any legal necessity.

The Court below appears to have believed that among Jats to which caste the parties belong there is a prevailing custom under which karao marriages are allowed, that is to say under which widows are allowed to remarry. If this practice prevails then a remarriage is not invalid and it is not necessary to invoke the aid of Act No. 15 of 1856 to validate such a marriage. In the view which has prevailed in the Allahabad High Court the Act would then be inapplicable so far that the widow on her remarriage would not forfeit her rights in the estate of her former husband, *vide. Mula* v. *Partab* (1) and several other previous cases. It is also clear that under S. 5 of the Act she would be entitled to inherit the estate of her second husband as if no marriage had taken place. Thus Mt. Nanhi would enter into the possession of both the half shares of Gopal and Dewan as their widow, legally entitled to remain in possession for her life. Her death took place on the 5th of February 1909 within 12 years of the suit. It is, therefore, apparent that the plaintiffs' claim can in no sense be held to be barred by time, the cause of action arising in their favour on her death when only the succession opened to both the estates.

The next point urged on behalf of the appellants is that the compromise, arrived at between the reversioners is binding on the plaintiffs. This contention has no force. In the first place it is not shown that the widow was any party to the compromise, then again as the lower appellate Court has remarked the exact nature of the compromise is not very clear. At any rate it is clear that it was not a partition of the estate between the reversioners during the lifetime of the widow with her consent but it was a mere agreement to divide part of that property which was the subject-matter of three suits pending in case those suits were actually decreed. As matters stand those suits were dismissed. It is not suggested that the present plaintiffs were themselves parties to the compromise and therefore also it is difficult to say how they can be in any way bound by what their predecessors, who then had only a *spes successionis* had done.

The defendants are only holding the property by virtue of certain mortgage-deeds. The learned vakil for the defendants has urged that the lower appellate Court should have found as to whether these had been executed for valid necessity or not. In the first place no specific ground as to this was taken in the numerous pleas raised in the memorandum of appeal before the lower appellate Court. In the next place the learned Judge has remarked that it is difficult to see what necessity there was for these mortgage-deeds in 1890. Apparently none was shown to him. When the point was not taken expressly before the lower appellate Court it cannot now be taken in second appeal. I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) [1910] 32 All. 489=6 I.C. 116=7 A.L.J. 417.

★ 1925 ALLAHABAD 442

LINDSAY AND KANHAIYA LAL, JJ.

Firm Jhandu Lal-Mithu Lal—Plaintiff—Appellant.

v.

Mt. Wilayati Begum and others—Defendants—Respondents.

First Appeal No. 19 of 1922, Decided on 2nd March, 1925, from a decree of the Addl. Sub. J., Agra, D/- 17th September, 1921.

(a) Negotiable Instruments Act, S. 68—Presentment before maturity is not valid.

No presentment is valid unless it is made after the bill had reached maturity. [P. 442, C. 2]

★ *(b) Negotiable Instruments Act, S.76(b)—Partial promise to pay—Further presentment is not necessary.*

Even a parol promise on the part of the endorser to pay the note is sufficient to constitute an engagement to pay notwithstanding non-presentment. [P. 443, C. 1]

Iqbal Ahmad, K. N. Katju, S. B. Johari and *B. Dayal*—for Appellant.

Muhammad Ullah and *N. P. Asthana*—for Respondents.

Lindsay, J.—This is a plaintiff's appeal arising out of a suit which was brought on a hundi. The document in suit is printed at page 27 of our record and it appears that it was drawn on the 25th September 1918 by a person named Muniruddin. Muniruddin drew on himself and also accepted the hundi on the date just mentioned. He afterwards delivered it to a person named Muhammnd Husain who negotiated it with the plaintiff firm and obtained cash therefor. The amount of the hundi was Rs. 8,500.

The suit out of which this appeal has arisen was brought by the plaintiff firm against the legal representative of Muhammad Husain who is dead and against the drawer and acceptor Muniruddin.

In the Court below the suit has been decreed against Muniruddin but it has been dismissed as against the representatives of Muhammad Husain. The basis of the judgment is this, namely, that there was no proper presentment of the bill for payment so as to render Muhammad Husain liable as an endorser.

The plaintiffs now appeal, and the argument is that the decision of the Court below is wrong.

We may mention here that an application has been made to this Court to admit additional evidence in the case in the shape of a letter. This application is made for the purpose of proving to the Court that the bill in suit was an accomodation bill; in other words, that Muniruddin drew and accepted the bill without valuable consideration. He did so merely for the purpose of enabling Muhammad Husain to raise money on it.

It is stated that this evidence only became available after the suit had been decided in the Court below.

After hearing the arguments in the case, however, we are of opinion that there is no necessity to admit any additional evidence in the case. Whether the bill was an accommodation bill or not does not appear to us to make any difference to the legal situation of the parties.

We have now to consider what took place in the matter of presentment for payment. The hundi was declared to be payable 359 days after the 25th September 1918. It therefore, came to maturity on the expiry of the period of grace that is the third day after the 19th September 1919, that is to say, on the 22nd September 1919.

Now the only evidence regarding presentment is to be found in the statement of Chandan Lal who is a partner in the plaintiff firm, and according to Chandan Lal's story he presented the bill for payment to the drawer Muniruddin and also to the endorser Muhammad Husain on the 19th September 1919.

We agree with the learned Judge of the Court below that this was not a good presentment in law for no presentment is valid unless it is made after the bill has reached maturity. The bill had not reached that stage on the 19th September 1919. There was therefore no valid presentment.

As against Muniruddin we think the Court below was right in granting a decree for, in any view, it appears to us that he was liable whether there was presentment or not. In the form in which the bill was drawn, Muniruddin himself being drawer and acceptor, it was to the holder to treat the document as a promissory note, and we have the further fact that Muniruddin has not appealed against the decree of the Court below.

There remains the question of the liability of the endorser Muhammud Husain.

Mr. Iqbal Ahmad who appears on behalf of the plaintiff-appellant relies upon the terms of S. 76 (b) of the Negotiable Instruments Act. This section and clause (b) lay down that no presentment for payment is necessary, as against any party sought to be charged therewith, if he has engagad to pay notwithstanding non-presentment.

There can be no doubt that a party to a Bill of Exchange can waive a presentment for payment as all the provisions relating to presentment are made for the protection and benefit of the party liable.

In support of his argument, Mr. Iqbal Ahmad relies upon the statement of Chandan Lal, which is uncontradicted and which we have no reason to disbelieve. Chandan Lal's statement is that on the 19th of September he went first of all to the house of Muniruddin with the hundi. He showed the hundi to Muniruddin and asked for payment. Muniruddin told him to go to Muhammad Husain saying that he did not think that Muhammad Husain would be likely to pay as sales were slow and the money was locked up in business.

Chandan Lal says that he ther went to Muhammad Husain with the hundi and said :—

"Please pay this money. I have come here after seeing Muniruddin ; he (Muhammad Husain) said the money is not procurable at present, you may charge interest at the rate of 13 annas per cent. I shall pay the money in a year or six months when it is received."

Mr. Iqbal Ahmad contends that if this evidence is believed it is sufficient proof of a waiver of presentment for payment on the part of the endorser, Muhammad Husain.

On the other hand, it is argued on behalf of the respondents that clause (b) of S. 76 cannot be applied in the light of this evidence because it is not made to appear that Muhammad Husain engaged to pay "notwithstanding non-presentment." The contention of the learned Advocate for the respondents is that unless the fact of the engagement is disclosed in the endorsement made in the present case the evidence before us could not be treated as evidence of an engagement to pay notwithstanding non-presentment.

It seems to us that this is putting too narrow a construction on clause (b) of S. 76, and we think that if there is reliable evidence before us of a parol promise on the part of the endorser to pay the note that is sufficient. We think we may fairly say that when Muhammad Husain informed the holder that he would pay the money in a year or six months when he had it available, that was an undertaking to pay without any further presentment of the bill.

We are of opinion, that the plaintiff firm ought to succeed in this appeal and that a decree should have been passed also against the legal representatives of Muhammad Husain. We therefore allow this appeal and substitute for the decree of the Court below a decree against all the defendants with costs including in this Court fees on the higher scale. It is, of course, to be understood that the decree in so far as it concerns the legal representatives of Muhammad Husain, can be executed only against the assets of Muhammad Husain in the hands of these persons.

Appeal allowed.

★ 1925 ALLAHABAD 443

WALSH, J.

Din Dayal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 657 of 1923. Decided on 1st February 1925, from an order of the S. J., Cawnpore.

(a) *Criminal Trial — Using knowledge of one case in another is wrong where accused are different.*

A Magistrate trying a security case as well as an assault case used his knowledge of the one in delivering judgment in the other while the accused was not the same in both cases.

Held : that the judgment was wholly irregular.

★ (b) *Criminal P. C., S. 107 — Masters and servants jointly tried — Evidence not sufficient— Masters discharged but servants ordered to provide heavy securities—Order is wrong.*

Where there were old standing feuds between two parties which in the course of events developed into a very serious and heavy litigation and the Magistrate finding no evidence against the masters discharged them but assuming a possibility of breach of peace ordered their servants to provide heavy securities,

Held : that the Magistrate's order was not justified.

Kailas Nath Katju—for Applicant.

R. Malcomson—for the Crown.

Judgment.—I am unable to find any justification for this order. It lays itself

open to such serious criticism that it is difficult to know where quite to begin. The order of the Deputy Magistrate, by which expression I mean the judgment, is mainly based upon a case which he had heard himself in which some of these persons were involved. I will deal the question of the personnel in a moment. But it is quite plain that although he referred to other matters, he could not leave out of his mind the case of assault which he referred to, and which he had heard the same day. That case of assault in which he convicted has been upset, and, therefore, three-fourths of the judgment of the Deputy Magistrate disappears. I will refer to the judgment in which it was upset in one moment. There would have been no harm, and it would have been only natural for him, trying a security case and an assault case on the same day against the same persons, to use his knowledge of the one to govern his judgment in the other, and to make such use appear in his judgment. The logical result, if the persons were the same, ought to be that if he convicted in the case of assault and thought the persons ought to be bound over, he ought to bind them over as part of the decision in the assault case. Further, the logical result of that would be that when the assault case was upset in appeal, the binding over would be upset too. In the result we have a judgment in a security case based largely, if not entirely, upon an assault case, which no longer exists.

It may be said in answer to this criticism that the accused in the assault case and in the security case were not the same. But if that is a just criticism, then the judgment and the decision in the assault case had no bearing upon the security case and were irrelevant and ought not to have been referred to. In fact as regards four of the people who are before me, and who were before the Magistrates in the Courts below in this case, the proceedings and judgment in the assault case were wholly irrelevant, because they were no parties to the assault case, and, therefore, the judgment of the Deputy Magistrate is irregular in using knowledge of another case. Although he cannot forget it and returns to it from time to time in the course of his judgment, he appears to be conscious that it requires support from other directions. The support which it requires can only be described as faint-hearted. The Deputy Magistrate sets them out and says somewhat quaintly :—

"These events are not proved very strongly so as to make them an offence. They certainly give a fear in the mind of one about the safety of his life"..

But if they are not proved sufficiently to make out an offence, they are not proved sufficiently to establish in a judicial mind the fact of reasonable apprehension. I am unable to understand the view of the District Magistrate about this acquittal in appeal. He says that the fact of the acquittal did not help the applicants before him. But the acquittal was subsequent to the order of the Deputy Magistrate, which was before him in revision, and if the subsequent acquittal did not help the case of the applicants, I cannot understand why the District Magistrate thought that their conviction helped the case against them which was practically the main ground on which the Deputy Magistrate had proceeded. But as a matter of fact, if the District Magistrate had taken the trouble to study the judgment of the Sessions Judge—I do not complain of his having failed to do so, because I think he ought to have quashed the order of the Deputy Magistrate at first sight without further examination—he would have found that the Sessions Judge acquitted the accused in that case, and, therefore, two of the applicants in revision before the District Magistrate, upon the ground that it was not made out beyond reasonable doubt that they were present at the occurrence at all. He would also have discovered that his subordinate officer, the Deputy Magistrate, had used in the judgment recording the conviction, an alleged statement as coming from the Civil Surgeon by way of expert medical evidence, which was not to be found. The Sessions Judge said that neither he, nor the prosecution, nor the defence, have been able to discover on the record any evidence justifying the finding with reference to the medical testimony arrived at by the Deputy Magistrate. This of course is a very serious matter, and having regard to the order of the Deputy Magistrate which I now propose to deal with, it ought to have opened the eyes of the District Magistrate to what was going on. The order which has been passed is, I hope, without precedent. I have asked in vain for the production of any precedent to justify it, and it appears to me to be outrageous on the

face of it. Reduced to plain language, it looks very much as though the Deputy Magistrate thought that where there were old standing feuds between two parties or two branches of a family, which in the course of events had come to a head by a very serious and heavy litigation, one might always assume a possibility of a breach of the peace, and bind over one party or the other to keep the peace under this section. If that theory became an established practice, a very large proportion of the litigant population of the United Provinces would inevitably have to be bound over, and the scarsity of sureties would become so great, that a considerable number of the litigants would find themselves in jail failing their ability to find anybody left to give security. But if, on the other hand, the Deputy Magistrate came to the conclusion that the servants of the three persons, who allege themselves to be the reversioners and who are the plaintiffs in the suit which has been filed, were really doing the wicked work of their masters, and were acting under their instigation and encouragement in either threatening or compassing the death of this expectant heir under the rule, and there was evidence upon which he could come to such a conclusion, then he ought to have found that fact against the masters and ordered them to give security. But he has dischrged them, which makes his order inconsistent in terms with the main structure of his judgment. If, on the other hand, the masters have been rightly discharged and there is no evidence against them, then the case against the servants for having so conducted themselves as to create an apprehension of the breach of the peace on account of the litigation between their masters and the other branch of the family, entirely breaks down. Yet he has made them provide sureties, which, as regards them and the circumstances of their case, assuming that their masters are innocent, are not only excessive, but which the Deputy Magistrate knew was impossible, and which he intended to be a punishment for the masters whom he was discharging. The objections, legal and otherwise, to such an order are obvious. The Deputy Magistrate went as near as he could to compel the masters to give their surety. He says in his judgment :—" The amount seems to be appropriate to their masters standing surety for them". Of course he had no jurisdiction to make that order but he made an order in 'such a form as to leave the masters no alternative except, on the one hand, to lose their servants by refusing to give sureties so that the men would have to go to jail; or being bound hand and foot by very onerous securities for the conduct of men who might leave their masters the next day and pursue at the instigation of the other side a consistent course of legalized blackmail upon their former masters. The order looks a subtle attempt to procure by indirect means what the Magistrate professes by his former order to be unable to do by law, and I am surprised that the District Magistrate did not see through it. I am surprised also that he did not see through the palpable *mala fides* of this application. It followed immediately upon the masters and the servants, who are now before me, having applied in the Civil Court for the appointment of a receiver, which resulted in these complainants, being ordered to give security in the amount of Rs. 5,000. It was not founded upon any public report or complaint by the police, but palpably on the allegation of a private individual, who was apparently smarting under a counter-move which had been taken by his opponent in the civil litigation. All this is so transparent, that the failure of the District Magistrate to see through it, can only be explained by his order in which he says that he is not going into the evidence. But it is a fact that the Deputy Magistrate who has made all these curious orders, is the same Deputy Magistrate who has made an order favourable to the same side in mutation proceedings on the revenue side, and although I have no jurisdiction over him or the District Magistrate except in criminal matters which are brought within the Code, I would suggest to the District Magistrate that as a matter of administrative procedure, it would be well if the Deputy Magistrate were prohibited for all time from adjudicating upon any matter in which these persons are concerned. If I were his superior officer, there are certain matters upon this record which I should call upon him to explain. It is possible that somewhere or another in this case there lurks trustworthy evidence that somebody has done some act indicating that he is contemplating a breach of peace. There is no evidence before me of anything of the kind, and, therefore, I can only quash all

the orders which have been made, and suggest to the District Magistrate that if he thinks that further proceedings of any kind are necessary, they should be directed against persons about whom there is some evidence.

Orders quashed.

1925 ALLAHABAD 446

LINDSAY AND KANHAIYA LAL, JJ.

Khudayar Khan—Appellant.

v.

Rahat Khan and others—Respondents.

Second Appeal No. 1327 of 1923, Decided on 12th February, 1924, from the decree of the Dt. J., Ghazipur.

Wajib-ul-arz — *Subsequent partition does not necessarily abrogate custom recorded therein.*

A custom recorded in the *wajib-ul-arz* is not necessarily abrogated by the partition of the village. It is open to the co-sharers to adopt that custom in its entirety or to modify it in order to adopt it to the altered constitution of the village. 37 *All.* 123 (*P. C.*) *Foll.* [P 443, C 2]

S. N. Sen and *S. N. Verma*—for Appellant.

Iqbal Ahmad—for Respondents.

Kanhaiya Lal, J. — This appeal is without force. The plaintiff sued to pre-empt certain property situate in certain mahals in which he was a co-sharer. The plaintiff claimed that he was entitled to preference by reason of his being a near kinsman of the vendor. The defendant-vendee was also a co-sharer in the mahal, and his defence was that he was also related to the vendor. The plaintiff relied on an alleged custom recorded in the wajib-ul-arz of 1882 and that prepared after the partition of the village in question in 1911. Both these wajib-ul-arzes gave a preferential right to a near kinsman of the vendor who was also a co-sharer in the mahal or patti in which the property sold was situated. The Court of first instance found that the custom recorded in the wajib-ul-arz of 1882 ceased to be enforceable after the partition and that the plaintiff could only succeed on the ground that there was a contract of pre emption entered in the new wajib ul-arz which was prepared at the time of partition. The lower appellate Court upheld that view.

We have examined the wajib-ul-arzes produced in the case and have no doubt that the view taken by the Courts below in regard to the effect of the partition on the custom recorded in the previous wajib-ul-arz is erroneous. As observed by their Lordships of the Privy Council in *Digamber Singh* v. *Ahmad Sayeed Khan* (1) a custom recorded in the wajib-ul-arz is not necessarily abrogated by the partition of the village. It is open to the co-sharers to adopt that custom in its entirety or to modify it in order to adopt it to the altered constitution of the village. The co-sharers in the present instance appear to have adopted the former course for the wajib-ul-arz recorded at the time of the partition of the village in question stated that the right of pre-emption shall continue to belong, in spite of the partition of the village, to the co-sharers who were near kinsmen of the vendor and that it would extend, subject to the limitations therein recorded, to co-sharers of one mahal as against co-sharers of the other mahals. The plaintiff, being a nearer kinsman of the vendor, was, therefore, rightly granted a decree for pre-emption.

It is urged on behalf of the defendant-vendee that the vendor was a minor at the time of the partition and that he was not bound by any contract entered into by the co-sharers at the time. Even assuming that he was a minor co-sharer at the time, it must be presumed that he must have been duly represented in the partition proceeding by some lawful guardian who looked after his interests, and the wajib-ul-arz prepared in partition proceeding must therefore be held to be binding on all the parties to the partition proceeding. It is not open to the vendor, if he was a co-sharer at the time, to go behind the partiton proceeding and raise pleas inconsistent with what was then recorded as one of the conditions on which the partition was effected. That being so, this appeal fails and is dismissed with costs, including in this Court, fees on this higher scale.

Application dismissed.

---

(1) [1915] 37 All. 123=42 I. A. 10=13 A. L. J. 236=19 C. W. N. 393=17 M. L. T. 193=2 L. W. 303=21 C. L. J. 237=28 M. L. J. 556=17 Bom. L. R. 393=28 I. C. 34=(1915) M. W. N. 581 (P. C.)

★ 1925 ALLAHABAD 447

MUKERJI, J.

Jumna Das and another—Appellants.

v.

Kunwar Bai—Respondent.

Second Appeal No. 900 of 1923, Decided on 21st January, 1925, against the decree of the Sub. J., Banda.

★ *Hindu Law—Stridhan—Sons succeeding to stridhan after mother's death as tenants in common.*

The stridhan property of mother is inherited by the sons without any right of survivorship attaching to it. They inherit as tenants in common and not as joint tenants with right of survivorship. 27 *Mad.* 300 *F. B. and* 36 *Bom.* 424 *Foll.* [P 447, C 1 ; P 448, C 1]

Kailas Nath Katju—for Appellants.

K. N. Laghate—for Respondent.

Judgment.—The question to be decided in this appeal is a question of Hindu Law and arises under the following circumstances. The property in suit belonged originally to one Piare. He gave it away absolutely to his daughter Mt. Sugna, in whose hand therefore it was her stridhan property. Mt. Sugna had three sons, *viz.*, Durga Prasad, the husband of the plaintiff-respondent and Jamna Das and Ganga Prasad, the defendants-appellants. The plaintiff-respondent claimed a third share in the property as being the separate property of Durga prasad.

The defence was that Durga Prasad died as a member of a joint Hindu family with the defendants and therefore the plaintiff inherited nothing.

It has been found as a matter of fact that Durga Prasad and his two brothers were living together as members of a joint Hindu family. The question is whether under the circumstances the share which Durga Prasad inherited was his absolute property inheritable by his widow on his death or whether Durga Prasad held the property as any other joint ancestral property inherited from father which would go by survivorship to his brothers.

The learned Judge of the lower appellate Court has mentioned the authorities quoted before him and has come to the conclusion that the stridhan property of mother is inherited by the sons without any right of survivorship attaching to it.

Before the case of *Vankayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1) was decided by their Lordships of the Privy Council, there was no doubt in the proposition that property inherited from a maternal grandfather was inherited without any attachment of the right of survivorship to it. But their Lordships of the Privy Council ruled in the above mentioned case that where three joint brothers inherited their grandfather's property they took it with right of survivorship attaching to the property. The question before me is how far this principle can be applied to the case of the inheritance of the stridhan property of their mother by three brothers who lived jointly.

It seems to me that the expression "ancestral property" has nowhere been so applied as to include property inherited from a female. The property inherited from Mt. Sugna is therefore not likely to be termed as 'ancestral'. Indeed, there is a direct decision on the point by the Madras High Court in the case of *Karuppai Nachiar* v. *Sankaranarayyan Chetty* (2). This was a decision of five learned Judges and it was held there that "When the stridhan property of a woman devolves on her sons, who, with their father, form an undivided Hindu family at the time of the mother's death, the sons take it as co-owners or tenants in common without benefit of survivorship."

A similar decision was arrived at by two learned Judges of the Bombay High Court in the case of *Bai Parson* v. *Bai Sowalu* (3). It is worth mentioning that the Privy Council case in I. L. R. 25 M., 678 was cited and was present in the minds of their Lordships in both the cases.

It is a matter of some conjecture how far the case of *Atar Singh* v. *Thakur Singh* (4), decided by their Lordships of the Privy Council, modified or affected the law as laid down in I. L. R., 25 Madras. In this latter case, the property, as in the case in I. L. R. 25 Madras, was inherited from maternal grandfather by one Dayal Singh. Dayal having

(1) [1902] 25 Mad. 678=29 I. A. 156=4 Bom. L. R. 657=7 C. W. N. 1=12 M. L. J. 299=8 Sar. 286 (P.C.)
(2) [1904] 27 Mad. 300 (F.B.)
(3) [1912] 36 Bom. 424=15 I. C. 774=14 Bom. L. R. 400.
(4) [1908] 35 Cal. 1039=35 I. A. 206=10 Bom. L. R. 790=128 P. W. R. 1908=8 C. L. J. 359=12 C. W. N. 1049=18 M. L. J. 379=4 M. L. T. 207=6 I. C. 721=42 P. R. 1910 (P.C.)

transferred the property his sons claimed that the property was ancestral in the hands of their father and sought to set aside the alienation. Their Lordships of the Privy Council remarked that it was for the sons to prove that the property was "ancestral" in the hands of Dayal Singh. It is, however, clear that the case in 25 Madras does not directly govern the case before me and that there are at least two cases having the authorities of seven learned Judges of two different Courts which establish the proposition that in the circumstances of the present case the property is taken by the heirs as tenants in common and not as joint tenants with right of survivorship.

In the circumstances I dismiss the appeal with costs which will include counsels fees in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 448

BANERJI, J.

Dhum Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 148 of 1925, Decided on 9th April 1925, from an order of the S. J., Kumaun.

(a) Police Act, (5 *of* 1861) *S.* 34—*Penal Code S.* 279—*Finding that no offence was committed under Police Act, S.* 34—*Conviction under Penal Code S.* 279 *is bad.*

The finding of a Magistrate that the accused was not guilty of an offence under S. 34 of the Police Act necessarily and logically means that the accused could not be convicted of an offence under S. 279 of the Penal Code. [P 448 C 2]

(b) Criminal P. C., Ss. 227 *and* 237—*Ss.* 227 *and* 237 *should be read together.*

An accused is entitled to know what offence he has to answer; Ss. 237 and 227, Criminal P. C. necessarily go together. It is not the intention of the legislature to empower a Court to convict an accused person of an offence of which he has not been told anything. [P 448 C 2]

C. Ross Alston, *Baleshwari Prasad* and *Surendra Nath Verma*—for Applicant.

M. Waliuallah—for the Crown.

Banerji, J.—A report was made at the police station, Srinagar, Garhwal, by constable Sadanand that one Dhum Singh came into the bazar carelessly and fast on a bicycle. Two girls were pushed down by it, and in spite of the policeman asking him to stop, he did not. The girls wept loudly but were not hurt. Upon that the Sub-Inspector submitted the report to the Town Magistrate suggesting that the man should be tried for driving the bicycle rashly without blowing the horn. Thereupon summons were issued to Dhum Singh to answer a charge under S. 34 of the police Act. The accused was tried by a Magistrate of the first class. The Magistrate says that the facts proved do not constitute an offence under S. 34, but the Magistrate convicted him under S. 279 of the Indian Penal Code and ordered him to pay a fine of Rs. 15. The accused went up in revision before the Sessions Judge, and one of the points taken by him was that he could not be convicted under S. 279 of the Indian Penal Code when the charge was under S. 34 of the Police Act, and the next point taken was that the Magistrate in his judgment does not definitely state in what way the accused was driving rashly. Mr. Alston on behalf of the accused has come up here in revision, and he states that his client was the first man to ride a bicycle in the bazar at Srinagar, and further that if the accused is held not to have committed an offence under S. 34, you could not convict him of an offence under S. 279 of the Indian Penal Code and further that under S. 227 of the Criminal Procedure Code the accused should have been told what was the offence that the Magistrate was going to try him for, and that he could not under S. 237 convict him of a different offence. It seems to me that the finding of the Magistrate that the accused was not guilty of an offence under S. 34 necessarily and logically means that the accused could not be convicted of an offence under S. 279 of the Indian Penal Code. Moreover an accused is certainly entitled to know what offence he has to answer, and Ss. 237 and 227, Criminal Procedure Code, necessarily go together, and it is not the intention of the legislature to empower a Court to convict an accused person of an offence of which he has not been told any thing. I, therefore, set aside the conviction and direct that the fine, if paid by accused, be refunded to him.

Conviction set aside.

1925 ALLAHABAD 449

SULAIMAN AND KANHAIYA LAL, JJ.

Abhainandan Prasad — Defendant — Appellant.

v.

Pashpat Nath Pande—Plaintiff—Respondent.

First Appeal No. 356 of 1921, Decided on 23rd January, 1925, from a decree of the Sub. J., Gorakhpur.

(a) *Pre-emption—Custom need not be immemorial.*

The fact that more than 100 years ago (and about 55 years prior to the last settlement) there was a single proprietor in the village is not by itself sufficient to rebut the presumption arising from the entries in three successive wajib-ul-arzes, as to the existence of a custom of pre-emption among the co-sharers. A period of hundred years and even of 55 years is not necessarily too short for the growth of a custom of pre-emption in the United Provinces where such a custom is well-known to be very common. It is not essential to show that such a custom is immemorial. 17 *All.* 87 and 28 *All.* 434 *Foll.* [P. 450, C. 2]

(b) *Pre-emption—New categories of pre-emptors added in later* wajib-ul-arz *— Custom is not negatived.*

The introduction of new categories of pre-emptors in the *wajib-ul-arz* in addition to the ones mentioned in previous *wajib-ul-arzes* does not necessarily negative the existence of a custom of pre-emption in favour of a co-sharer as against a stranger. [P. 451, C. 1.]

(c) *Pre-emption—Settlement of pre-emption in* 1885 *in United Provinces—Entry is specially important.*

An entry in a wajib-ul-arz made at the settlement of 1885 in the United Provinces, as to the custom of pre-emption in a village is of particular importance. [P. 451, C. 1.]

(d) *Pre-emption—Wajib-ul-arz—Later* wajib-ul-arz *ampler than earlier ones—Custom is not necessarily negatived.*

The mere fact that subsequent *wajib-ul-arzes* are fuller raises no presumption that they were not records of a custom; for the later *wajib-ul-arzes* may very well be mere amplifications of the previous *wajib-ul-arzes*. The case may be different when they absolutely contradict the entries in the previous *wajib-ul-arzes* and cannot be reconciled with them. 33 *All.* 196 *Foll.* [P. 451, C. 2.]

(e) *Pre-emption—Partition of village—No new* wajib-ul-arz*—Pre-existing custom of pre-emption is not negatived—But right will be confined to the new fiscal units.*

Where a fresh *wajib-ul-arz* has not been prepared at partition, it does not necessarily follow as a matter of law or principle that the custom or contract in force before the partition is no longer to have effect or operation. 22 *All.* 1 and 37 *All.* 129 *Foll.* 1922 *All.* 182 and 41 *All.* 426 *Ref.* [P. 451, C. 2.]

The partition, however, would have the effect of confining the right to the new fiscal units unless the contrary is established by other evidence. A mere proof that prior to the partition of the village the custom of pre-emption existed would not be sufficient to entitle the plaintiff to a decree. It would be necessary for him to show, either on the construction of the wajib-ul-arz or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza would survive on partition of that mouza into separate mahals, so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale. 37 *All.* 129 *Foll.* [P. 452, C. 1.]

(f) *Pre-emption — Husband's maternal grandfather's nephew is not near relation.*

The nephew of the maternal grandfather of the husband of the vendor is not a near relation (*hissedar qaribi*). He is a distant relation (*hissedar baidi*) of the vendor's husband. [P. 452, C. 2.]

(g) *Pre-emption—Suit for—Plaintiff set up by a stranger—Suit cannot be dismissed if plaintiff is entitled to pre-empt.*

If the plaintiff has a legal right to pre-empt it is unnecessary for the Court to consider from what source he is going to procure the pre-emption money, If subsequent to the litigation he allows any stranger to come in or attempts to transfer the property to such stranger, it would be open to the co-sharers of the village to bring a suit for pre-emption. The mere fact that the suit is instituted at the expense of another person and that the person claiming pre-emption is merely a nominal plaintiff acting on his behalf is immaterial so long as the plaintiff has the legal right to pre-empt. 23 *O. C.* 85 *Foll.* [P. 452, C. 2. P. 453, C. 1.]

(h) *Landlord and tenant—Houses in zamindari area* prima facie *pass with zamindari.*

In the absence of evidence to the contrary, the houses or buildings situate within the zamindari area were presumed to be included in and to pass with the zamindari. [P. 453, C. 1.]

Tej Bahadur Sapru, Shankar Saran and *Iswar Saran*—for Appellant.

Girdhari Lal Agarwala—for Respondent.

Facts.—This was a defendant's appeal arising out of a suit for pre-emption. Under a sale-deed dated the 31st of August, 1919 Mt. Padmavati, defendant No. 2, transferred to Rai Bahadur Babu Abhainandan Prasad, defendant No. 1, a 7 annas and odd share in holding No. 6 mahal No. 3 of village Magadiha and a 12 annas share in mahal No. 2 patti No. 1 of the same village for Rs. 25,000. The plaintiff claimed that under a custom prevailing in this village he was entitled to pre-empt this sale inasmuch as it had been effected without any offer being made to him in the first instance. He also alleged that the sale consideration mentioned in the deed was inflated, the true consideration being only Rs. 19,243-2-0.

[Their Lordships stated facts and after setting out the contentions of the parties, proceeded :—]

Judgment.—In support of the alleged custom the plaintiff relied on entries in the *wajib-ul arzes* of 1833, 1860 and 1885. He also relied on a judgment in the case of the year 1901 and a judgment of the year 1907, and also on a reference in those judgments to an earlier pre-emption decree of 1880. On the other hand, it has been contended on behalf of the defendant that having regard to the previous history of this village, the variations in the three *wajib-ul-arzes*, and the partition which has since been effected, there is really no custom in this village. In order to show the previous history of this village reliance is placed on two documents called '*Kaifiyat Mahtawi*' and '*Kaifiyat Sarishtai Nizamat*' of 1833 and 1860 respectively. These documents show that soon after the district of Gorakhpur had been acquired by the British Government from the Nawab Wazir of Oudh, the village was farmed out to one Sheikh Farhat from 1210 to 1212 Fasli. From 1213 to 1215 Fasli the village was in possession of certain mortgagees, Mirza Hasan Ali Beg and Assubut Ali. From 1216 to 1219 Fasli it was farmed out to three persons, Ganesh Dat, Balgobind and Dat Ram. From 1220 to 1224 Fasli Ganesh Dat and Dat Ram were in possession. On the 29th of February, 1818, however, the whole village appears to have been sold and the name of Gobind Singh, auction purchaser, was recorded exclusively. Subsequent to this and about 1820 Gobind Singh sold this village to three persons, Sheo Nath, Nandlal and Balgobind. At the time of the regular settlement of 1833 a four anna share was recorded in the names of Uma Dat and Sheo Nath, an eight annas share in the names of Nandlal and Balgobind and the remaining four annas share in the names of Bisheshar Dat, Mahesh Dat and Shankar Dat. It is not disputed that from the year 1820 onwards there have always been more than one co-sharer in this village. It is strongly contended that inasmuch as the village was owned by a single proprietor from the year 1818 to 1820 there could possibly have been no occasion for the growth of a custom of pre-emption, and that, therefore, the entry in the *wajib-ul-arz* of 1833 must be taken to be a record of contract. It is then urged that the subsequent entries in the *wajib-ul-arzes* of 1860 and 1885 must therefore also be presumed to have been records of contract. We are of opinion that this is not a correct way of approaching the question. The plaintiff is entitled to rely on the entry in the *wajib-ul-arz* of the last settlement of 1885. That entry raises a *prima facie* presumption that there is a custom of pre-emption existing in this village. The plaintiff can further supplement this evidence by the entries in the earlier *wajib-ul-arzes* of 1860 and 1833 as corroborative evidence. If these *wajib ul-arzes* raise a *prima facie* presumption that a custom of pre-emption exists in the village, the burden would lie on the defendant vendee to show the contrary by producing evidence to rebut that presumption. All that is established in this case is that about the year 1820, that is to say more than 100 years ago (and about 55 years prior to the last settlement) there was a single proprietor in this village. In our opinion this circumstance by itself is not sufficient to rebut the presumption arising from the entries in the successive *wajib-ul-arzes*. A period of 100 years and even of 55 years is not necessarily too short for the growth of a custom of pre-emption in these provinces where such a custom is well-known to be very common. It is not essential to show that such a custom is immemorial, *vide Kuar Sen* v. *Mamman* (1) and *Lakhraj Bharthi* v. *Anrudh Tiwari* (2).

The next point urged is that inasmuch as there are variations in the three *wajib-ul-arzes* the presumption is negatived. It is pointed out that under the *wajib-ul-arz* of 1833 a right was given to mere co-sharers in the village, whereas in the *wajib-ul-arz* of 1860 a right was given to near co-sharers (*hissedar qaribi*), then to co-sharers in the *thok* and then to the other co-sharers in the village, and in the *wajib-ul-arz* of 1885 a right was given to own brothers, then to near relations, then to co-sharers in the patti and then to co-sharers in the village. It is apparent, therefore, that in the year 1833 there was only one category of pre-emptors, in 1860 there were three categories, and in 1885 there were four categories.

We must, however, note that so far as the right to pre-empt the property in favour of a co-sharer as against a stranger is concerned, this was recognized in all

(1) [1895] 17 All. 87=(1895) A. W. N. 10.
(2) [1906] 28 All. 434=(1906) A. W. N. 80.

the three *wajib-ul-arzes*. The plaintiff is not claiming a preference against the defendant on the ground that he is either an own brother or a near relation of the vendor. He claims the right of pre-emption on the ground that he is a co-sharer while the defendant-vendee is a perfect stranger. The addition of the new categories in the *wajib-ul-arz* of 1885, therefore, does not necessarily negative the existence of a custom of pre-emption in favour of a co-sharer as against a stranger.

We may point out that the entry made at the settlement of 1885 is of particular importance. According to the Gazetteer of Gorakhpur (pp. 151-2) the settlement operations commenced soon after 1883 and lasted till 1890. Gorakhpur proper was inspected in 1886-87 or after. The settlement was sanctioned from 1889 to 1919. Now under the Circular of the Board of Revenue dated the 24th of August, 1886 which was issued for the guidance of officers conducting the settlement operations in Gorakhpur district, it was provided that the Settlement Officer should make a note of custom or constitution peculiar to a mahal, and it was further provided that as regards mahals which belonged to proprietors other than Muhammedans the Settlement Officer was to record a right of pre-emption only when the proprietors expressly demanded that it be noted and proved conclusively that the custom existed. In the year 1886 this village was an exclusively Hindu village and we are entitled to presume that at that time the Settlement Officer, before making this entry, was fully satisfied that a custom did exist in the village. We have had occasions to refer to the Circular in several cases, *vide* the cases of *Nandan Singh* v. *Guptar Singh* (3) and *Babban Pande* v. *Lachhman Chaudhari* (4).

As a special significance attaches to the entry in the last *wajib-ul-arz* we are entitled to draw a very strong presumption from it, specially as it purports to record a custom of pre-emption and not only an agreement as to such a right.

It may also be noted that it is possible that when a more thorough enquiry was made in 1885 complete details of the custom were recorded which were not forthcoming at the time when the *wajib-ul-arz* of 1860 or of 1833 was prepared. It was held in the case of *Returaji Dubain* v. *Pahlwan Bhagat* (5) that the mere fact that subsequent *wajib-ul-arzes* are fuller, raises no presumption that they were not records of a custom, for the later *wajib-ul-arzes* may very well be mere amplifications of the previous *wajib-ul-arzes*. The case may be different when they absolutely contradict the entries in the previous *wajib-ul-arzes* and cannot be reconciled with them.

We have already noted that in addition to the entries in these *wajib-ul-arzes* the plaintiff has produced the judgments of 1901 and 1907. The judgment of 1901 also contained a reference to a pre-emption decree of 1880. We, therefore, find that the custom did exist.

We are also of opinion that the effect of the partition of 1897 which was subsequent to the year 1885, when the last *wajib-ul-arz* was prepared, cannot be deemed to extinguish the custom. No new *wajib-ul-arzes* were framed at the partition of 1897 and there is nothing on the record to show that the co-sharers intended that the old custom should be abrogated. It was held in the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (6) that such a partition had not necessarily the effect of extinguishing the previously existing custom. In the recent case of *Digambar Singh* v. *Ahmad Sayeed Khan* (7) their Lordships of the Privy Council quoted with approval the view of Mr. Justice Banerji that where a fresh *wajib-ul-arz* has not been prepared at partition, it does not necessarily follow as a matter of law or principle that the custom or contract in force before the partition is no longer to have effect or operation.

The view that in the absence of evidence to the contrary the old custom would continue even after the partition, has been consistently followed by this Court, *vide* the cases of *Jokhan Singh* v. *Sabhajeet Singh* (8) and *Deokinandan* v.

(3) 1924 All. 424=22 A. L. J. 7.
(4) 1924 All. 371=46 All. 205=22 A. L. J. 62=5 L. R. A. Civ. 33.
(5) [1911] 33 All. 196=7 I. C. 680=7 A. L. J. 1040 (F. B.)
(6) [1899] 22 All. 1=(1899) A.W.N. 111 (F. B.)
(7) [1914] 37 All. 129=42 I. A. 10=13 A. L. J. 236=19 C. W. N. 793 = 28 I. C. 34 = 17 M. L. T. 193=2 L. W. 303=21 C. L. J. 237 =28 M.L.J. 553=17 Bom. L.R. 393=(1915) M. W. N. 531 (P. C.)
(8) 1922 All. 182=20 A. L. J. 223.

Mahtab Rai (9). We, therefore, think that the mere fact that there has been a partition of this village would not necessarily extinguish the right. The partition, however, would have the effect of confining the right to the new fiscal units. Under the pre-existing custom the persons who were jointly liable for payment of Government revenue had a right of pre-emption as against a stranger. After the partition those proprietors whose shares are situated in another mahal are no longer under any joint liability to pay such revenue. Owners of one mahal can, therefore, in no sense be called co-sharers (*hissedaran*) of the vendor *qua* the share sold in another mahal. In order, therefore to establish that the plaintiff has a right of pre-emption in this mahal it is not sufficient for him to show merely that previous to the partition a custom of pre-emption existed in this village. In the Privy Council case of *Digambar Singh* v. *Ahmad Sayeed Khan* (7) their Lordships at page 141 pointed out that a mere proof, that prior to the partition of the village the custom of pre-emption existed, would not be sufficient to entitle the appellant to a decree. It would be necessary for him to show, either on the construction of the *wajib-ul-arz* or by other evidence, that the custom of pre-emption which obtained in the unpartitioned mauza would survive on partition of that mauza into separate mahals so as to give a sharer in one of the new mahals a right to pre-empt property in another of those mahals in which he was not a sharer at the date of the sale.

The plaintiff is not a co-sharer in mahal No. 2. He is a proprietor in the village. There is nothing to show that at the time of the partition the right of the proprietors in the village to pre-empt shares sold in mahals other than their own was preserved. In the absence of any such evidence, the plaintiff is not entitled to a decree for pre-emption of the share sold in mahal No. 2. The learned vakil for the respondent has relied on the judgments of 1901 and 1907 to show that they are evidence of a right of pre-emption having been exercised in favour of a co-sharer in another mahal. This view is expressed by the learned Subordinate Judge also. We are, however, unable to accept that this was so. A perusal of the judgment of the year 1901 makes it quite clear that the learned Subordinate Judge came to the conclusion that it had not been established in that case that the plaintiff was a co-sharer of another mahal and not of the same mahal in which the share sold was situated; whereas the judgment of 1901 which unfortunately has not been printed shows that the claim was decreed not on the ground that the plaintiff was a co-sharer in another mahal but on the ground that he was a near relation of the vendor.

The defendant-vendee says that he is a *rishtedar qaribi* of the vendor and, therefore, claims that he comes under the first category of the entry in the *wajib-ul-arz* of 1885. There is a pedigree attached to the written statement filed by the defendant which shows that the defendant was the nephew of Babu Sham Lal who was the maternal grandfather of the husband of the vendor, Mt. Padmavati. He is not related in the direct paternal line but is related through a female and he is related really to the vendor's deceased husband and not to the vendor herself. Furthermore the several links in the pedigree show that he is not a near relation (*hissedar qaribi*) though he may be called a distant relation (*hissedar baidi*) of the vendor's husband. We are, therefore, not satisfied that the defendant vendee can bring himself within the second category mentioned in the *wajib-ul-arz* of 1885, namely the category of near relation so as to have a preference over the plaintiff.

[Their Lordships, after holding on the evidence that the plaintiff had not refused to purchase the property before the sale was effected and that it had not been established that the plaintiff was fighting the case not on his own behalf, proceeded:—]

Furthermore we are of opinion that even if it had been established that the plaintiff had instituted the suit at the instigation of other persons, that would not by itself have disentitled the plaintiff from getting a decree. If the plaintiff has a legal right to pre-empt, it is unnecessary for the Court to consider from what source he is going to procure the pre-emption money. If, subsequent to this litigation, he allows any stranger to come in or attempts to transfer the property to such stranger, it would be open to the co-sharers of the village to bring a suit for pre-emption. It was held in the

(9) [1919] 41 All. 426=50 I. C. 209=17 A. L. J. 467.

case of *Athar Husain* v. *Idu Shah* (10), by the Oudh Court of which one of us was a party, that the mere fact that the suit was instituted at the expense of another person and that the person claiming pre-emption was merely a nominal plaintiff acting on his behalf was immaterial so long as the plaintiff had the legal right to pre-empt. This view has been followed by this Court in the case of *Makhan* v. *Shyam Lal* (11), decided on the 25th of January, 1924.

The last point to consider is as to whether the plaintiff is entitled to pre-empt the two houses situated in mahal No. 2 which have been transferred under the sale-deed. In this mahal the entire patti No. 6 has been transferred, and it is not disputed that these houses stand on the land so transferred. Ordinarily these houses would be deemed to be appurtenant to the zamindari property unless there was evidence to show that they were treated separately and stood on a distinct and separate footing. Reliance is placed strongly on behalf of the defendant on the circumstance that in the sale-deed these houses are separately mentioned and their boundaries are separately given. In every village, however, zamindars have their collection houses which are appurtenant to the zamindari. Our attention has not been drawn to any specific evidence which would indicate that these houses were held and occupied separately and independently of the zamindari. It was held in the case of *Alu Husain* v. *Ramzan Ali* (12), that in the absence of evidence to the contrary, the houses or buildings situate within the zamindari area were included in and passed with the zamindari. See also *Banke Lal* v. *Jagat Narain* (13). We may also note that in the sale-deed no separate valuation of these houses has been entered.

The result, therefore, is that this appeal succeeds as regards mahal No. 2 and fails as regards mahal No. 3 in which we find that the plaintiff is entitled to a preferential right. The sale in this case was effected for a consideration of Rs. 25,000 the correctness of which is no longer challenged here, but there are no materials on the record to enable us to determine what portion of that consideration was paid on account of the share sold in mahal No. 2 and what part of it was paid on account of the portion sold in mahal No. 3 including the materials of the houses standing therein which are comprised in the sale. We accordingly direct the lower Court to determine, after taking such additional evidence as the parties may adduce, what portion of the sale consideration should be paid by the plaintiff for the portion of the property in dispute which is situated in mahal No. 3 including the materials of the houses in question as a condition precedent to the enforcement of the pre-emptive right?

Two months' time will be allowed for the return of the finding and ten days will be allowed from the date of receipt of the finding for filing objections.

[After receipt of the finding the appeal was allowed in respect of the property situate in mahal No. 3.]

Appeal allowed.

(10) [1920] 23 O.C. 85=56 I.C. 691=7 O.L.J. 271.
(11) S.A. No. 1444 of 1922.
(12) [1882] 4 All. 381.
(13) [1900] 22 All. 168=(1900) A.W.N. 31.

★ 1925 ALLAHABAD 453

MUKERJI, J.

Sat Narain Sahu—Defendant—Appellant.

v.

Bindesri Prasad and another—Plaintiffs—Respondents.

Second Appeal No. 860 of 1923, Decided on 2nd January 1925, against the decree of the Dt. J., Benares

★ *Hindu Law—Widow—Reversioner entering into compromise in widow's life-time is estopped from challenging it.*

Where a man, who becomes ultimately a reversioner has entered into a compromise with the limited owner in the life-time of a holder of life-interest, he is precluded from disputing the validity of the compromise. 40 *A.* 487 *(P. C.) Foll.*

[P 454 C 1]

S. N. Gupta—for Appellant.

Surendra Nath Sen and *Mukhtar Ahmad*—for Respondents.

Jugdment.—The sole question to be determined in this appeal is one of law and arises under the following circumstances. The property now in suit is a piece of land on which originally stood a house. The house and other properties belonged to one Gayadin. He was succeeded by his wife Mt. Parbati. Mt. Parbati died and her daughter Mt. Rajwanti succeeded to a life-estate. The appellant in this appeal is a

male agnate of Gayadin and is the actual reversioner to his estate on the death of Mt. Rajwanti which happened before the institution of the suit, out of which this appeal has arisen. On the 20th of September, 1915, Mt. Rajwanti and the appellant entered into an agreement by which Mt. Rajwanti was declared to be the absolute owner of the house and it was definitely stated that she could do anything she liked with the property. Mt. Rajwanti, before her death on the 16th of January, 1922, disposed of the house by way of sale in favour of the present respondent. The present respondent instituted the suit to obtain a declaration that he was the owner of the site by virtue of his purchase.

The appellant contended *inter alia* that Mt. Rajwanti had only a life-interest and she could not make a valid alienation. To this the respondent replied that the appellant having himself been a party to the agreement of the 20th of September, 1915, he could not reprobate the contract and is estopped from denying the plaintiffs' title.

The respondents' contention on this point has found favour with the Courts below and the only question to be determined is whether the appellant is not estopped from contending that Mt. Rajwanti was the absolute owner of the property and could sell it.

There is a vast amount of literature on the question of estoppel in cases arising under circumstances, more or less similar to the present ones. No useful purpose would be served by examining all the cases on the point. Each case was decided on the peculiar facts under which it arose. The principle, however, was definitely laid down in the Privy Council case of *Kanhai Lal* v. *Brij Lal* (1). The principle therein laid down was that where a man, who became ultimately a reversioner, had entered into a compromise in the lifetime of a holder of life-interest, he was precluded from disputing the validity of the compromise. This case was followed in this Court in the case of *Bahadur Singh* v. *Ram Bahadur* (2). A similar view was taken in the Full Bench case of *Fateh Singh* v. *Rukmini Rawan* (3). In my opinion the principle applies with full force to the case before me and I am clear that the Courts below were right in holding that the appellant was estopped from denying the plaintiffs' title.

The appeal fails and it is hereby dismissed with costs which will include counsel's fees in this Court on the higher scale.

Appeal dismissed.

(1) [1918] 40 All. 487=45 I. A. 118=22 C. W. N. 914=8 L. W. 212=24 M. L. T. 23=35 M. L. J. 459=16 A. L. J. 825=(1918) M. W. N. 709=28 C. L. J. 394=5 Pat. L. W. 294=47 I. C. 207=20 Bom. L. R. 1048 (P. C.)

(2) 1923 All. 204=45 All. 277=21 A. L. J. 140=4 L. R. A. Civ. 105.

(3) 1923 All. 387=45 All. 339=21 A. L. J. 235=4 L. R. A. Civ. 392 (F. B.)

★ 1925 ALLAHABAD 454

RYVES AND MUKERJI, JJ.

Ali Hammad—Plaintiff—Appellant.

v.

Ghurpattar Singh and others—Defendants—Respondents.

Second Appeal No. 1750 of 1922, Decided on 18th November 1924, from a decree of the Dt. J., Azamgarh.

★ (a) *Limitation Act, Arts.* 144 *and* 142—*Plaintiff's title proved—No dispossession alleged or proved—Art.* 144 *applies.*

The plaintiff proved that he had acquired the lands in a certain year. Subsequently the plaintiff's name disappeared from the settlement record and the defendant's name continued from the last settlement. The plaintiff did not plead dispossession. It was not found that he was actually dispossessed on a certain date.

Held: that the plaintiff having proved that he got the lands in suit in a certain year, that fact should be taken as the basis of decision, and that Art. 144 would apply and the Court should consider whether the defendants had completed a title in themselves by being in adverse possession for twelve years. 39 *Mad.* 617 and 41 *All.* 669 *Foll.* [P. 455, C. 2]

(b) *Limitation Act, Art.* 144—*How far property can be possessed directly is material factor.*

In considering the question of possession the Court will have to consider the nature of the property. How far the property is capable of being possessed directly will have to be considered. If for instance, the property is a land covered all over with wood, water, etc., even if the man in possession proved that he has been in possession in a clearer manner than the man with the title the adverse possessor may not succeed. 44 *Mad.* 883 (*P. C.*) *Foll.* [P. 455, C. 2]

Peary Lal Banerjee, Iqbal Ahmad, Narain Prasad Asthana and *Mukhtar Ahmad*—for Appellant.

Narmadeshwar Prasad Upadhiya and *Ram Nama Prasad*—for Respondents.

Mukerji, J.—The plaintiff in the Court of first instance is the appellant here. He brought the suit, out of which this appeal has arisen, praying for a declaration of his title to a large tract of land the largest portion of which was covered with wood, water etc., and in the alternative, for possession. He said in his plaint that once many years ago the parties were co-sharers, that there was a partition in 1889 and the entire tract of land fell to the plaintiff's share and was formed into one complete mahal. He further stated that a short time before the institution of the suit, that is to say in 1918, the defendants had a partition case among themselves and as a result of that they divided the land. He further alleged that on the 24th of October, 1918 the defendants interfered with his possession. The suit was instituted on the 10th of December 1918. The defence was that the title was with the defendants and at any rate they had acquired it by having completed twelve years' adverse possession.

The Court of first instance found that the plaintiff had failed to prove by satisfactory evidence his possession within twelve years of the suit. He also found that the defendants too had failed to prove their adverse possession for that period. The learned Subordinate Judge applied Article 144 of the Indian Limitation Act and said that the defendants having failed to prove twelve years' adverse possession, the plaintiff ought to succeed. He accordingly gave a declaration as to plaintiff's title. Some of the defendants appealed and the learned District Judge decreed the appeal having applied Article 142 of the Indian Limitation Act.

In this Court two main points have been urged. First, it has been urged that the plaintiff's title having been found to have existed in 1889, it was for the defendants to have proved adverse possession for over twelve years. The second point urged is this. A large portion of the land which is unculturable is covered with wood and water and that the nature of this land has not been taken into consideration by the learned Judge of the lower appellate Court. The argument is that where possession is doubtful and title is clear, possession ought to follow title. As we read the judgment of the learned District Judge, we find that he also agreed with the Court of first instance that the plaintiff had made out his title under the partition of 1889. The learned Judge, however, found that in the settlement of 1901 the plaintiff's name disappeared from the settlement record and that the names of the defendants have continued since the last settlement. He, therefore, found that the plaintiff had failed to prove that any title subsisted in him. Evidently he applied the Article 142 of the Limitation Act.

It appears to us that the plaintiff having proved that he got the lands in suit in 1889, that fact should have been taken as the basis of decision. The plaintiff nowhere stated in the plaint that he had been dispossessed. It has not been found as a fact that he was actually dispossessed on a certain date. In the circumstances according to the Privy Council case of *The Secretary of State for India* v. *Chellikani Rama Rao* (1), followed in *Jai Chand Bahadur* v. *Girwar Singh* (2). Article 144 would apply and the learned Judge should have considered whether the defendants had completed a title in themselves by being in adverse possession for twelve years.

The second point mentioned above is really involved in the first. In considering the question of possession, the learned Judge will have to consider the nature of the property. How far that property is capable of being possessed directly will have to be considered. We may draw the learned Judge's attention to a recent case decided on the 18th of July 1921 by their Lordships of the Privy Council in *Kuthali Moothavar* v. *Pertingali Kunharankutty* (3). That case related to certain hills. The title was with one party and the other party had proved that he had exercised possession over the property in a clearer manner than the party having the title. In the circumstances of the case the judicial committee held that the party with title should succeed. We are of opinion that the learned Judge has approacned the case from a wrong point

(1) [1916] 39 Mad. 617=43 I.A.192=31 M.L.J 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A.L.J. 1114=20 M.L.T. 435=4 L.W. 486=35 I.C. 902=18 Bom. L.R. 1007 =25 C.L.J. 69 (P. C)

(2) [1919] 41 All. 669=52 I.C. 366=17 A.L.J. 814.

(3) 1922 P.C. 181=44 Mad. 883=48 I.A. 395= 41 M.L.J. 650=14 L.W 721=(1921) M.W. N. 847=24 Bom. L.R. 669=26 C.W.N. 666 =30 M.L.T. 42 (P. C.)

of view and it is necessary that he should reconsider the case in the light of the remarks contained in this judgment. We accordingly set aside the decree of the Court below and remand the case to it for being re-tried. Costs here and hitherto will abide the result.

Decree set aside.

★ 1925 ALLAHABAD 456

MUKERJI, J.

Mulay—Appellant.

v.

Balgovind and another—Respondents.

Second Appeal No. 1036 of 1923, Decided on 11th February 1925, from a decree of the Sub. J., Meerut.

★ *Civil P. C., O 21, R. 57—Execution case struck off for default—Attachment directed to subsist—Order is valid and attachment continues.*

An order of Court directing an attachment to subsist even when the execution was ordered to be struck off on account of a default on the part of the decree-holder is an improper order, but not a nullity and is binding on the parties to it. 1922 *All. 62 Foll.* [P. 457, C. 2.]

Mohanlal Sandal—for Appellant.

Surendra Nath Sen and *Panna Lal*—for Respondents.

Judgment.—This appeal is by the defendant and arises under the following circumstances. Respondent Bal Govind held a simple money decree against one Kanak Singh, who has since died, and in execution of the decree Kanak Singh's property, which is now in dispute, was attached. Sale proclamation was issued, but no sale was effected. On the 11th of September 1920, the executing Court passed a certain order, the effect of which has to be considered in this appeal. The order was somewhat in the following language :—

"Since the decree-holder has failed to pay the cost of *munadi* (proclamation of sale by beat of drums) the execution case be struck off as infructuous. The attachment will stand. The execution costs will be paid by the judgment-debtor."

Four days later, the decree-holder again applied for execution. The Court held that the order dismissing the execution application for default was really a wrong order because nothing whatever was to be done by the decree-holder towards the sale being effected. It, accordingly, proceeded with the execution at the stage it stood, on the 11th of September 1920. While the second stage of the proceeding was being held, on the 4th of November 1920, the defendant purchased the property. The attachment effected at the instance of the decree-holder was duly followed by a sale in execution and the property was purchased by the decree-holder. The defendant in pursuance of his private purchase obtained an order for mutation of names in his favour and therefore, the decree-holder purchaser could not obtain a mutation order in the revenue Court. He, thereupon, instituted the suit for recovery of possession and mesne profits against the purchaser from the judgment-debtor.

Two points have been urged in this Court. One is that in spite of the order of learned Munsif, dated the 11th of September 1920, that the attachment should stand it did not stand and secondly, in any case, the appellant should be allowed to retain the property by paying off the decretal amount due to the auction purchaser as the decree-holder.

In my opinion none of the points is tenable.

Taking the second point first. It is clear that the respondent Balgobind obtained a complete title to the property if the attachment subsisted. In the circumstances there is no reason why he should lose the property on receiving the decretal amount.

Coming to the first point. It is not even the case that the appellant is purchaser between the two dates, *viz.*, the date of dismissal of the execution proceeding and the date of its revival. I need not express any opinion as to what would have happened if the purchase had been made between those two dates. It has been held in this Court *vide Mohammad Mubarak Husain* v. *Sahu Bimal Prasad* (1) that an order directing the attachment to subsist in the case of a default on the part of the decree-holder would be an improper order, but it would not be a nullity and would be binding on the parties to it. This is the latest case in this Court and the learned Judge who decided it distinguished an earlier case of *Dildar Husain* v. *Sheo Narain* (2). The appellant in this case claims under one of

(1) 1922 All. 62=44 All. 274=20 A. L. J. 113.
(2) [1919] 41 All. 157=49 I. C. 113=17 A. L. J. 52.

the parties to the order, *viz.*, the judgment-debtor, and is bound not only by the order of the 11th of September 1920, but also by the order passed on the application, dated the 15th of September 1920. On the same date as this application was made, that is to say on the 15th of September 1920, the Court ordered that a sale proclamation should issue. The Court evidently held that the attachment subsisted. In the teeth of these two orders it was not open to the judgment-debtor to transfer the property so as to give a person claiming under him a title, better than his own.

The result is that there is no force in this appeal and it must fail. The appeal is dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 457

SULAIMAN AND DANIELS, JJ.

Muhammad Abdul Rab—Applicant.

v.

Khodaija Bibi--Opposite Party.

First Appeal No. 215 of 1923, Decided on 14th April 1925, from an order of the Dt. J., Pilibhit.

Guardians and Wards Act (1890) *S.* 41—*Discharged guardian—Liabilities continue and can be enforced in proceedings under the Act.*

Liabilities of even a discharged guardian do continue after his discharge as regards any fraud which may subsequently be discovered and an order for restoration of any property of the ward that remains in his possession can be executed in proceedings under the Guardians and Wards Act. [P 457 C 2]

St. C. Thompson and *P. N. Sapru*--for Applicant.

S. B. Johari—for Opposite Party.

Sulaiman, J. — This appeal arises under the Guardians and Wards Act. The appellant was appointed guardian of the minor, *Mt.* Khodaija, and under sanction of the District Judge, he exchanged certain property of her own with that of his minor ward on the 25th of July, 1912. In 1916 he was discharged, and the girl's father was appointed her guardian. Subsequently she was married, and her husband, Aziz Ahmad, was appointed her guardian. Aziz Ahmad applied to the District Judge for re-opening the exchange on the ground that it was highly disadvantageous to his minor wife. The learned Judge, after enquiry, passed an order, on the 28th of April, 1921, setting aside the deed of exchange and ordering Abdul Rab, the appellant, to return the property which belonged to the minor before the exchange. This order expressly mentioned that Abdul Rab was agreeable to the cancellation of the exchange Abdul Rab came up in revision here. This revision was dismissed on the ground that the said order was a consent order and was not open to be challenged.

Aziz Ahmad has put that order in execution and obtained delivery of possession of the property Subsequent to the delivery of possession. Abdul Rab applied to the Court below to restore to him the possession on the ground that the order was without jurisdiction. His application has been refused. Hence this appeal.

We are of opinion that when the order dated the 28th of April, 1921 was passed on the basis of consent, it is no longer open to Abdul Rab to contend that that order was passed without jurisdiction. It is true that on that date he had been discharged from the guardianship, but liabilities of even a discharged guardian do continue after his discharge as regards any fraud which may subsequently be discovered. This is expressly provided in S. 41 (4) of Act VIII of 1890 It must, therefore, be deemed that the order of the 28th of April, 1921 was passed against Abdul Rab directing him as a guardian still under the control of the District Judge.

An order passed against the guardian is certainly executable. A guardian is an officer of the Court and is responsible to the Court which appointed him as guardian for due management of the property of the ward and for restoration of any property of the ward that remains in his possession. Orders against him can be executed in proceedings under the Guardians and Wards Act. The case is quite different from an attempt to enforce an order against a third party who may be a perfect stranger to such proceedings. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 458

MUKERJI AND DALAL, JJ.

Shah Muhammad Fakhruddin—Applicant.

v.

Rahimullah Shah—Opposite Party.

Rev. No. 8 of 1924, Decided on 23rd July, 1924, against an order of the Sub. J., of Ghazipur.

Civil P. C., S. 115—Pending suit—No revision lies.

Where the matter to be revised arises out of the proceedings of a pending suit there will be no revision till the suit has been decided.[P.458, C2]

There were two suits the plaintiff in one of which was the defendant in the other. The parties agreed to refer the matters in dispute to arbitration. Before the arbitrators, the parties stated that they had arrived at a compromise by which one suit should be decreed and the other suit should be dismissed. The arbitrators recommended that the Court should dispose of the two suits according to this compromise. When the matter went before the Court it set aside the award on the ground that the compromise recorded by the arbitrators has been arrived at by means of lottery,

Held; that no revision lay from the order of the Court. [P. 458, C 2]

Uma Shankar Bajpai—for Applicant.

Iqbal Ahmad, Mukhtar Ahmad and *Raza Ali*—for Opposite Party.

Judgment.—These two applications in revision arise out of the same facts. There were two suits before the learned Subordinate Judge of Ghazipur, the plaintiff of one of which was the defendant in the other. The parties agreed to refer the matters in dispute to arbitration and three persons were appointed arbitrators. Before the arbitrators, the parties stated that they had arrived at a compromise by which the suit instituted by the applicant before us should be decreed and the suit instituted by the opposite party Rahimullah should be dismissed. The arbitrators recommended that the Court should dispose of the two suits according to this compromise. When the matter went before the learned Subordinate Judge, Rahimulla took exception to the award on the ground that the compromise recorded by the arbitrators had been arrived at by means of lottery and the compromise was not binding on him. The learned Subordinate Judge gave effect to this objection and set aside the award. It is against this order that the two applications in revision have been filed.

It appears to us that no revision would lie under S.115 of the Civil Procedure Code. This section was interpreted in a Full Bench case of this Court, *viz* : *Buddhoo Lal* v. *Mewa Ram* (1). In that case three learned Judges as against two held that where the matter to be revised arose out of the proceedings of a pending suit there would be no revision till the suit had been decided. In the case before the Full Bench it appears, the question was as to whether the trial Court had jurisdiction to hear a particular suit. The trial Judge decided that he had the jurisdiction and accordingly proceeded to hear the suit. Then, an application in revision was filed to this Court. The majority of the Judges hearing the application were of opinion that the order of the trial Judge deciding that he had jurisdiction to hear the suit was not a 'case' and no revision lay. The language used by Piggott, J. leaves no room for doubt on the point. He says :—

"If this view is correct it follows that, whereas all 'cases' are not 'suits,' every suit is at least a 'case'. From this I would go on to conclude that where the 'case' in which the revisional jurisdiction of the High Court is invoked happens to be also a 'suit' then this 'suit' is also a 'case' referred to in S. 115 of the Civil Procedure Code, which requires to be decided before the record is called for".

Following this full Bench case we are of opinion that no application in revision lies against the order passed by the learned Subordinate Judge. We may add that the applicant is not without his remedy. On the trial of the suits he may succeed and there may be no occasion for him to complain of the order passed by the learned Subordinate Judge. If the decision on the merits goes against him he can appeal on the merits of the case and also urge the ground that the trial Court ought to have accepted the compromise and the award as final between the parties.

We dismiss the applications in revision but without costs as nobody appears to resist the applications.

Applications rejected.

---

(1) [1921] 43 All. 564=63 I. C. 15=19 A.L.J 558 (F. B.)

★ 1925 ALLAHABAD 459

WALSH AND SULAIMAN, JJ.

Ravi Nandan Prasad—Decree-holder—Appellant.

v.

Jagar Nath Sahu and others — Judgment-debtors—Respondents.

First Appeal No. 74 of 1924, Decided on 26th January 1925.

★ (a) *Civil P C., O. 21, R. 90 — Auction-purchaser can apply under R. 90.*

An auction purchaser is entitled to apply under O. 21, R. 90, he being included in the expression " a person whose interest is affected by the sale." [P. 460, C. 1]

Per Walsh, J.—An auction purchaser cannot bring a suit to set aside a sale on the ground of material irregularity in the publishing or conduct of the sale resulting in substantial loss to him.

Per Sulaiman, J.—The right of the auction-purchaser to apply under R. 90 does not mean that the door is open for a general enquiry into the title of judgment-debtors. To do so would be to call upon decree-holders to prove the title of their judgment-debtors in the property which they are seeking to sell. If the decree-holder, in a *bona fide* belief that the interest which he wants to sell vests in his judgment-debtor and without any fraud, misrepresentation or concealment, puts up that interest for sale, it cannot be said that there has been a material irregularity in the omission to disclose the real fact, if a subsequent enquiry were to disclose that the judgment-debtor did not really own the entire interest which was put up for sale. [P. 464, C. 1]

The only case where a question of title can be gone into in these summary proceedings would be a case where an auction purchaser attempts to prove that the judgment-debtor had no saleable interest whatever. 38 *Mad. L. J.* 228 *Ref. to and appr.* 1924 *Pat.* 319 *Diss.* [P. 464, C. 1]

(b) *Civil P. C., O. 21, R. 90—" Substantial loss need not be pecuniary" — Sale proclamation representing encumbered property as free—Auction purchaser can apply for setting aside sale.*

The principle of *caveat emptor* does not apply under R. 90 when the auction purchaser applies to set aside the sale, where it is shown that there has been a misdescription affecting the quality and value of the property. The expression " substantial loss" is not necessarily confined to " pecuniary loss". [P. 462, C. 1]

The proclamation described the property which was really a leasehold interest, as a freehold estate. There was nothing in the proclamation to show that the judgment-debtor had only a *lessee's* interest in the property.

Held; that it was a fundamental misdescription and misrepresentation of the character of the property and that where the auction purchaser actually was misled and suffered substantial loss, he was entitled to have the sale set aside. [P 462, C. 1]

Tej Bahadur Sapru and *K. Verma*—for Appellant.

K. N. Katju, P. L. Banerji and *Murari Mohan Dey*—for Respondents.

Walsh, J.—This is a first appeal from an order which raises an important question—though to my mind a simple question—of the proper construction of O 21, R. 90 of the Code of Civil Procedure. In the Court below an auction-purchaser who had purchased property put up for sale under a decree, applied to have the sale set aside on the ground that he had suffered substantial loss owing to irregularity in the publication and conduct of the sale. An objection was taken in the Court below that the auction-purchaser had no right to apply under this rule. That objection was overruled by the learned Judge, who adopted the view taken by the Madras High Court in a case to which I will refer in a moment, and he then went on to hold that the property had been misdescribed by a material omission from the sale proclamation which omitted to mention that the property was subject to a charge called a *perjawat*, that the applicant was unaware of it, and that he was induced to enter into the purchase by misrepresentation, which led him to believe that he was purchasing an absolute ownership, whereas it was only a lease-hold property, and he therefore set the sale aside and directed that the money should be refunded to the purchaser.

The main question which has been very fully argued before us—all the authorities both before and since the present Code having been referred to during the discussion—was whether the learned Judge was right in holding that an auction purchaser can apply under O. 21, R. 90. The question whether he can or cannot is obviously a very important one to auction purchasers as a class, because if he can, and does not, or if he does, and applies unsuccessfully, he is clearly prohibited under rule 92 of the same Order from bringing a suit. This prohibition may in certain cases turn out to be a serious disadvantage to auction purchasers. Under the old Code he could, and often did, bring a suit, and in some Courts a sort of traditional belief has taken root that he can bring a suit and cannot apply under this rule. If he has to apply under the rule, he has by the provisions of the Code very little time at his disposal in which to do so, and if he allows the time to run out, he cannot fall back upon a right to sue, which, if it existed, would give him much more time to prepare for his case and to collect the relevant material. It might, however, on

the other hand be pointed out that there are very good reasons why the Code should have provided that he should apply, and not bring a suit. Everybody else who can conceivably be affected by the sale—using that term in its widest sense—has to apply and cannot sue. There does not seem any real reason why the auction purchaser should stand in any different category. Moreover the Court executing the decree, controlling and carrying out the sale, is obviously the Court best equipped for determining the question whether there has been irregularity or fraud in the publishing or conduct of it, and *a fortiori* if it is the best Court for the purpose, it is clearly best in the interests of the parties and for the Court that the matter should be disposed of as speedily as possible and by an application, rather than by a dilatory suit, for after all it is the execution proceedings which are concerned, and it is desirable that the question whether the sale ought to be confirmed or not should be settled as speedily as possible. But whether the foregoing observations are sound or not —and they are merely *obiter*—they cannot affect the interpretation of this rule if the language of the rule is clear.

The question whether an auction-purchaser is entitled to apply, depends on the question whether he is included in the expression "a person whose interests are affected by the sale. It is necessary to observe that this expression was not contained in the corresponding provision which was in force up to 1908, and up to that date the auction-purchaser could not apply but could bring a suit. It follows therefore, that for the purpose of determining this question, the cases decided before 1908, or decided after 1908, with reference to proceedings which had begun before 1908, bearing upon the question whether auction-purchasers could apply or could properly bring a suit, are wholly irrelevant, and for my part, I decline to look at them. Unfortunately I find them still cited, as though they were relevant and authoritative, in text-books dealing with the law under this rule, and they have been cited as authorities in one decision form which I feel compelled to differ. The expression to be considered is:—"whose interests are affected by the sale." I find myself compelled to hold as a matter of law that a person who is the highest bidder, whose bid is accepted who is compelled by law to pay a deposit, and unless something intervenes, is compelled by law to complete his purchase, is a person "whose interests are affected by the sale. It is impossible to use a wider term than "a person's interests." In the ordinary use of the word in the English language it is a term covering every sort of interest recognised by law, such as, in the case of an auction purchaser, liability to pay the money, liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered. If the expression were "interest in the property," it would of course be confined to an interest in the property sold antecedent to the sale. If the word were merely "interest" without the plural and without the words "in the property," it might be possible to hold that the word "interest" was confined to interest in the thing itself at the time of the sale But that is not the expression, and to my mind the actual expression in the rule is free from ambiguity or difficulty of any kind and ought to be construed as meaning what it says. It would be unnecessary further to labour this point if it were not for two decisions of the Patna High Court relied upon by the appellant. The first is the case of *Khetre Mohan Datta* v. *Sheikh Dilawar* (1) decided in the year 1918. No reference is contained, either in the judgment, or in the head-note, to the rule which the Court was construing. The Court seems to have assumed that the question was settled beyond controversy and not open to argument. The judgment says:—"the Munsif very properly held that the auction-purchaser was not a person who could come in and attack his own purchase," and it went on to say "it is quite clear that it is not open to a party who purchases at an auction sale to impugn the validity of his own purchase." It is clear therefore that the Court was treating it as a matter which was well settled. I cannot, with great respect, accept the expression used in the foregoing quotation, that an auction-purchaser complaining of any irregularity antecedent to the sale, is attacking his own purchase. What he is attacking is the conduct of

(1) [1918] 3 Pat. L.J. 516=46 I.C. 614=5 Pat. L. W. 151.

the sale on the publication of the material factors or description of the property put up for sale, and it seems to me a misdescription to say that in seeking relief from a burden which has been unjustly imposed upon him by an irregularity misdescribing the subject-matter of his purchase, or concealing material facts, he is making an attack upon his own purchase. It is merely a complaint that he has, either as the result of a mistake, or of a trick, bought something which he had not the slightest intention to buy, and that he is saddled with something which was not, so far as he is concerned, his purchase at all. The Madras High Court in 1921 in the case of *Bhavirisethi Gopalakrishnayya* v. *Pakanati Pedda Sanjeeva Reddi* (2) without apparently being aware of the decision in Patna held that the expression included the auction-purchaser. This is the decision which the Court below has rightly followed. I merely wish to say with regard to it, that I find it puts too narrow an interpretation even on the word "interest." It treats the word "interest" as being an interest in the property which he has acquired at the sale, declining to hold as the Patna High Court has done, that it was confined to the narrow meaning of interest prior to the sale. For my part, as I have already said, I see no reason for limiting it even to the notion of interest in the property sold. The matter came again before the Patna High Court in the year 1923 in the case of *Kartik Chandra Chatterji* v. *Nagendra Nath Roy* (3) and that Court had before it, and had to construe, rule 90 with which we are now concerned, and it also had the advantage of considering the decision I have just referred to of the Madras High Court. The learned Judge who delivered judgment in that case repeated what he had said in the previous case of the Patna High Court to which I have referred, saying that it was settled in that Court, that is to say Patna that the auction-purchaser could not apply except under rule 91, and in explaining that rule 90 was not designed for the relief of the auction-purchaser at all, it cited decisions from the Calcutta High Court and by the Privy Council antecedent to 1908, which to my mind are irrelevant. The Court declined to follow the view taken in Madras, holding that it was precluded from doing so by the language of rule 90, and held that "interests affected by the sale" mean "interests in the property existing before the sale." I do not think that we have any right to insert fundamental amendments of this kind into the plain language of a rule. To my mind that is not interpretation but legislation, and I can only repeat that we are bound to take the words as they stand, and that it is quite obvious that an auction-purchaser whose bid is accepted and who is provisionally bound to complete his purchase, is a person whose "interests are affected by the sale." I would even be prepared to go further by way of attempting to explain why the word "auction purchaser" is not used in the rule as it is used in the next rule, which provides that the auction purchaser may apply to set aside the sale where the judgment-debtor has no saleable interest in the property, and say that in a case, for example, where the auction-purchaser was a mere trustee or agent employed to purchase on behalf of a syndicate of persons who were either unwilling or unable to be present, and who entered into the purchase, on their behalf in his own name, and then quarrelled with them and declined to take the necessary steps to set aside the sale if there has been irrgularity against which they desired to protect themselves, yet although they were not actually the purchasers at the sale in so many words, they would be persons whose interests were affected by the sale, and who might ultimately apply on the ground that the auction-purchaser declined to do so on their behalf. The result is that in my view the auction-purchaser is now brought into the same category as the decree-holder, judgment-debtor and other persons in previous rules upon the subject, and may apply under rule 90 with the natural result that he is prohibited from bringing a suit on the same complaint. On this ground I hold that the appeal fails subject to the further question whether we are prepared to confirm the learned Judge on the merits.

The question of the merits is really a much more difficult one, largely by reason of the fact that the learned Judge is so satisfied that the merits of the application are established, that he has omitted to state the steps by which he

(2) [1920] 38 M.L.J. 223=11 L.W. 184=55 I.C. 333=(1920) M.W.N. 152.
(3) 1924 Patna 319=5 Pat. L. T. 41.

arrives at certain conclusions or inferences which he has summarized in his judgment. I agree with him that the principle of *caveat emptor* does not apply under this rule where it is shown that there has been a misdescription or a concealment amounting to a substantial misrepresentation affecting the equality and value of the property. I use the word "quality" advisedly, because I do not think that the expression "substantial loss" is necessarily confined to "pecuniary loss." It is not true to say that if a man thinks he is buying unencumbered property and finds afterwards that it is encumbered to no greater extent than Rs. 5 per annum, that the difference is necessarily represented by capitalizing the annual sum of Rs. 5. A man making decision whether he shall bid and purchase a property, is a free agent. He is entitled to make his own choice, and he is entitled to know what it is for which he is asked to pay, and in my judgment he is entitled to say, when he discovers that he is burdened with some charge of which he was ignorant, "the amount of this charge is not in itself a matter of great consequence to me, but its very existence is a thing which stamps the property with a character I do not like, and I should not have purchased, or at any rate I was not prepared to pay a substantial price for the property if it was charged in any way." Now there are two features about this case which impress me very much in favour of the finding that substantial loss has been made out. The proclamation described the property as free from encumbrance. To my mind that was a fundamental misdescription and misrepresentation of the character of the property. It was a misrepresentation holding out the property to be free when it was not free. One attack which the appellant has made upon the finding of the learned Judge is that the learned Judge says in his judgment: "he, the purchaser purchased it thinking that it is *muafi* land, and therefore paid a very big sum for it," and it is said that the learned Judge has gone beyond the evidence in holding that fact in favour of the applicant, because the applicant did not, as he really should have done, go into the box. Whether by a sort of mutual understanding, which frequently happens without a clear record being left behind to testify to it by those present at the trial it was treated as common ground that the applicant thought he was getting free property one cannot say with certainty in this case. But it seems to me that the appellant is in this difficulty. He had been the mortgagee of the property and he was in possession of the document relating to it, and a very superficial acquaintance with them must have shown him the existence of this encumbrance. Either he was guilty of gross carelessness in supplying the materials to the Court without consulting the relevant documents which would have shown him what the materials were, or he knew and wilfully concealed the existence of this small charge. Inasmuch as he himself allowed the Court to describe the property in the proclamation as free from encumbrance, it does not lie in his mouth to complain that the learned Judge has attributed to the purchaser the same belief which the decree-holder allowed the Court to advertise. A man who even honestly misdescribes the subject-matter of a sale by misrepresentation, such as the description "free from encumbrance," when there is an encumbrance cannot be heard in a Court of law to complain that the purchaser knew what he was buying. The learned Judge has found that the purchaser has suffered substantial loss, and even conceding that a pedantic criticism of the judgment may succeed in showing that there are gaps in the reasoning by which he has reached his conclusion, the judgment satisfies me that the learned Judge was convinced that this was one of those cases which I described in the foregoing observations in which the mere monetary amount of the existing charge was not the only material factor in holding that the purchaser had suffered substantial loss by reason of the irregularity in the publication and description of the sale in the proclamation, but that he arrived at the conclusion because he was satisfied, and I think rightly, that the purchaser objected to buy the property with any encumbrance at all quite apart from the question what its amount might be. I think there was abundant evidence to justify the finding that substantial loss had been suffered in the sense in which that expression is used in S. 90, even though the sum was not a large one, and upon the evidence I should have come to the same conclusion.

We therefore, hold that the appeal must be dismissed with oosts.

Sulaiman, J.—I agree. Under S. 311 of the old Code the decree-holder or any person whose immovable property had been sold could apply to have the sale set aside on the ground of a material irregularity in publishing or conducting it. On the language of that section it was quite clear that an auction purchaser could not apply. The Privy Council in the case of *Birj Mohun Tkakur* v. *Rai Uma Nath Chowdhry* (4) held that an auction purchaser did not come within the meaning of that section. In the later case of *Kala Mea* v *Harperink* (5) their Lordships of the Privy Council affirmed the decree in a Civil suit brought by an auction-purchaser on the ground of misrepresentation made by the sale officer. The language of the corresponding provision in the new Code has been materially altered. Under Order 21 rule 90 in addition to the decree-holder and to any person entitled to share in a rateable distribution of assets, every person whose interests are affected by the sale, has a right to apply. There can be no doubt that the expression 'any person whose interests are affected by the sale" is much wider and the question is whether it includes an auction purchaser also or not.

It is impossible to answer this question on mere general considerations. On the one hand it may be conceded that an auction purchaser purchases the property at an open competition where no warranty of title is given and that therefore when he bids he takes a certain amount of risk if it turns out that the property which he has got is not worth the amount which he paid. It must also be conceded that to give him a summary remedy under this rule to apply to have the sale set aside would be taking away from him the right to bring a separate suit, and would also be curtailing the period during which he can seek his remedy. On the other hand it cannot be denied that if there exist heavy incumbrances on a property which is put up for sale and they are not announced at the time of the sale the auction purchaser may offer a very high price for it and may be seriously prejudiced thereby. An auction purchaser is not ordinarily a party to the proceedings and he often comes on the scene at the last moment and knows very little about the property that is put up for sale. If all the particulars necessary to disclose to him the nature of the interest he is going to bid for, are not mentioned at the time and he has no right to have the sale set aside by reason of such omission it would be denying him justice. As I have said it is unsafe to answer the question on general considerations only. It is our duty to interpret the words of the rule as they stand. The expression perhaps is not as clear as it may have been and it is its ambiguity which has led to a conflict of opinion between the Patna and Madras High Courts. The learned Judge of the Patna High Court in the case of *Khetro Mohan Datta* v. *Sheikh Dilawar* (1) and in the case of *Kartik Chandra Chatterji* v. *Nagendra Nath Roy* (3) seem to take the expression 'interests' as meaning an interest in the property put up for sale. They therefore argue that the auction-purchaser's interest in the property is really created by the sale and cannot be said to have been affected by it. On the other hand the learned Judges of the Madras High Court in the case of *Gopala Krishnayya* v. *Sanjeeva Reddi* (2) have taken the view that if the interests of an auction purchaser are affected when the sale is to be set aside they must also be affected if the sale is to be confirmed.

I agree with my learned brother that the expression 'a person whose interests are affected by the sale' must be taken in its general sense and there is no justification for restricting it to mean interest in the property put up for sale. As pointed out by him the word 'interest' is not used in the singular but is in the plural number. It is easy to imagine cases where the interest of a person may be affected by the sale though he may have no actual interest in the property which is put up for sale. The expression is of a much wider scope and there seems to be no good ground for holding that it should not include an auction-purchaser. The Calcutta High Court also has taken the view that the expression is of very wide import. *Abdul Aziz* v. *Tafazuddin* (6).

---

(4) [1893] 20 Cal. 8=19 I.A. 154=6 Sar. 245 (P. C.)

(5) [1908] 36 Cal. 323=36 I.A. 32=6 A.L.J. 34=13 C.W.N. 249=5 M.L.T. 126=9 C.L. J. 165=11 Bom. L.R. 227=19 M.L.J.115=1 I.C. 122=5 L.B.R. 25 (P. C.)

(6) [1914] 19 C.W.N. 326=23 I.C. 839

I wish however to guard myself against being understood to hold that by conceding the right to an auction-purchaser to apply under this rule, I mean to open a door for a general enquiry into the title of judgment-debtors. To do so would be to call upon decree holders to prove the titles of their judgment-debtors in the property which they are seeking to sell. I take it that if the decree-holder, in a *bona fide* belief that the interest which he wants to sell vests in his judgment-debtor and without any fraud, misrepresentation or concealment, puts up that interest for sale, it cannot be said that there has been a material irregularity in the omission if a subsequent enquiry were to disclose that the judgment-debtor did not really own the entire interest which was put up for sale. Under Order 21 rule 13 which deals with cases of attachments, all that is required is a specification of the judgment-debtor's share of interest in the property to the best of the belief of the decree-holder, and so far as he has been able to ascertain the same. The same principle it seems to me would apply to a mortgagee decree-holder also. A decree-holder has a right to put up for sale what he honestly believes to be his judgment-debtor's property and may offer it to be purchased without giving any warranty of title at all.

The only case where a question of title can be gone into in these summary proceedings would be a case where an auction purchaser attempts to prove that the judgment-debtor had no saleable interest whatever. It is supposed that there is an implied guarantee that at least some intersst is being put up for sale, and, therefore, if it be a fact that the judgment-debtor has no saleable interest whatsoever, the auction-purchaser is given a remedy under rule 91 to apply to have the sale set aside. He has no general right to ask the Court to enquire into the interest of the judgment-debtor and set aside the sale if it is satisfied that he did not possess the exact amount of interest which was announced to be sold.

In the present case the property was put up for sale and was described as a free-hold. There was nothing in the proclamation of sale to suggest that the judgment-debtor had merely a lessee's interest in the property. Under order 21 rule 66 it is the duty of the decree-holder to see that all incumbrances to which the property is liable are mentioned as well as every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. Even if it be assumed that the ground rent payable on this land cannot be called an incumbrance on the property, nevertheless it must be conceded that it was a particular which was material for a purchaser to know in order to judge of the nature and value of the property. The mortgagee decree-holder had the title deeds in his possession and must be deemed to have been aware that the property was only lease-hold. His omission to describe it as such was a deliberate omission and it certainly amounted to a material irregularity within the meaning of order 21 rule 90. All the conditions under which this land is held are not shown in these proceedings. We do not know exactly what the terms are on which the occupier can be ejected. Further there is a claim on behalf of the Municipal Board for a *haq chaharum*. That, however, is not admitted either by the decree-holder or the auction-purchaser. It is reasonable to assume that the auction purchaser would not have offered such a high price for this property if he had known that the property he was going to purchase was a mere lease-hold and not a free-hold. I, therefore, agree with the Court below that it is established that there was a material irregularity in publishing and conducting the sale and in consequence of that irregularity the auction-purchaser has suffered substantial loss.

By the Court.—The order of the Court is that this appeal is dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 465

MEARS, C. J. AND PIGGOTT, J.

Ammar and others—Plaintiffs—Appellants.

v.

Govind and others—Defendants—Respondents.

Letters Patent Appeal No. 86 of 1924, Decided on 5th March 1925, from the judgment of Daniels, J., D/- 22nd February 1924.

Agra Tenancy Act, (2 of 1901) S. 167—Suit for declaration that plaintiffs are joint tenants with defendants—Civil Court can try.

Unless the fourth schedule of the Act is produced before the Court and a suit or application of a precisely similar kind (to the suit in question) and parallel in its results is shown to the Court as being a suit exclusively triable by the Revenue Court, the Civil Court will not only be within its rights in trying the suit but will be bound to determine it. [P. 466, C. 1.]

A suit for declaration that the plaintiffs are joint in occupancy with the defendants is cognizable by a Civil Court. [P. 466, C. 1.]

Uma Shankar Bajpai—for Appellants.

Baleshwari Prasad—for Respondents.

Judgment.—On the 26th of July 1921 five of the present respondents to this appeal brought a suit against Ammar, plaintiff No. 1 in this matter, alleging that they (the respondents) were tenants-in-chief and that he (Ammar) was a sub-tenant. The suit was for arrears of rent. Ten days later Ammar and his three brothers brought a suit in the Civil Court against all the six respondents alleging that they (the four brothers) had a joint and equal right of occupancy with the six respondents. On the 28th of September 1921 the Revenue Court passed an *ex parte* decree in favour of the present respondents, thus accepting their statement that they were in fact tenants-in-chief, and that Ammar was a sub-tenant. There the matter rested for the moment, but on the 20th of December the Munsif gave a decision in the case now under consideration. One of the pleas undoubtedly taken was that the suit for a declaration that the plaintiffs were joint in occupancy with the defendants was a matter that was exclusively triable by the Revenue Court, because the Munsif in his judgment says that he has no doubt whatever that he has jurisdiction to try this matter. He gave a decision upholding the claim of the four plaintiffs. Sometime after the 20th of December and on a date previous to the 8th of May 1922 the *ex parte* decree was set aside and the suit for the arrears of rent as between tenants-in-chief and an alleged sub-tenant was dismissed. From the decision of the Munsif there was an appeal to the District Judge heard on the 8th of May 1922, and notwithstanding the very definite statement of the Munsif on the subject of jurisdiction, there was no appeal from the Munsif to the District Judge on this question of S. 167 of the Local Tenancy Act. The District Judge affirmed the finding of the Munsif, and the matter then came before a single judge of this Court, who on the 22nd of February 1924 came to the conclusion that S. 167, which had then been put in the forefront of the grounds of that appeal, was a bar to the suit. We have asked the learned counsel who appears for the respondents to turn to the fourth schedule of the Act and to point out to us any suit or proceeding therein described which the plaintiffs in this present suit could have embarked upon in the Revenue Court. He has told us, and frankly, that there is in the fourth schedule no suit of the character now before us, and that there does not appear to have been in the fourth schedule any provision for a suit by which people alleging themselves to be co-tenants can go to a Revenue Court and ask for a declaration that they have a right of co-tenancy joint and co-equal with that of the persons whom they have made defendants. That appears to be right, but it does not quite exhaust the argument for the respondents, because the learned counsel has laid stress upon the fact that there was in existence at the date of the commencement of the civil suit, which was August 6, 1921, a proceeding pending before the Revenue Court taken at the instance of the present respondents against one of the present appellants which in effect would have determined the question which the present appellants sought to determine by this action. We are not sure that that is right. The real question before that Court was, whether Ammar, the defendant in the Revenue Court was liable to pay a rent as sub-tenant? The answer to that might have been a simple negative, but it does not follow at all that there was necessarily any exact definition of his rights or of the position in which

he stood as regards the then plaintiffs; nor would it include a definition of the rights of the three other persons who on the 6th of August 1921 allied themselves with Ammar in this declaratory suit. We think that the Munsif was right in holding that he had jurisdiction, and that, unless the fourth schedule of the Act was produced before him and a suit or application of a precisely similar kind and parallel in its results was shown to him as being a suit exclusively triable by the Revenue Court, he was within his rights, and it was, indeed, his duty to hear and determine the matter brought before him by the then four plaintiffs. That being so, we are of opinion that this appeal must be allowed with costs. We therefore set aside the decree of the learned Judge of this Court and restore that of the lower appellate Court. The cost of both hearings in this Court will include fees on the higher scale.

Decree set aside.

1925 ALLABAHAD 466

DANIELS, J.

Ganga Prasad and another — Applicants.

v.

Mt. Kishni and another — Opposite Parties.

Civil Rev. No. 151 of 1924, Decided on 27th November, 1924, from an order of the Addl. Munsif, Hathras.

Civil P. C., O. 23, R. 1—Withdrawal allowed—Question of formal defect not considered—Order is revisable.

Where the Court without applying its mind to the question whether there is any formal defect in the suit, allows the suit to be withdrawn with permission to the plaintiff to bring a fresh suit, and actually there is no formal defect; the Court acts with material irregularity and its order is open to revision by the High Court. [P. 766, C. 2]

M. A. Aziz and *Iqbal Ahmad* — for Appellants.

Surendra Nath Sen — for Opposite Parties.

Judgment.—This is a revision against an order passed by a Munsif allowing a plaint to be withdrawn under O. 23 rule 1 of the Code of Civil Procedure. It is admitted that the order cannot be supported on the merits. The question is whether any revision lies. In *Rahmat Ullah* v. *Dharam Singh* (1), Banerji, J. allowed an application in revision in precisely similar circumstances. The Bombay and Calcutta High Courts have taken the same view in *Rajindra Lal* v. *Atal Bihari* (2) and *Bai Kashibai* v. *Shidapa Anappa* (3). It is urged for the respondent that the same Judge who decided *Rahmat Ullah* v. *Dharam Singh* (1) was a member of a Bench which held that no revision lay in *Jhunku Lal* v. *Bisheshar Das* (4). An examination of the two cases shows that they are not really contradictory. In *Jhunku Lal* v. *Bisheshar Das* (4) the plaintiff based his application upon the fact that formal proof of a certain plaint had not been given. The Court had to consider whether this amounted to a sufficient cause within the meaning of Order 23, rule 1. It applied its mind to the question and decided erroneously that it did. As the Court had applied its mind to a question which it had jurisdiction to decide, it was held that even though the decision was wrong no revision lay under S. 115 of the Code of Civil Procedure. The facts here are different. The Court never applied its mind to the question at all. The plaintiff merely alleged that there was a formal defect in the plaint but did not specify what the defect was and, in fact, as is now admitted, there was no formal defect whatever. The learned Munsif in his judgment does not state what the formal defect is. He simply says in general terms "the frame of the suit is bad". Under these circumstances the decision in *Jhunku Lal* v. *Bisheshar Das* (4), is no bar to my holding, as I do hold, that the Munsif acted with material irregularity in allowing the suit to be withdrawn with liberty to file a fresh suit. I therefore set aside his order and direct him to restore the suit to his file and dispose of it according to law. If the plaintiff wishes to withdraw he must do so unconditionally. The respondents will have their costs of this revision.

Order set aside.

---

(1) 1922 All. 185=20 A.L.J. 90=3 L.R.A. Civ. 93.
(2) [1917] 44 Cal. 454=39 I. C. 969=25 C. L. J. 455.
(3) [1913] 37 Bom. 682=21 I. C. 23=15 Bom. L. R. 823.
(4) [1918] 40 All. 612=46 I. C. 71=16 A.L.J. 495

1925 ALLAHABAD 467

SULAIMAN AND DANIELS, JJ.

Net Singh and others—Applicants.

v.

The Receiver of the Estate of Gajraj Singh and another—Opposite Parties.

F. A. F. O. No. 161 of 1924, Decided on 20th May 1925, from an Order of Dt. J. Jhansi.

Prov. Ins. Act, S. 28 (5)—S. 28 (5) applies to land coming under Bundelkhand Alienation of Land Act (III of 1901), S. 16.

Property which is exempted by virtue of S. 16 of the Bundelkhand Alienation of Land Act (3 of 1903) from liability to be sold in execution of money decree is "exempted from attachment and sale' within the meaning of Pro. Inso, Act. S. 28 (5) and does not vest in the receiver in insolvency. 1 *Lah.* 192 (*F.B.*) *and* 2 *Lah.* 78 *Dist.*[P467C2]

Per Sulaiman, J.—The policy of the legislature obviously seems to be that properties which cannot be attached and sold do not vest in the Receiver. There is no injustice in this, for, when creditors cannot recover their debts by sale of the properties, they suffer very little if their representative, the Receiver, cannot realise the debts out of such properties. [P468 C2 ; P469 C1]

C. Thompson—for Applicants.

Daniels, J.—This is an appeal against an order of the District Judge of Jhansi refusing to set aside two alienations made by the insolvent after adjudication on the ground that this particular property does not vest in the receiver. The learned District Judge's order is so brief as to hardly amount to a judgment at all. He does not specify the nature of the property or give any reasons why it does not vest. He merely refers to a previous order of his which was passed on an application to prosecute the insolvent under S 69 and which has no bearing on this question. From other papers on the record, however, it appears that the property is property to which the provisions of the Bundelkhand Alienation of Land Act of 1903 apply. The appellant before us is the principal creditor of the insolvent. The learned District Judge relied on S. 16 of the Bundelkhand Alienation of Land Act which says that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree made after the commencement of this Act. Sub-section (5) of S. 28 of the Provincial Insolvency Act provides that the property vesting in the receiver shall not include any property which is exempted by any enactment for the time being in force from liability to attachment and sale in execution of a decree. The appellant relies on two decisions of the Punjab High Court *Sardarni Datar Kuar* v. *Ram Rattan* (1) and *Mauji* v. *Girdhari Lal* (2). In the latter of these cases the learned Judges held that notwithstanding a similar provision in the Punjab Alienation of Land Act, property of this kind did vest in the receiver. With all respect we are unable to follow the reasoning of this judgment. If we ask the question, could this property have been attached and sold in execution of a Civil Court decree ? The answer, in view of S. 16 of the Bundelkhand Alienation of Land Act, must be 'No.' It follows, therefore, that this is property which is exempted from attachment and sale within the meaning of S. 28 of the Provincial Insolvency Act. We are, therefore, unable to accept this appeal which we accordingly dismiss. We make no order as to costs as the respondent is not represented.

Sulaiman, J.—I agree and would only like to add a few words with regard to the rulings that have been cited. The case of *Nagindas Bhukandas* v. *Ghelabhai Gulabdas* (3) is not directly in point because in that case the question turned on the express provisions of S. 4 of the Provident Funds Act (No. IX of 1897) which make the deposit not liable to attachment and say that the receiver will neither be entitled to it nor have any claim on it. Similarly the case of *Sagar Mal* v. *Rao Girraj Singh* (4) may be said to be not directly in point because there the question was whether the occupancy holding vested in the receiver. The decision turned to some extent on the provisions of the Agra Tenancy Act. That case, however, is helpful to this extent that even under the provisions of the Agra Tenancy Act there is no express prohibition against attachment and all that S. 20 says is that the tenancy is not transferable in execution of a decree of the Civil or revenue Court. In the same way the Full Bench case of *Kalka Das* v. *Gajju Singh* (5) may be helpful.

---

(1) [1920] 1 Lah. 192=58 I.C. 603 (F. B.)
(2) [1921] 2 Lah. 78=61 I.C. 664.
(3) [1919] 44 Bom. 673=56 I.C. 449=22 Bom. L.R. 322.
(4) [1916] 39 All. 120=38 I.C. 171=14 A.L.J 1031.
(5) [1921] 43 All. 510=62 I.C. 897=19 A.L.J. 439 (F. B.)

The case of *Sardarni Datar Kuar* v. *Ram Rattan* (1) is also distinguishable because there the learned Judges of the Lahore High Court came to the conclusion that under S. 72, Civil Procedure Code, a Civil Court has power to make a temporary alienation of the property.

It is unnecessary to express any opinion as to whether a Civil Court can order the collector to take steps as provided in the section or whether it can only authorise him if he himself represents to the Court. It is quite sufficient to say that in these Provinces a notification under S. 68, Civil Procedure Code has actually been issued, which apparently is not the case in the Punjab, and that, therefore, S. 72 is wholly inapplicable here.

The case of *Mauji* v. *Girdhari Lal* (2) is certainly in point because the corresponding sections of the Bundelkhand Alienation of Land Act (No. 3 of 1903) and the Punjab Alienation Land Act are identical in language. The learned Judges of Lahore have held that there is a difference between the expression 'attachment and sale' and the expression 'attachment or sale', and that inasmuch as there is no prohibition against attachment of properties, the case does not fall within S. 28 of the Insolvency Act.

In the first place, I would like to point out that the conjunction 'and' is not always used in its cumulative sense. The words that it joins need not always be taken individually ; for example, the sentence 'sales and gifts of occupancy holdings are prohibited' does not mean that sales and gifts are to be taken together, but it means either of them individually. The sentence is a perfect equivalent of 'sales or gifts etc., are prohibited.'

If the expression 'attachment and sale' is to be given an altogether different meaning from the expression 'attachment or sale', then there may be some difficulty in applying that portion of S. 28, subclause (5) of the Insolvency Act which mentions property exempted by the Civil Procedure Code from liability to 'attachment and sale' for the proviso to S. 60 of the Code speaks of 'attachment or sale.'

With great respect to the learned Judges of the Lahore High Court, I would say that the learned Judges, in their anxiety to avoid giving to the word 'and' the meaning of the word 'or' have attached to it the meaning which an expression like 'and also' or 'as well as' would have. Their interpretation of the section is that only property which is exempted from liability to attachment and also exempted from liability to sale does not vest in the receiver. With great deference I would say that the fallacy consists in supposing that the expression 'exempted from' governs the two words 'attachment' and 'sale' whereas it really governs only one word 'liability.' There is, therefore, no justification for splitting up the clause as if it read exempted from liability to attachment and also exempted from liability to sale'.

The position is in no way improved by considering that the words 'attachment and sale' are indissolubly connected together. If this be so, then they together indicate the continued process of attachment followed by sale, that is, sale with attachment as distinguished from sale without attachment. Surely if a process consists of two steps and either of those steps is missing, the complete process itself is absent. Property which cannot be attached (though sold) or which cannot be sold (though attached) cannot obviously be 'attached and sold'. The Bundelkhand property is admittedly not liable to be sold in execution. If one condition is not fulfilled, it is obvious that both the conditions taken together cannot be said to be fulfilled. If a property is not liable to be sold, it is certainly not liable to be attached and sold If 'liability to attachment and sale' is a narrower expression than 'liability to attachment or sale' then the negative expression 'non-liability to attachment and sale' assumes a wider scope than the negative 'non-liability to attachment or sale', and all properties within this wider compass would be exempted from vesting in the receiver.

The matter becomes abundantly clear if we ask ourselves the question "Is this property liable to attachment and sale."? The answer cannot possibly be in the affirmative. It must be in the negative, and if the answer is 'No', the property is exempted from liability to 'attachment and sale' and, therefore, does not vest in the receiver at all.

The policy of the legislature obviously seems to be that properties which cannot be attached and sold do not vest in the receiver. There is no injustice in this for when creditors cannot recover their

debts by sale of the properties, they suffer very little if their representative, the receiver, cannot realise the debts out of such properties. The same protection seems to have been intended for members of the agricultural tribes in Bundelkhand as extends to tenants of non-transferable tenancies in the Agra Province. In neither case the property is saleable in execution of any decree. It is, therefore, not available for the creditors and, therefore, it does not vest in the receiver. This view finds support from S. 17 (A) of the Bundelkhand Land Alienation Act under which provision is made for the realization of the decrees for arrear's of revenue and arrears of profits and not for Civil Courts' decrees.

Appeal dismissed.

★★ 1925 ALLAHABAD 469

WALSH AND RYVES, JJ.

In the Matter of Chunni Lal Kalyan Das.

Mis. Case No. 307 of 1924, Decided on 18th December, 1924.

★★ (*a*) *Income-Tax Act* (*XI of* 1922) *S.* 4 (*vii*)—*Even casual and non-recurring receipt from business etc., is not exempted.*

A receipt of a casual and non-recurring nature arising from business or the exercise of a profession, vocation or occupation does not come within exception. [P 470 C 1]

★ (*b*) *Income Tax Act* (1922) *S.* 2 (4) *Scope.*

The negotiation of the sale of a large Mill is "business". [P 470 C 1]

★★ (*c*) *Income Tax Act*, (*XI of* 1922) *S.* 4 (*vii*) — *Isolated transaction — Unusually heavy commission is not of "casual or non-recurring" nature.*

The adventure of a business man who is enabled, through his business associations, to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But on the other hand, it is a class of transaction which might occur to any such business man once only or half a dozen times again, during the course of the year. Profits arising from such a transaction are not of a casual or non-recurring nature. [P 470 C 2]

L. M. Banerji—for the Crown.

Tej Bahadur Sapru and *Gopi Nath Kunzru*—for Opposite Party.

Walsh, J.—In this case we are required to answer three questions submitted to us in a case stated by the Commissioner of Income-Tax under S. 66 of the Income-Tax Act of 1922. The case is very clearly stated by the Commissioner of Income-Tax in the document before us dated the 1st of November, 1924. Although question C comes last, it is desirable to refer to the answer which we are compelled to give to that question. The Income-Tax Commissioner agrees that under the peculiar circumstances of this case, which really were adopted by him for the convenience of the assessee the information acquired by his department that the assessee had engaged in other transactions, must be excluded from consideration, and that this matter must be judged upon the hypothesis that the transaction or adventure in question was an isolated transaction in the year of assessment. The facts are that when the books of the assessee were examined, he having been in regular business as a cloth and grain merchant, which regular business he had given up, an item was found relating to the year of assessment of Rs. 60,000 entered as having been received as brokerage in the transaction of the sale of the Mills of Messrs. John and Company of Agra to Messrs. Chari and Company, who floated the Agra United Mills Company Ltd. It is a fact that this sum was the balance of an entire sum of Rs. 75,000, Rs. 15,000 of which had already been paid, but that fact does not affect the question we have to answer. The question is whether that sum is a receipt, not being a receipt arising from business or the exercise of a profession, vocation or occupation which was of a casual and non-recurring nature. In answer to that question one, first, has to determine the grammatical construction of the exemption. In so doing one has to bear in mind that it is an exemption and therefore of a negative nature, and inasmuch as it does not correspond with any provision contained in any similar legislation in England, and has not apparently been the subject of any decision in India, we have to interpret it as a matter of first impression guided only by the arguments of counsel on either side. In our view the passage beginning with the word "not" and ending with the word "occupation" is an exception upon an exception, that is to say, the word "which" relates only to receipts which are not receipts arising from business or the exercise of a profession, vocation or

occupation. If the argument on behalf of the assessee were adopted, the result would be to strike out that qualifying passage from the section, and to make all receipts, whether arising from business or not, which are of a casual and non-recurring nature, within the exemption. We, therefore, hold that a receipt arising from business or the exercise of a profession, vocation or occupation does not come within the exception.

The next question is whether on the facts stated, it was open to the Commissioner to hold that this was a receipt arising from business or the exercise of an occupation. He says, and we agree with him, that the particular transaction is certainly one of the business of a broker, and that it comes within the definition of business. The assessee at one time appears to have taken the same view, for he entered it in his books as a business transaction, and that fact alone constitutes evidence upon which the Commissioner might rightly find, as he has done, that it was a receipt arising from business. But in our view the definition of the word "business" as used in S. 2, sub-sec. 4 places the matter beyond doubt. The word "business" is there defined as including any adventure, and it is not possible to exclude from the expression "adventure", indeed successful adventure, the negotiation of a sale of a large mill which resulted in a commission payable to the value of Rs. 75,000. The answer to question A, therefore, is that the clause exempts only receipts of a casual and non-recurring nature, which are not receipts from business or the exercise of a profession, or occupation by an assessee.

It would be superfluous for us to give an answer to question B upon the assumption that our answer to the question A were accepted as final. But in accordance with the order of this Court directing a case to be stated, the question has been submitted to us and has been argued on both sides. In our view this transaction, although an isolated transaction, was not of a casual or non-recurring nature. To some extent the discussion of this question overlaps the question whether a particular receipt is a receipt arising from business or the exercise of a vocation. Cases were cited to us on behalf of the assessee, such as *Assets Co. Ltd.* v. *Forbes* (1), and the unreported case of *Commissioners of Inland Revenue* v. *Sangster* (2), which appears to have been an excess profits duty case, decided in 1919, the report of which is not before us. Following upon these two cases is the decision of the Privy Council in the case of *Commissioners of Taxes* v. *Melbourne Trust Ltd.* (3). In our opinion these cases have no application to the question before us, as they deal with the well-known problem, much debated, as to whether in a particular case the realisation of assets is merely an enhancement of capital, or the result of carrying on trade, so as to be in substance and in fact the receipt of income. In taking the view we do, we found ourselves mainly upon the use of the word "nature" in the exemption. The word is not "occurrence". If the language were "a casual or non-recurring occurrence", there would be much to be said for the contention of the assessee. But the expression "nature" appears to us to be a word used independently of the accident of the event happening in fact once only, or more often in a fortunate year. It connotes a class of dealing which might occur only once, but which might occur several times. Now the adventure of a business man who is enabled, through his business associations, to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But, on the other hand, it is a class of transaction which might occur to any such business man once only or half a dozen times again, during the course of the year. The Government Advocate put what may be said to be a decisive illustration of the true meaning of the word "nature" when he pointed out that if you sold your own house at a profit, although the question would also arise as to whether the result of that transaction was a profit at all or rather only enhanced capital, it would, in any discussion as to whether it was brought within this exemption, undoubtedly be a transaction of a non-recurring nature. You could not do it twice. But if, on the other hand, you engaged in a solitary transaction of bringing two of your friends together, and negotiated the sale of the house of one of them to the

(1) [1897] 3 Tax Cases, 542=34 S. L. R., 486.

(2) K. B. D., 1919.

(3) [1914] A. C. 1001=84 L. J. P. C. 21=111 L. T. 1040=30 T. L. R. 685.

other and thereby earned a commission, you would, in our opinion, be carrying out a transaction, which, although casual in fact, would not be of a non-recurring nature, because having done so once with success, you might be asked by some vendor to do it again. Our answer, therefore, to question B is that the particular profit in question was not of a casual and non-recurring nature within the meaning of the section.

Our answer to question C is :—No.

The assessee must pay the costs of this case, being the amount certified by the Government Advocate.

Reference answered.

★ 1925 ALLAHABAD 471

SULAIMAN AND BOYS, JJ.

Rudra Pratap Singh—Objector—Appellant.

v.

Sharda Mahesh Prasad Singh—Decree-holder—Respondent.

Ex. First Appeal No. 330 of 1924, Decided on 25th March 1925, from decree of the Sub. J., Mirzapur.

(a) *Civil P. C., S. 53—Hindu son with ancestral property liable for the debt is legal representative.*

A decree-holder who has a decree against a Hindu father can proceed in execution after his death against the joint ancestral property in the hands of the son and can treat the son as the legal representative of his judgment-debtor provided the property is liable under the Hindu Law for the debt. [P 472 C 1]

★ (b) *Hindu Law—Debts — Father accepting surrender from Hindu widow—Claim by third party—Father honestly contesting claim but failing—Judgment debt is recoverable from son's ancestral property.*

A Hindu widow surrendered her estate in favour of a certain person. After her death, another person instituted a suit for the recovery of possession of the property. The person in whose favour the surrender had been made defended the suit but he ultimately failed.

Held. that the judgment debt was not tainted with illegality or immorality and it was open to the decree-holder to proceed in execution for costs against the ancestral property in the hands of the son of the judgment-debtor. [P 472 C 1]

Harendra Krishna Mukerji—for Appellant.

Harnandan Prasad—for Respondent.

Judgment.—This is an appeal by certain objectors arising out of an execution proceeding. Briefly stated the facts of the case are as follows :—A Hindu widow was in possession of a large estate situated in the district of Mirzapur and in 1913 she purported to surrender it in favour of Baijnath Prasad Singh, the father of Babu Rudra Pratap Singh, the present appellant. She died soon after and a suit was instituted by Raja Tejbali Singh, the father of Raja Sharda Mahesh Prasad Singh, the defendant-respondent, for recovery of possession of the property claiming it by right of lineal primogeniture. He impleaded certain relations of Baijnath Prasad Singh who were transferees from the widow but did not implead the present appellat. Babu Rudra Pratap Singh. In this suit we understand that the present appellant, actually appeared as a witness for his father at some stage of the proceedings and also joined his father in executing a security bond in order to obtain a temporary stay. The case was fought up to the Privy Council. The ultimate result was that with the exception of certain moveable properties, the bulk of the property was given to Raja Tejbali Singh. Baijnath Prasad Singh died in January 1921 just before the judgment was pronounced by their Lordships of the Privy Council, though it is suggested on behalf of the respondent that he died after the arguments were over.

The decree-holder has put the decree for costs in execution and has attached the joint ancestral property in the hands of the present appellant who is the son of the deceased judgment-debtor.

Two objections were raised on behalf of the objector : (1) that no credit had been given for Rs. 4,000 which had been deposited in cash as security in the High Court, and (2) that the appellant was not the legal representative of the deceased judgment-debtor inasmuch as the previous suit had been contested by him in his personal capacity.

With regard to the sum of Rs. 4,000 there is no force in this appeal. The amount was deposited as security but has not yet been taken out by the decree-holder. He cannot, therefore, be called upon to give credit for it at once. If, however, he takes this amount out in execution of the decree, credit will of course have to be given for it.

The main point raised in this appeal is that the appellant is not the legal representative of the deceased judgment-debtor. Before the passing of the new Code of

Civil Procedure there was some conflict of opinion as to whether a decree-holder who had a decree against a Hindu father could proceed in execution after his death against the joint ancestral property in the hands of the son and could treat the son as the legal representative of his judgment-debtor. That controversy has now been set at rest by the inclusion of S. 53 in the new Code which provides that for the purpose of execution property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. So the only point to consider is whether the property which is now to be attached is the property of the son or the other descendant, which is liable under the Hindu law for the payment of the debt of the deceased ancestor. The debt was a judgment-debt against the father of the present appellant and there is nothing to suggest that it was in any way tainted with illegality or immorality. Baijnath Prasad Singh had obtained a surrender from a Hindu widow and he was put in possession. He was honestly contesting a claim brought by a third party and present appellant also by his conduct approved of the defence raised by his father. It has been suggested on behalf of the appellant that the litigation was a mere speculation and gambling. This contention cannot be accepted. The deceased had been put in possession by a qualified owner and as defendant he was resisting a claim brought by a person who might have failed to establish his right. There is no question of fraud or collusion and it is, therefore, impossible to say that the judgment-debt against Baijnath Prasad Singh was tainted with immorality or illegality. It is open to the decree-holder to proceed in execution against the ancestral property in the hands of the son which the Court is bound to treat as property of the deceased which has come to the hands of the son as his legal representative. The objection, therefore, has no force and must be overruled.

The result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 472

MUKERJI, J.

Sanokhan—Applicant.

v.

Emperor—Opposite Party.

Cr. Rev. No. 442 of 1924, Decided on 2nd Oct. 1924, from an order of S. J., Agra.

Penal Code, S. 211—Making definite statement to police about commission of offence — S. 211 applies.

There is an essential dfference between a mere information to the Police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case, which is much graver than the former, S. 211 of the Penal Code applies. 1924 *All.* 779 *Ref.* [P. 472, C. 2]

Saila Nath Mukerji—for Applicant.

Assistant Government Advocate—for the Crown.

Judgment.—Two points have been urged in this case. The first one is that the offence was really one under S. 182 of the Indian Penal Code, and not one under S. 211 of the same Code. The finding is that the applicant laid a clear and definite information before the police, to the effect that there was a dacoity in his house and certain particular persons took part in it. It has been found that no dacoity took place, and at any rate the persons mentioned never took part in the dacoity. The question in the circumstances is whether the case falls under S. 211 of the Indian Penal Code, or not.

The latest pronouncement upon the point is by Walsh, Ag. C. J. and Ryves, J., in the case of *Kashi Ram* v. *King-Emperor* (1).

It seems to me that there is an essential difference between a mere information to the police and a definite statement to it that a certain person has committed a certain particular offence. In the latter case which is much graver than the former S. 211 of the Indian Penal Code applies. In my opinion the conviction is right.

As regards the sentence the applicant was fortunate enough to have the original sentence reduced by the learned Sessions Judge, to one of nine months' rigorous imprisonment. Having regard to the fact that the charge brought by the applicants fell within the second portion of S. 211, a sentence of nine months is a light one. I refuse to interfere with the sentence. The application is rejected.

Application rejected.

---

(1) 1924 All. 779=46 All. 906=22 A.L.J. 829 =5 L.R.A. Cr. 137=25 Cr. L.J. 1239.

1925 ALLAHABAD 473

MUKERJI. J.

Rameshwar—Applicant.

v.

Gobind Prasad and another — Opposite Party.

Criminal Rev. No. 656 of 1924, Decided on 26th January 1925 from an order of the Addl. S. J., Cawnpore.

Criminal P. C., Ss. 435 and 439 — Prosecution for cheating — Lower Court finding fraud but acquitting accused on ground that fraud was inchoate —Revision was allowed.

Where in a prosecution for cheating the lower Court found that the accused had acted fraudulently but held that the fraud was inchoate and inconsequential, and acquitted the accused,

Held ; that on the finding of fraud, a conviction ought to have followed and that the case should be remitted. [P. 473, C. 2]

G. P. Boys and *Saila Nath Mukerji*—for Applicant.

G. W. Dillon—for Opposite Party.

Mukerji, J.—This is a revision filed at the instance of the complainant asking this Court to set aside an order of acquittal passed by the learned Additional Sessions Judge of Cawnpore and to restore the order of the learned Magistrate convicting the opposite parties.

It appears that the complainant's masters were whole-sale merchants of cloth and the opposite parties were retail traders. The opposite parties owed money to the complainant's firm. The complainant's masters gave the opposite parties 24 hours' time to pay up. This time was granted by means of a telegram, although the parties were residing at the same place, *viz* : Cawnpore. The object of sending a telegram was evidently to show the urgency of the matter. The prosecution case is that the opposite parties approached the creditor firm and induced them to grant 15 days' time to pay up. It is further said that the object was that within the time granted, the opposite parties would remove their goods from their shop and would thereby escape the payment of just dues of the creditors. This object was carried out. The telegram was sent on the 19th of May 1924, and the Civil Courts closed for the usual vacation on the 1st of June 1924. It is clear that on the closing of the Civil Courts it was not open to the creditors to seek any remedy in the Civil Court. The creditors went to the Criminal Court and brought a charge of cheating against the opposite parties. The learned Magistrate, who heard the case, was of opinion that cheating had been committed and he, convicting the opposite parties, sentenced them. An appeal was taken to the learned Additional Sessions Judge. He found that, to quote his own words,

"All that the prosecution evidence shows is that the appellants fraudulently induced the complainants to give them some time, but the fraud, it seems, was inchoate and inconsequential".

The learned Sessions Judge remarks that there was no guarantee that the Civil Court, at the instance of the creditors, would have granted an order for attachment before judgment. But the question is not what the Civil Court would have granted or not granted. The main question is whether the creditors could have moved the Court to grant their prayer or not, if the time of 15 days had not been obtained. On the finding of the learned Sessions Judge that the time was obtained fraudulently, a conviction ought to have followed.

Mr. Dillon, who has appeared for the opposite parties, has argued that the learned Sessions Judge did not really mean to hold that there was any fraudulent intention when 15 days' time was asked for. He argued that it was not expected that a Sessions Judge of Mr. Banerji's standing would make a mistake like that.

I do not think I should express any opinion of my own on the facts. It would be the duty of the learned Sessions Judge to find on the facts and to apply the law. On the judgment, as expressed by the learned Additional Sessions Judge, there would be a clear case of cheating. In my opinion the appeal has not been adequately dealt with and it should be re-heard.

I may point out that this Court was really asked to do what it was not authorised to do, *viz* : to convert a finding of acquittal into a finding of conviction. In the view which I take of the matter and in the course which I propose to take, the law would be respected.

I accept the petition in revision, set aside the judgment of the learned Additional Sessions Judge and remand the appeal to him with the direction that it will

be re-heard with proper notice to the opposite parties and disposed of according to law. If there be no Additional Sessions Judge exercising jurisdiction at Cawnpore, the appeal will be heard by the learned Sessions Judge himself.

Revision accepted.

★ 1925 ALLAHABAD 474

SULAIMAN, J

Mt. Mahtab-un-Nissa—Appellant.

v.

Rifaqat Ullah and others—Respondents.

Execution First Appeal No. 44 of 1923, Decided on 14th November, 1924, from a decree of the Sub. J., Budaun.

★ (*a*) *Mahommedan Law — Marriage — Hindu married woman adopting Islam—Subsequent marriage with Mahommedan is illegal unless first marriage is dissolved through Court.*

Where a Hindu married woman embraces Islam and marries a Mahommedan the mere fact of her changing her religion though *bona fide* does not *ipso facto* dissolve her previous marriage. Though she must be deemed to be governed by the Mahommedan Law after conversion, yet even under that law a convert's first marriage is not dissolved automatically. It is only where the conversion takes place in a country where the Mahommedan Law is not administered that the marriage is so dissolved on the lapse of the woman's term of probation. But when she remains in a country where the Mahommedan Law regarding questions of marriage is in force she has only the right to obtain a divorce after her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court. If such dissolution is obtained, even if the marriage with the Mahommedan took place within a few days of her running away from her husband *i. e.*, before the expiry of her period of probation, the haste would have been a mere irregularity which would be perfectly cured by long continued co-habitation and treatment as a wife. But in the absence of such authorised and legal dissolution the original marriage tie cannot be severed. Her going through a form of marriage a second time cannot make this second performance a valid marriage. No question of doctrine of *factum valet* would arise in a case where a woman's husband is still alive. The second marriage is not only irregular but illegal and such an illegality cannot be cured either by acquiescence or long continued co-habitation. [P 475, C 1, 2]

★ (*b*) *Contract Act, S. 23 (h)—Past illegal co-habitation is not illegal consideration.*

Where a Mahommedan transfers certain property in lieu of a dower to a woman who has been his wife but with whom his marriage has been illegal, the consideration is not illegal though it may be void.

★ (*c*) *T. P. Act, S. 6 (h)—Consideration partly void—Transfer may be good.*

If the consideration is merely void as distinct from unlawful the transfer may hold good if it purports to be in lieu of the void consideration as well as some other consideration which is good. [P 476, C 2]

★ (*d*) *Contract Act, S. 24 — Out and out transfer—S. 24 does not apply.*

S. 24 of the Contract Act would not by implication apply to cases of an out and out transfer. [P 476, C 2]

S. A. Haidar—for Appellant.
Iqbal Ahmed—for Respondents.

Judgment.—This is a an Execution First Appeal arising from an objection raised to the attachment of certain property. The respondent is a purchaser of a decree for dower which had been passed in favour of Saiyid-un-nissa deceased against Ali Hasan her husband. Ali Hasan died during the execution proceedings and Saiyid-un-nissa brought on the record the present appellant Mt. Mahtab-un-nissa and her daughters treating them as the 'heirs of the deceased Ali Hasan.' The first application for execution which was made against these persons was ultimately struck off. A subsequent application was put in and these persons were again treated as the heirs of Ali Hasan deceased. Mt. Mahtab-un-nissa put in an objection that part of the property sought to be attached belonged to her exclusively as it had been transferred to her under a registered sale-deed executed on the 9th of April, 1913, by Ali Hasan in her favour for a sum of Rs. 7,000. The decree-holder by way of reply put in the plea *inter alia* that the marriage of Mt. Mahtab-un-nissa with Ali Hasan was illegal inasmuch as she was a Thakur woman and the wife of a living husband, that she had been kidnapped by Ali Hasan unlawfully and without the consent of her husband and could, therefore, not have been lawfully married to the deceasad. It was also pleaded that the sale deed in question was a fictitious and collusive transaction executed in order to defeat and delay the execution of the decree. Evidence was recorded on both the points in question, but the learned Subordinate Judge has unfortunately not gone into the question of the collusive and fictitious nature of the sale transaction but has disallowed the objections of

the facts admitted or said to have been proved that the marriage of Mt. Mahtab-un-nissa could not have been a legal and valid one. This finding is challenged in appeal. On the question of fact there cannot be much doubt. The evidence on both sides establishes the fact that some 20 or 25 years ago Mt. Mahtab-un-nissa whilst she was a married Hindu woman and her Hindu husband was living eloped and became a Mohammedan. Within a few days of her leaving her husband's house, she went through a form of marriage with Ali Hasan and lived with him as his wife and gave birth to a number of children. The learned Subordinate Judge seems to have been of opinion that in view of the provisions contained in Act No. XXI of 1866 the first marriage of Mt. Mahtab-un-nissa could not have been dissolved without a reference to the Civil Court. It is apparent however that the said Act has no application whatsoever to the facts of the present case. That Act was enacted to legalize under certain circumstances the dissolution of marriages of native converts to Christianity deserted or repudiated on religious grounds by their wives or husbands.

Nor is it correct to say that Mt. Mahtab-un-nissa's first marriage was indissoluble. I am prepared to admit that the mere fact of her changing her religion even though *bona fide* did not *ipso facto* dissolve her previous marriage. Though she must be deemed to be governed by the Muhammadan Law after conversion, yet even under that law a convert's first marriage is not dissolved automatically. It is only where the conversion takes place in a country where the Muhammadan Law is not administered that the marriage is so dissolved on the lapse of the woman's term of probation. But when she remains in a country where the Muhammadan Law regarding questions of marriage is in force she has only the right to obtain a divorce after her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court. This was the view expressed by the learned Judges of the Calcutta High Court in 'the matter of *Ram Kumari*; *In the matter of* (1). Even though that was a case arising under the Indian Penal Code the rule of law was correctly indicated, and is fully supported by Hedaya Vol. I Book II Chapter V.

Assuming therefore that it was possible to get the previous marriage dissolved in a proper way, the question still remains whether that was really done in the present case.

The finding is that the marriage with Ali Hasan took place within a few days of her running away from her husband, that is to say before the expiry of her period of probation. The haste however would have been a mere irregularity which would be perfectly cured by long continued cohabitation and treatment as a wife. But it is also clear that the former marriage had not been dissolved by a decree of the Court. In the absence of any such authorised and legal dissolution I am bound to hold that the marriage tie had not been severed. Her going through a form of marriage a second time therefore could not make this second performance a valid marriage. No question of the doctrine of *factum valet* would arise in a case where a woman's husband is still alive. The second marriage is not only irregular but illegal and such an illegality cannot be cured either by acquiescence or long continued cohabitation. I cannot therefore hold that any dower debt in its strict sense was due to her from Ali Hasan.

But this finding does not dispose of the appeal. The sale deed purported to have been executed in lieu of Rs. 7,000, out of which Rs. 5,000 represented part of the dower debt and the balance of Rs. 2,000 was left in the hands of the vendee in order to pay off certain mortgage and simple debts of Ali Hasan. As to the sum of Rs. 5,000 it is urged on behalf of the decree-holder that it was a void and illegal consideration inasmuch as no legal marriage had taken place. It is then contended that the transfer in lieu of such an unlawful consideration is a nullity under S. 6 sub-clause (*h*) of the Transfer of Property Act. I am however of opinion that it is impossible to dispose of the case on any such abstract proposition of law. It is true that every person is presumed to know the law. On the other hand as the question of law raised was by no means a simple one there is always a possibility of the objector having been deceived and made to believe by the deceased Ali Hasan that a valid marriage was being contracted and that she was

(1) [1891] 18 Cal. 264.

entitled to a dower debt of Rs. 5,000. If acting on the representation so made she had submitted to live with him as his wife and had borne children to him there might well have been circumstances under which Ali Hasan himself would have been estopped from challenging the va idity of the marriage in question, It was held in the case of *Man Kuwar* v. *Jasoda Kunwar* (2) as well as in the case of *Dhiraj Kuwar* v. *Bikramajit Singh* (3) that past cohabitation was not such an mmoral consideration as to make a promise in lieu of it altogether void, It was however pointed out by Aikman, J. in the case of *Alice Marry Hill* v. *William Clarke* (4) that in the two cases previously mentioned the cohabitation had not been shown to have been adulterous. In the opinion of the learned Judge adultery being an offence against the criminal law in India cohabitation past or future if adulterous was not merely an immoral but an unlawful consideration. In that case however the plaintiff was trying to enforce a contract the validity of which the defendant was impugning. I would further like to point out that adultery though an offence on the part of the man is not an offence on the part of the married woman. It cannot therefore be urged that the consideration passing from her is necessarily illegal though of course it is indisputably immoral. Bigamy however is an offence committed both by the married woman and the man. But in the present case the question is not whether such a contract can be specifically enforced in a Court of law, but the question is whether an out and out transfer already effected in lieu of a consideration for immoral and even illegal cohabitation is a nullity. When the agreement is that parties are to live in adulterous cohabitation in future the contract is obviously illegal, but if in order to compensate the woman for the past illicit connection, the offending party gives her some property I would not be prepared to say that the consideration for it is illegal. The offence had already been committed. Payment of compensation for a past criminal offence cannot be deemed to be illegal, even though under certain circumstances it may be immoral. In my opinion there is a clear distinction between a mere contract to pay an allowance in future in order that an illicit connection be continued, and a transfer of property in favour of the woman for cohabitation which has already taken place. In the former case I would have no hesitation in saying that the agreement is illegal but in the latter case I would not be prepared to say that it is so.

Under the Muhammadan law dower may be fixed at the time of marriage or even enhanced subsequently. It can thus be a consideration not only for future cohabitation but also for the past one. In the present case Ali Hasan on a demand of the dower debt (fixed at the time of the so-called marriage or enhanced subsequently) having been made, might well have imagined that he was estopped from challenging the validity of the marriage and had no real defence to such a claim. If being esptoped he attempted to satisfy that claim by transferring a part of the property I am unable to say that the consideration of the transfer was illegal even though as a matter of law it might have been void.

As the decree-holder is a mere attaching creditor and not in any other way a representative of Ali Hasan she may well urge that she is not bound by any personal estoppel against Ali Hasan. She would then be entitled to say that the consideration of Rs. 5,000 even though not illegal was certainly void as no legal marriage had in law taken place. But if the consideration of Rs. 5,000 was merely void and not unlawful then the transfer cannot be a nullity unless the balance of Rs. 2,000 was also a void consideration. Under S. 6 Sub-clause (h) the transfer is a nullity when the transfer is for an unlawful object or consideration within the meaning of S. 23 of the Indian Contract Act. If the consideration is merely void the transfer may hold good if it purports to be in lieu of this void consideration as well as some other consideration which is good. Further in the absence of any clear authority I am not prepared to hold that S. 24 of the Contract Act, which *prima facie* applies to a mere contract and would vitiate the whole of it if any one or any part of several considera tions is unlawful, would by implication apply to cases of an out and out transfer when that section has not been expressly made applicable. I am therefore of opinion that the the mere fact that considera-

(2) [1875-78] 1 All. 478.
(3) [1881] 3 All. 787=(1881) A. W. N. 57.
(4) [1900] 27 All. 266=1 A. L. J. 632.

tion of Rs. 5,000 falls to the ground would not make the transfer void if the balance of the consideration was valid. Of course if the reduced consideration is grossly inadequate the transfer itself may be presumed to have been made with intent to defraud, defeat or delay creditors within the meaning of S. 53 of the Transfer of Property Act.

I therefore find it impossible to dispose of this appeal without first having the questions of fact arising in this case determined. For ought one knows there might never have been any supposed dower debt or any other outstanding debt and the transaction in question might have altogether been a fictitious one. The questions of law would then become merely academic. I accordingly send down the following issues for determination which have been left undecided :—

1. Was any sum of Rs. 5,000 or less fixed as dower at the time of the second supposed marriage or *bona fide* enhanced subsequently ?

2. Were any debts amounting to Rs 2,000 or less as referred to in the sale deed actually outstanding against Ali Hasan at the time of the alleged sale ?

3. Was the transfer in question an honest and *bona fide* transfer in lieu of the supposed consideration or was it a mere fictitious transaction intended to defeat and delay the respondent decree-holder ?

No fresh evidence will be allowed. The Court below will submit its findings at an early date. On receipt of the findings the usual ten days will be allowed for objections.

[On receipt of the findings of the lower Court on the issues remitted, the following judgment was delivered :—]

Judgment.—The facts of this case are fully set forth in my order dated the 6th June, 1924. Under that order I sent down three issues for finding. The findings on those three issues have now been returned and no objections whatsoever have been filed as to their correctness. I must therefore accept these findings as final for the purposes of this appeal. The lower appellate Court finds that at the time of the supposed second marriage a sum of Rs, 25,000 was actually fixed as the appellant's dower and that Rs. 5,000 at least were still outstanding at the time when the transfer took place. It has also found that the sum of Rs 2,000 left in the hands of the vendee under the sale deed was not a fictitious sum but, as a matter of fact, debts to that amount were due and the amount was subsequently realised in execution proceeding against the appellant. It has also come to the conclusion that the transfer in favour of the appellant was *bona fide*, and for consideration. In view of the opinion which I expressed on the questions of law raised in this appeal, these findings now entitle the appellant to a decree. I accordingly allow this appeal and setting aside the order of the Court below allow the objection of Mt. Mahtab-un-nissa and order that the application for execution be dismissed as against her with costs including in this Court fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 477

MUKERJI, J.

Zabar Singh and others—Applicants.

v.

Ram Sarup—Opposite Party.

Criminal Rev. No. 503 of 1924, Decided on 29th September, 1924, from an order of the Dt. Mag. Meerut.

Criminal P. C, (1923) S. 436—Revising authority differing from trial Court in conclusion on evidence—Further inquiry cannot be ordered.

Where on the evidence, a revising authority comes to a different conclusion from the Court that hears the evidence, a further enquiry under S. 436 (new) should not be ordered, [P. 477, C. 1]

Muhammad Husain—for Applicants.

N. C. Vaish—for Opposite Party.

Judgment.—This is an application to revise an order of the learned District Magistrate of Meerut ordering a further inquiry into the case started by one Ram Sarup against the applicants.

It appears that Ram Sarup filed a complaint that the applicants in the course of the night cut and removed the crops which he had grown on his field. The accused persons stated in defence that

they did not do the act attributed to them, and urged that the case had been falsely brought against them on account of some revenue litigation. The learned Deputy Magistrate heard the entire evidence that was adduced before him, and he says "the witnesses have differed materially from each other on several points in cross-examination, and they have left a general impression on my mind that the evidence is unworthy of credit."

The learned Deputy Magistrate having discharged the applicants, the opposite-party went up to the District Magistrate who has ordered a further enquiry into the case.

The question is whether this order of further enquiry was right and justified in the circumstances of the case. The leading case on the point is that of *Queen Emperor* v. *Chotu* (1). There, it was laid down in effect that, where the whole evidence has been heard by a Magistrate hearing the case and the evidence has been disbelieved, a revising authority would not rightly interfere. It was pointed out that the provisions of the (old) S. 437 were meant to apply to cases where there had been some misinterpretation of the law, or principle of law, and there was, otherwise, a miscarriage of justice.

It has been repeatedly held in this Court that, where on the evidence a revising authority comes to a different conclusion from the Court that hears the evidence, a further enquiry under S. 437 (old) and S. 436 (new), should not be ordered. I have read both the judgments, and I am of opinion that it was not a fit case in which a further enquiry should have been ordered. The whole evidence was recorded by the learned Deputy Magistrate, and there was really nothing further to be done in the case.

I set aside the order of the learned District Magistrate, dated the 11th of July, 1924.

Application allowed.

(1) [1886] 9 All. 52=(1886) A. W. N. 281 (F.B.)

1925 ALLAHABAD 478

MUKERJI, J.

Ram Autar—Applicant.

v

Emperor—Opposite Party.

Criminal Rev. No. 582 of 1924, Decided on 7th January, 1925, from an order of the Add. S. J., Benares.

Penal Code, S. 411—*Property found in room accessible to persons other than accused — Conviction is liable to be set aside.*

Where the goods which were alleged to be stolen property were found in a room which had no shutters and which was accessible to all the members of the accused's family,

Held: that the accused could not be conclusively said to have been in possession of the stolen articles. 15 *All.* 129 and 22 *All.* 445 *Appl.*

[P. 478, C. 2]

A. Sanyal—for Applicant.

The Asstt. Government Advocate — for the Crown.

Judgment.—The applicant has been convicted of the offence under S. 411 of the Indian Penal Code and the allegation against him is that he was in possession of a stolen lota and a stolen thali.

This application in revision, in my opinion, should succeed on two grounds. First, the whole case is a very suspicious one, and, secondly, even if all the facts found by the learned Sessions Judge in appeal be accepted, it has not been established that the appellant was in possession of the stolen articles.

On the first point. The judgment of the learned Sessions Judge leaves an impression on the mind that the accusation was more or less reckless and that the appellant was charged with having stolen more things than have been established to have been stolen property.

Coming to the second point, It appears that the goods were found in a room which had no shutters and which was accessible to all the members of a joint family. Here we have at least the appellant, and his father, Ganga Din, living in the house. The principle laid down in the case of *Queen Empress* v. *Sangam Lal* (1) and *Queen-Empress* v. *Nirmal Das* (2) applies.

I accept the application in revision and acquitting the appellant of the offence of which he has been convicted set aside the sentence and order his release. The fine, if paid, will be refunded.

Application allowed.

[1] [1883] 15 All. 129=(1883) A.W.N. 48.
[2] [1900] 22 All, 445=(1900) A. W. N. 169.

★ 1925 ALLAHABAD 479

STUART AND RYVES, JJ.

Dip Narain Rai—Plaintiff—Appellant.

v.

Lachhman Upadhiya and others—Defendants—Respondents.

Second Appeal No. 192 of 1923, Decided on 15th January 1925, from a decree of the Dt.. J., Ghazipur.

★ *Civil P. C., O. 22, R. 4—Mortgage suit—Judgment-debtor dying between preliminary and final decrees—Decree-holder substituting honestly person believed to be sole representative—Person entitled to be co-representative cannot redeem after final decree.*

When a judgment-debtor, under a preliminary decree for foreclosure, has died between the passing of the preliminary decree and the final decree and the decree-holder has honestly substituted the person whom he believes to be the sole representative of the judgment-debtor and that person has accepted the possession, and when a final decree for foreclosure has subsequently been passed, a person who had right to be a co-representative of the judgment-debtor's estate and had as such a right to redeem the property cannot enforce a right to redeem subsequent to the passing of the final decree. 26 *Mad.* 230 and 32 *Cal.* 296 (*P. C.*) *Foll.* [P 479 C. 2, P 480 C 2.]

Uma Shankar Bajpai and *Janaki Prasad*—for Appellant.

M. L. Agarwala and *Haribans Sahai*—for Respondents.

Stuart, J.—It is necessary to state the following facts:—In November, 1861 Ghumraj Rai executed a mortgage by conditional sale of certain property in the village of Pipra Kalan, in the Ballia district, in favour of Sheo Saran Upadhiya. In 1915 the mortgagor was represented by Sukhdeo Rai and the mortgagee was represented by a certain Lachhman. Lachhman instituted a suit for foreclosure against Sukhdeo Rai. A preliminary decree was passed on the 15th of July, 1915 by consent of parties under the terms of which Sukhdeo Rai was given six months within which to pay Rs. 1,104-15-0. and, in default of such payment, the land mortgaged was to pass to Lachhman. No application was made for a final decree and in 1918 Sukhdeo Rai died. It is suggested that the reason why no application was made for a final decree was because Lachhman had already obtained possession of the property by a private arrangement with Sukhdeo Rai. After the death of Sukhdeo Rai, certain people claimed to be his heirs in respect of this property. Lachhman then applied for the preparation of a final decree. He had to ascertain who was the legal representative of Sukhdeo Rai. This was clearly not an easy task for many persons had put themselves forward as the heirs of Sukhdeo Rai. Sukhdeo Rai belonged to the Rudra Rai branch of the family and he was the sole survivor of that branch, and his heirs had to be found in the Dina Nath Rai branch of the family. To any person acquainted with the circumstances of the Ballia district, it will be seen that Lachhman was in a position of real difficulty in discovering who Sukhdeo Rai's heirs would be. He finally put forward Mahadeo Rai as Sukhdeo Rai's successor. Mahadeo Rai did not contest the position that he was the representative and a final decree was passed on the 12th of April, 1919. On the 10th of May, 1921, a certain Dip Narain Rai instituted a suit in the Court of the Subordinate Judge of Ghazipur for possession of this property as of right or, in the alternative, for possession of this property by redemption of the mortgage on the ground that he had succeeded to a portion of the property of Sukhdeo Rai. The Subordinate Judge decided that he was not an heir and dismissed his suit. An appeal was then filed before the District Judge who found that Dip Narain Rai was an heir but that his suit must fail as the proceedings were finally concluded by the final decree of the 12th of April, 1919. Dip Narain Rai has preferred this second appeal.

The point for decision is briefly as follows:—When a judgment-debtor, under a preliminary decree for foreclosure, has died between the passing of the preliminary decree and the final decree and the decree-holder has honestly substituted the person whom he believes to be the sole representative of the judgment-debtor and that person has accepted the position, and when a final decree for foreclosure has subsequently been passed can a person who had a right to be a co-representative of the judgment-debtor's estate and had as such a right to redeem the property, enforce a right to redeem subsequent to the passing of the final decree There is no direct authority upon this point. In order to decide it, we have to examine certain considerations. The law as to the representation of a deceased defendant before the passing of a decree is contained

in Order 22, rule 4 of the Code of Civil Procedure. This rule reproduces, with no change of principle, S. 368 of the old Code as amended in 1888. The law in respect of substitution of the representative of a deceased defendant may be shortly stated as this. It is in the first instance for the plaintiff to bring the representative of a deceased defendant upon the record. If he does not do so within 90 days of the date of the death, his suit abates under the provisions of Article 177 schedule I of the Indian Limitation Act as amended in 1920. While it is obligatory upon the plaintiff to discharge this duty in so far as he is capable of doing so, any person who has not been so substituted by the plaintiff who claims to be interested as a representative of the deceased defendant, has a right to come before the Court and claim to be substituted as such representative. It has been held in particular instances that, when the plaintiff has, in such circumstances, made an honest and intelligent endeavour to secure such representation, the estate is ordinarily sufficiently represented for certain purposes.

There is nothing in the Code or in the orders which explicitly cover the case of the substitution of the representative of a deceased judgment-debtor but the principles already enunciated undoubtedly govern such substitution. When a mortgagor judgment-debtor dies during the period that elapses between a preliminary decree for foreclosure and a final decree for foreclosure, it may well happen that a person who claims to be his representative and has not been made his representative, may have a grievance. It may be that through no fault of his he is deprived of the knowledge that such a decree exists. This is practically the position taken up by the appellant in this appeal. Against this it may be said that on the principles which we have already enunciated it is open to the representative of a deceased judgment-debtor, whose name has been inadvertently omitted from the array of parties, to come forward and to apply that his name should be added. Dip Narain Rai does not seem to have suggested that he had no knowledge of the proceedings. He says that he was very ill at the time they took place. The District Judge does not believe him on this point.

There is no direct authority upon the subject but two decisions have been quoted to us by the learned counsel for the respondents which have a bearing upon the point. The earlier of these decisions is contained in *Kadir Mohideen Marakkayar* v. *N. V. Muthukrishna Ayyar* (1). The Bench which decided this appeal upheld the validity of a transfer of a sale made under a final decree on a mortgage. The mortgagor was a man called Kadir. He died before the passing of the decree. One of his sons was substituted as his heir on the application of the plaintiff and the decree was passed against that son as sole defendant. That son's name appeared alone as defendant both in the proceedings up to the preliminary decree and in the proceedings up to the final decree. It was subsequently found that there was a second son who ought also with others to have been named as a representative of the deceased Kadir. But the Bench held that it was not open for the second son or his representatives or successors to question the validity of the transfer in any way as the estate of the deceased had been sufficiently represented for the purposes of the suit, and in the absence of any fraud or collusion, the decree bound the estate. The Bench was of opinion that the son had sufficient remedy in the power to apply to be joined as a representative.

In a subsequent decision of their Lordships of the Privy Council, in *Khiarajmal* v. *Daim* (2), their Lordships held that when a Muhammedan had died and three out of four of his legal representatives had been brought on the record in his place while the name of the fourth had been inadvertently omitted, the estate was sufficiently represented for the purposes of the suit and that no right of redemption remained.

After consideration, accepting the principles laid down in the above decisions, we decide this appeal as follows :—

We consider that the proceedings for substitution of the name of the deceased Sukhdeo Rai were honest and correct, that the decree-holder legitimately did all what he could be properly expected to do and that the decree of the 12th of April, 1910 concludes the matter

We therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) [1902] 25 Mad. 230=12 M. L. J. 368.
(2) [1904] 32 Cal. 296=32 I. A. 23=1 C. L. J. 581=9 C. W. N. 201=2 A. L. J. 71=7 Bom. L. R. 1=8 Sar. 734 (P. C.)

1925 ALLAHABAD 481

KANHAIYA LAL, J.

Dhanukdhari Mani and others—Plaintiffs—Appellants.

v.

Mt. Piari and others—Defendants—Respondents.

Second Appeal No. 263 of 1923, Decided on 3rd July, 1924, from the decree of the Sub. J., Gorakhpur, D/- 23rd September, 1922.

U. P. Land Revenue Act Ss. 111 and 112—Order on objections under S. 111—Order of another partition officer at subsequent stage of same proceeding cannot affect the order.

S. 111 contemplates an objection, involving a question of title, being raised on or before the date fixed in the notice issued by the Collector to the co-sharers inviting objections to the applcati on for partition. An order passed on such an objection is treated as regards the rights of the parties, as if it were a decree of the civil Court, and an appeal from that order lies to the District Judge. [P. 482, C. 1, 2.]

An order of another partition officer at a subsequent stage of the same proceeding cannot affect an order passed in such manner.

In a partition proceeding, an objection filed under S. 111 of U. P. Land Revenue Act was disallowed. Afterwards the partition was suspended for some time. When it was resumed again, the same objection was raised again by the same objector. This time the objection was allowed.

Held; that the subsequent order of the Revenue Officer was not passed under Ss. 111 and 112 of the U. P. Land Revenue Act, because the objections had already been determined before and the effect of the suspension of the partition proceeding owing to the settlement operations was merely to revive the partition proceeding from the stage at which it had been left. [P. 482, C. 1.]

Haribans Sahai—for Appellant.

Janki Prasad—for Respondents.

Judgment.—This appeal arises out of a suit brought by Raghubansman Tiwari, the father of the present plaintiffs appellants, for a declaration that he was the owner in possession of an 8 pies share in mauza Belahi and of certain plots of exproprietary land in the village Dhatura *khas* on the allegati on that he lived jointly with Paramhansman Tiwari, the husband of Mt. Piari, that Paramhansman had died in the lifetime of his father, and that Mt. Piari was only entitled to maintenance. It was further alleged that the name of Mt. Piari had been entered in the revenue papers for her consolation, that 4 *big.* 12 *dhurs* of exproprietary land in the village Dhatura *khas* was set apart for her maintenance and that she had wrongfully transferred a portion of the property, standing in her name, to the defendants Sheolochanmani Tiwari and Sheomohanmani Tiwari, without any legal necessity. The defence was that Paramhansman Tiwari, the husband of Mt. Piari lived separately from the plaintiff, that the transfers in question were made for legal necessity, and that as the daughter of Mt. Piari was alive, the plaintiff had no right to sue.

The Court of first instance found that Raghubansman Tiwari was living separately from Paramhansman Tiwari, that the property in dispute was originally their ancestral property and had passed out of the family by virtue of an auction sale to a person named Ganga Sahu, from whom it was subsequently obtained by gift by Raghubansman Tiwari and Paramhansman Tiwari jointly, and that though the transfers in question were not made for legal necessity, the plaintiff was not entitled to any relief because the daughter of Mt. Piari was alive.

During the course of the hearing of an appeal from that decree it transpired that the matter in issue between the parties had already been dealt with adversely to the plaintiff in a partition proceeding, to which the present plaintiff and Mt. Piari were parties. An issue was therefore remitted to the Court of first instance to ascertain whether section 111 of the U. P. Land Revenue Act barred the plea raised by the defendants. The Court of first instance found on the evidence then adduced that section 111 of the U. P. Land Revenue Act did not bar the defence either as regards the zamindari share or the tenancy land in suit. That finding was upheld by the lower appellate Court, which also came to the conclusion that the property in dispute was no longer the joint family property of Raghubansman Tiwari and Paramhansman Tiwari, and that they were separate at the time of the death of the latter.

The learned counsel for the plaintiff appellant relies on the order passed in the partition proceeding of the 27th January 1920. It appears that in 1914 a partition proceeding was instituted on the application of a co sharer named Mahangu Sah in respect of the village Belahi; and in the course of that proceeding an application was made by Mt. Piari on the 31st March 1914 that her share should also be separated. To this Raghubansman

Tiwari, the present pfaintiff, objected on the ground that he was joint with the husband of Mt. Piari and that Mt. Piari was only entitled to maintenance. That objection was disallowed by the Assistant Collector in charge of the partition proceeding on the 12th August 1914. His finding was that Raghubansman Tiwari and Paramhansman Tiwari were separate. Before the petition could, however, be further proceeded with the Settlement operations commenced and under the standing orders of the Board of Revenue the partition had to be stayed or suspended till the Settlement was completed. The Settlement was concluded in 1919. The partition proceeding was then resumed from the stage at which it was left. On the 20th December 1919 Bharatman Tiwari and Mt. Piari moved the partition officer again for the separation of their share; but this application was opposed by Raghubansman Tiwari on the old ground that he was joint with Paramhansman Tiwari, the husband of Mt. Piari, and that Mt. Piari was only entitled to maintenance, for which 4 *bighas* 12 *dhurs* of land had been allotted to her. The previous order passed by the partition officer was brought to the notice of the Court; but in spite of that order the Court proceeded to enquire into the merits of the objection afresh and came to the conclusion that Raghubansman Tiwari and Paramhansman Tiwari had been joint in estate and that Mt. Piari was not entitled to have the share recorded in her name separated. The present suit was filed on the 14th September 1920 for the declaration above referred to; and in the alternative it was claimed that if the plaintiff was not found in joint possession, a decree for possession should be awarded to him.

The main question for consideration is whether the second order of the partition officer operates as *res judicata*. It is clear that that order was not passed under sections 111 and 112 of the U. P. Land Revenue Act because the objections filed to the partition had already been determined in 1914 and the effect of the suspension of the partition proceeding owing to the Settlement operations merely was to revive the partition proceeding from the stage at which it had been left. Section 111 contemplates an objection, raising a question of title, being raised on or before the date fixed in the notice issued by the Collector to the co-sharers inviting objections to the application for partition. An order passed on such an objection is treated as regards the rights of the parties, as if it were a decree of the Civil Court; and an appeal from that order lies to the District Judge. The order of the 12th August 1914 appears to have been passed on an objection filed by Raghubansman Tiwari under section 111 of the U. P. Land Revenue Act. That order could only have been varied by a Court of appeal competent to determine the question of proprietary title within the meaning of section 112 and not by an order of another partition officer at a subsequent stage of the same proceeding. As pointed out in *Hardeo Singh* v. *Narpat Singh* (1) and *Kalka Prasad* v. *Manmohan Lal* (2) an order passed on an objection filed after the date fixed in the notice had expired cannot be treated as an order determining the rights of the parties under section 112 of the U. P. Land Revenue Act; and the Courts below have rightly refused to attach any finality to it. The order did not purport to be an order passed on a review of the previous order. The officer who passed this order was not the same as the officer who passed the previous order. The order of the 12th August 1914 was on the other hand final between the parties on the question now at issue: and the Courts below have rightly refused to regard the plaintiff as entitled to more than a possible reversionary interest in the property of Paramahansman Tiwari, in case Mt. Piari died, leaving no daughter or male children or grand-children.

The plaintiff can, however, be granted a declaration to protect his possible reversionary rights. The appeal is therefore allowed in so far that the plaintiff will be granted a declaration that the transfers made by Mt. Piari in favour of the other defendants will not be binding on the reversionary heirs of her husband after her death. As the suit has failed on the main grounds on which the plaintiff came to the Court, he cannot be allowed any costs and will have to pay the costs of the defendant, Mt. Piari here and in the Courts below. The defendants transferees will bear their own costs throughout.

Appeal partly allowed.

---

(1) [1897] 20 All. 75—(1897) A. W. N. 197.
(2) [1916] 38 All. 302—33 I. C. 86—14 A. L. J. 373. (F. B.)

1925 ALLAHABAD 483

MUKERJI AND BOYS, JJ.

Bansidhar—Plaintiff—Appellant.

v.

Dulhatia and others — Defendants — Respondents.

Second Appeal No. 303 of 1923, Decided on 19th February, 1925, from a decree of the Sub. J., Banda.

Hindu Law—Reversioners—Suit by, reversioner is in a representative character - Civil P. C., S. 11.

On the death of last full owner of the property, a part of the property was recorded as held by his widow although his son survived him. After the death of the son the property which was recorded in his name, being a portion of his father's property, was recorded in the names of his mother and a predeceased brother's widow. The mother executed a deed of gift in favour of her daughter-in-law. A possible reversioner to the estate sued for declaration that the widow had no right to execute a gift. The defence, *inter alia*, was that the widow held adversely to the estate of her husband and had matured in herself an absolute title and was, therefore, competent to execute the deed of gift. This defence succeeded in respect of that portion of the property which had been recorded in the widow's name on the death of her husband. The suit succeeded in respect of that portion of the property which came to be recorded in the name of the widow on the death of her son. After the failure of the reversioner, his brother started a fresh campaign of litigation on the same allegations as had been made by the former plaintiff.

Held: the decree in the previous suit should be treated as concluding the later suit brought by the other reversioner. 19 *A.L.J.* 749 *Foll.*

[P 484 C 2]

Peary Lal Banerji—for Appellant.

Ram Nama Prasad—for Respondents.

Mukerji, J—The question in this appeal is whether a former decision given against Sheo Mangal, a brother of the plaintiff, operates as *res judicata* or not.

The Courts below have held that it does operate as *res judicata* as regards a portion of the property in suit.

Briefly the facts are these :—

Ganesh Din was the owner of the property in suit. On his death, a part of the property was recorded as held by his widow although his son, Ram Partab, survived him. After the death of Ram Partab, the property which was recorded in his name, being a portion of his father's property, was recorded in the names of his mother and a predeceased brother's widow. The mother of Ram Partab executed a deed of gift in favour of her daughter-in-law and this gave rise to the suit which was brought by Sheo Mangal.

Sheo Mangal sued as a possible reversioner to the estate and his case was that Mt. Dulhatia, the wife of Ganesh Din, was in possession of the property as a Hindu widow and had no right to execute a gift.

The defence, *inter alia*, was that the widow held adversely to the estate of Ganesh Din and had matured in herself an absolute title and was, therefore, competent to execute the deed of gift. This defence succeeded in respect of that portion of the property which had been recorded in Mt. Dulhatia's name on the death of Ganesh Din. The suit succeeded in respect of that portion of the property which came to be recorded in the name of Mt. Dulhatia on the death of her son.

After the failure of Sheo Mangal, his brother, Bansidhar, started a fresh campaign of litigation on practically the same allegations as had been made by Sheo Mangal.

As stated above, the question is whether the decree in Sheo Mangal's suit should or should not be treated as concluding Bansidhar's suit.

It has been conceded that this High Court, in the case of *Kesho Prasad* v. *Sheo Pragash Ojha* (1) held that the justification of allowing a reversioner to sue in the life-time of the widow was this that he was suing not on his own behalf but on behalf of the entire body of reversioners or the person who would be the actual reversioner on the death of the widow. In other words, it was held that a suit by a reversioner came within the explanation 6 of S. 11 of the Civil Procedure Code. This judgment, which was of a Full Bench, was upheld by the Privy Council. The judgment is reported in Volume 46 of the Allahabad Series of the Indian Law Reports at page 831. On the face of it, the principle of these two rulings should apply.

The learned counsel for the appellant has sought to distinguish the case on two grounds :—

First, he said that there are observations in the judgment of the Privy Council which show that where the reversioner's suit fails, a second suit by a different reversioner would not be barred as *res judicata*. As to this argument we are of opinion that there is nothing in the judgment of the Privy Council which can

(1) [1921] 19 A.L.J. 749 (F.B.)

support it. Their Lordships make the following remarks :

" Their Lordships, of course, recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which the plaintiff had failed whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked."

In our opinion their Lordships gave the reason for holding why in the case of a failure of a reversioner's suit, the question whether or not the decree would bind the ultimate reversioner was not always capable of the same answer. To our mind their Lordships had, in their view, the case of a reversioner colluding with a transferee, for the simple reason that he was not certain whether the property was going to vest in him or not ultimately. Their Lordships expressly mention cases of fraud and collusion in continuation of the remarks already quoted. Looking to the principle of the decision, we are of opinion that the case before us is entirely governed by the observations of the Privy Council and the decision of this Court. No question of collusion or fraud on the part of Sheo Mangal has been raised before us.

Sheo Mangal's suit was either a representative suit or it was not. If it is not a representative suit, Bansidhar's suit is not equally a representative one because there is no difference between the two suits in any respect at all. If Bansidhar's suit is not a representative suit, there is no reason why he should be allowed to maintain one on his own account. If the suit of Bansidhar is not a representative suit, the result of the suit will not bind the ultimate reversioner. If that be the case, there is no ground for allowing Bansidhar to maintain this suit.

Again, if Bansidhar's suit be a representative suit, the suit of Sheo Mangal must be treated as having been a representative suit. If Sheo Mangal's suit was a representative one, the decree must bind Bansidhar also.

There is another aspect of the case. Supposing that Bansidhar's suit succeeds on the merits, the result would be that, say ten years hence, when the actual reversion opens out, there will be two conflicting judgments for the actual reversioner and the transferee to meet. The question would arise which of the two judgments should operate as *res judicata.* The learned counsel for the appellant argued that the later judgment should operate as *res judicata* ; but it is always necessary to avoid conflicting judgments and this Court cannot allow two contradictory judgments to come into existence.

In our opinion, therefore, the judgment previously obtained against Sheo Mangal should operate as *res judicata.*

The second ground urged by the learned counsel for the appellant was that the transferee and the transferor both urged that Mt. Dulhatia was not holding as a representative of Ganesh Din but was holding in her own right. This consideration, argued by the learned counsel, took the base entirely out of the purview of the cases quoted above. In our opinion the nature of the defence cannot alter the nature of the suit.

The appeal fails and it is hereby dismissed with costs.

Appeal dismissed.

★ 1925 ALLAHABAD 484

MUKERJI, J.

Thakur Rudrapal Singh and others — Plaintiffs—Appellants.

v.

Matabadal Singh and others — Defendants—Respondents.

Second Appeal No. 461 of 1923, Decided on 25th November 1924, against the decree of the Sub, J., Jaunpur, D/- 23rd December, 1922.

★ *Civil P. C., O. 34 Rr. 7 & 8—T. P. Act, S. 60 Civil P. C., S. 11—Previous decree directing mortgagee to withdraw mortgage money deposited by mortgagor and to deliver property to mortgagor—Subsequent suit for redemption is barred.*

If the right of redemption still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption would lie. The order that would extinguish the right of redemption need not be an order purporting to extinguish that right. All that is necessary to bar a second suit is an order of the Court which would have the effect of extinguishing the right of redemption. [P 485 C 2]

In the previous suit a decree was passed directing the mortgagee to take the mortgage money which had been deposited in Court by the mortgagor and to deliver the property to the mortgagor. The mortgagor applied for delivery of the property. Afterwards he gifted the property to the plaintiff. The application for the

delivery of the propererty was susequently dismissed. The plaintiff brought another suit to redeem the property.

Held: that the decree in the previous suit was not one under Civil P. C., O. 34, R. 7 but was a combined decree under O. 34, R. 8 and, as under it the mortgagee was permitted to withdraw the money that had been already deposited in Court, it had the effect of extinguishing the mortgage and a second suit for redemption was barred.

[P. 486 C. 1.],

Mushtaq Ahmad with K. N. Katju—for Appellants.

S. N. Sen—for Respondents.

Judgment. This appeal presents only a question of law for determination, the facts being all admitted.

The history of the case is briefly this. There was a mortgage by father and son Ram Saran Singh and Mahadeo in favour of the predecessor-in-title of the defendants. Mahadeo brought a suit for redemption after having deposited in Court the full amount of the mortgage money *viz*.. a sum of Rs. 100, under S. 83 of the Transfer of Property Act. Evidently because the mortgagees did not witndraw the money from Court, Mahadeo, brought a suit for redemption and a decree was passed in his favour on the 26th of June 1918. The language of the decree is important and is as follows :—

"That the suit for possession by redemption of the mortgage set up by the plaintiff be decreed and the claim for mesne profits up to the date of the suit be dismissed. The plaintiff will get *pendente lite* and future mesne profits, the amount of which will be determined in the execution department. If the amount of the mortgage money Rs. 100, deposited by the plaintiff under S. 83 of the Transfer of Property Act has been withdrawn, he is given six months' time from to day to pay into Court the said sum, failing which the mortgaged property will be sold. If the deposit under S. 83 of the Transfer of Property Act has not been withdrawn defendants will be entiled to withdraw it."

As happened to be the case, the money deposited under S. 83 of the Transfer of Property Act was still in Court and was actually withdrawn by the mortgagees on the 6th February 1919. Mahadeo knew that the mortgage money was already in Court and he accordingly applied at once for delivery of possession. This application was made on the 25th of July 1918. Unfortunately, however, this application was dismissed for default on the 13th of November 1918. After having presented the application for delivery of possession Mahadeo gifted away the plaint property to one of his sister's sons Ram Jagat. Ram Jagat died and his four brothers the plaintiffs Nos. 2 to 5 inherited his property. They and the plaintiff No. 1 who obtained a portion of the property from the other plaintiffs by a deed of exchange have launched a fresh suit to redeem the property which is still in the possession of the defendants, the representatives of of the original mortgagees.

The question that has to be answered is whether the suit is barred as *res judicata*.

The suit succeeded in the Court of first instance, but the learned Judge of the Court below was of opinion that the suit was barred.

On the authorities of this Court, there can be no two opinions on the point that if the right of redemption still subsists, not having been extinguished either by an act of the parties or by an order of the Court, a second suit for redemption would lie. Nobody says that the right of redemption has been extinguished by an act of the parties. The only question. therefore. is whether the decree that was passed on the 26th of June 1918 had the effect of extinguishing the right of redemption that initially lay in Mahadeo.

Incidently, I may mention here that it was contended on behalf of the appellants that the order that would extinguish the right of redemption should be an order purporting to extinguish that right. This contention has no force, not only because it does violence to the language of para. 2 of S. 60 of the Transfer of Property Act but also because the only order which is pointed out in argument as the only order of the Court which can extinguish a right of redemption, *viz*. the order under r. 8. O. 134 C. P. C. does not at all speak of extinction of a right of redemption. It is clear, therefore, that all that is necessary to bar a second suit is an order of the Court which would have the effect of extinguishing the right of redemption.

This brings us to the consideration of the decree that was passed by the Court on the 26th of June 1918. It must be conceded that the decree that was passed is not a decree in accordance with the terms of O. 134. r. 7 of the C. P. C. That order merely contemplates that in future payment will be made by the mortgagor. In this particular case the mortgage money was in deposit in Court and the learned Munsif authorised the mortgagees by his decree to take away that money in satisfaction of the mortgage. This decree I need hardly repeat is not in accordance

with the decree contemplated by r. 7, O. 34, C. P. C. The money was, as a matter of fact, withdrawn later on. But before this was done Mahadeo was advised that he was entitled under the decree to ask for delivery of possession. I do not think that in this he was wrongly advised. Because the money was there to be taken away by the mortgagees whenever they wanted to do so. If they put off taking the money away from the Court for years that fact could not prevent Mahadeo from asking for delivery of possession. The decree that was passed was, so to say, a combined decree under O. 34, r. 8, C P. C. As it permitted the mortgagees to withdraw the money the result was bound to follow, *viz.* the extinction of the mortgage. All that remained to be done was to take over possession from the mortgagees. The mortgage money having been satisfied under the orders of a Court, it cannot be said that the right of redemption still exists.

A large number of rulings were cited by the learned Counsel for the appellants but I have not thought it necessary to discuss them in my judgment, for the simple reason that each case was decided on the language of the decree that was passed in the former suit for redemption or for sale.

I agree with the Court below that the suit is barred as *res judicata* and dismiss the appeal with costs which will include Counsel's fees in this Court on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 486

MUKERJI AND BOYS, JJ.

Kandhaiya Singh—Defendant—Appellant.

v.

Kundan—Plaintiff—Respondent.

Second Appeal No. 491 of 1923, Decided on the 26th February 1925, from a decree of Dt. J., Benares.

★ *Civil P. C., S. 11—Might and ought—Suit to set aside sale on ground of non-receipt of consideration—Court finding that consideration was partly paid—Subsequent suit for balance of purchase money is not barred.*

Where, to ask for a certain relief in a suit would embarrass the trial of the suit or would place the plaintiff in a false position, the plaintiff will not be bound to ask for that relief in the same suit but can bring another suit for

In the previous suit, the plaintiff asked for the setting aside of a sale deed executed by her on the ground that she had not received any consideration therefor. The Court found that she had received a part of the consideration money but held that on her returning the same within a certain time she was entitled to get back the property. The plaintiff then brought another suit for the recovery of the balance of the purchase money after deducting the sum which she had been held to have received.

Held.—The subsequent suit was not barred by limitation. [P. 487, C. 2.]

Durga Charan Banerji—for Appellant.

Kailas Nath Katju—for Respondent.

Mukerji, J.—The sole question for determination in this appeal is one of law, namely, whether the present suit is barred as *res judicata* on account of a previous judgment.

The facts involved in the point of law are briefly these :—

The respondent, who was the plaintiff in the Court of first instance, brought a suit in the year 1917 against the defendant-appellant for the setting aside, *inter alia*, of a sale-deed, executed by her on the 13th of April, 1914, in favour of the appellant. She said that the sale-deed was a fictitious one, that no title was meant to pass by it, that although it was, on the face of it, for the sum of Rs. 2,000, she got no portion of the consideration money, that her statement before the Sub-Registrar that she had received a consideration of Rs. 1,600 was false and that the sum of Rs. 400 that was actually handed over to her before the Sub-Registrar, had been returned by her after the registration of the document was over. On these allegations, she sought cancellation of the sale-deed and also recovery of possession of the house.

The Court of first instance held that the sale was obtained in circumstances under which it was open to her to avoid it. But it also held that she had received a portion of the consideration money. A decree was accordingly made in favour of the plaintiff for recovery of possession of the house on condition of payment of a certain amount of money. The plaintiff appealed and she contested the finding that she had to pay anything at all. The learned District Judge, who heard the appeal, reduced the amount payable by her but otherwise upheld the

passed in the case, the plaintiff was ordered to pay a sum of Rs. 600 within a certain period of time, and it was further ordered that in case of default of payment, the suit should stand dismissed. The plaintiff failed to pay the sum of Rs. 600 and the result was that her suit for recovery of possession stood dismissed. Thereafter, the respondent brought the suit out of which this appeal has arisen, for the recovery of Rs. 1,400 being the balance of the purchase money, by the sale of the property sold. She evidently wanted to enforce what is known as vendor's lien over the property.

The defence, *inter alia*, was that the suit was barred as *res judicata* and this is the only point which we have to decide in this appeal.

Both the Courts have found against the defendant. In the various cases that have come before the Court from time to time, the question of *res judicata* has been decided on the facts of each case. It would always be difficult to get a case exactly in point. The principle laid down, however, seems to be this, that where the subsequent claim, if added to the former claim, was likely to embarrass the trial of the suit or was likely to place the plaintiff in a false position, it would not be incumbent on the plaintiff to ask for the relief in the second suit along with the relief asked for in the earlier suit. For example, in the case of *Mahomed Ibrahim* v. *Sheikh Hamja* a suit was brought for redemption and it having failed, a second suit was brought in ejectment. It was held that the second suit was not barred as *res judicata*. Similarly, in *Veerana Pillai* v. *Muthu Kumara Asary* (2), a mortgagee brought a suit for sale and it was held that his mortgage was really an usufructuary one and he could not maintain a suit for sale. Then he brought a second suit for recovery of possession on foot of the same mortgage. It was held that the second suit was maintainable. In *Mahandar Singh* v. *Janki Singh* (3), a suit was brought claiming an entire property. It was dismissed, the Court having found that the parties were joint owners. The second suit of the plaintiffs, for a declaration that they were entitled to collect a half share of the rents from the land, was held to be maintainable.

It will, therefore, be seen from these cases that simply because the parties to both the suits are the same and some allegations common, it does not necessarily follow that a second suit brought by the same plaintiff should be held barred as *res judicata*.

Coming to the facts of the case. As already stated, the plaintiff wanted a declaration that the sale was fictitious, that it was obtained from her by fraud and that she received not a single shilling out of the consideration money. Under the circumstances, the plaintiff could not very well say, in the same breath, that if the Court held the sale to be a genuine one, she should be given the sum of Rs. 1,400 as a part of the consideration money, she having received the balance.

The second 'ground of attack' would have been entirely inconsistent with her first case and any evidence that she might lead on the two contradictory cases was not at all likely to be accepted by the Court.

We hold that in the circumstances of the present case the second suit is not barred as *res judicata*.

The appeal fails and is hereby dismissed with costs.

Appeal dismissed.

(1) [1911] 35 Bom. 507=12 I. C. 387—13 Bom. L. R. 895.
(2) [1904] 27 Mad. 102.
(3) [1905] 2 A.L.J. 342.

1925 ALLAHABAD 487

LINDSAY AND KANHAIYA LAL, JJ.

Kehar Singh—Plaintiff—Appellant.

v.

Jahangir Singh and another—Defendants—Respondents.

Second Appeal No. 1832 of 1923. Decided on 20th March, 1925, from a decree of the Sub. J., Meerut

T. P. Act, S. 52—Pre-emption suit—Vendee reselling to vendor after filing of suit—Section applies.

The doctrine of *lis pendens* would apply when, after the institution of a suit for pre-emption the vendee transfers the property to the vendor. 72 *I. C.* 247 *Not appl.* 30 *All.* 467; 36 *All.* 60 *Ref.* [P. 488, C. 1.]

A. P. Pandya—for Appellant.

M. L. Agarwala—for Respondents.

Lindsay, J.—After hearing counsel for the parties in this case, we have decided that the appeal must prevail. The facts may be briefly stated. The suit for

pre-emption was filed on the 7th September, 1922, to pre-empt a sale, which was carried out on the 19th September. 1921.

On the 14th September, that is one week after the suit had been filed, the vendee re-sold the property to the vendor, and on the 11th October, 1922, he put in a written statement saying that the plaintiff had no cause of action inasmuch as he, the vendee, had got rid of the property by re-transferring it to the vendor. The Court of first instance applied the doctrine of *lis pendens* and decreed the suit. The lower appellate Court has reversed the first Court's finding on the strength of the ruling to be presently referred to that the doctrine of *lis pendens* did not apply.

In our opinion the decision of the Court below is erroneous. The case upon which the lower appellate Court relied is reported in 72 *I. C.*, 247.

We have lately had before us a case which is on all fours with the case now under consideration. This is S. A. No. 1708 of 1923, (1925 All. 502) We cannot, on the facts make any distinction between that case and the case now before us.

In that case we had occasion to refer to the judgment upon which the lower appellate Court has relied in this case, and we pointed out that the judgment did not apply to the facts before us. We also quoted other rulings of this Court to show that the doctrine of *lis pendens* applied to suits of this kind. We referred to *Ghasitey* v. *Gobind Das* (1) and *Kamta Prasad* v. *Ram Jag* (2).

We are satisfied that the doctrine of *lis pendens* has to be applied in the present case. We think it is intolerable that a vendee, after a suit for pre-emption has been filed, should be allowed to reconvey to the vendor and to defeat the suit which has been brought by a pre-emptor. In a case of this kind parties who enter into such transactions are not entitled to the protection of the Court, while the plaintiff, on the other hand, ought to have the full benefit of the doctrine of *lis pendens*, as laid down in S. 52 of the Transfer of Property Act. Applying that principle, therefore we reverse the decree of the Court below and restore that of the Court of first instance. The appellant is entitled to his costs here and heretofore. In this Court costs will include fees on the higher scale.

Appeal allowed.

(1) [1908] 30 All 467=5 A.L.J. 477=(1908) A.W.N. 221.

(2) [1913] 36 All. 60=22 I. C. 266=12 A. L.J. 9.

★ 1925 ALLAHABAD 488

SULAIMAN, J.

Ram Narain—Appellant.

v.

Nihal Singh—Respondent.

Second Appeal No. 872 of 1923, Decided on 16th January 1925, from a decree of the J., Small Cause Court, Agra.

★ (*a*) *Civil P. C., S.* 11 — *Two appeals in same suit — Two decrees passed — Second appeal filed from only one—Appellant not prejudiced by the other—Second appeal is not barred.*

Where there are two decrees arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought up in second appeal and there is nothing, prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata* or at all by reason of his failure to appeal from the decree which does not prejudice him. [P. 489 C 1,2]

The suit was for damages. The trial Court decreed the suit for 5 years. Both parties appealed and two decrees were passed. By the decree in the plaintiff's appeal the first appellate Court increased the number of years for which damages were awarded but reduced the rate of damages. The net result was that the decree of the Trial Court in plaintiff's favour was reduced in amount. In the defendant's appeal, the lower appellate Court disallowed the defendant's objection that the whole suit should be dismissed. The defendants filed a second appeal from the decree in this appeal alone.

Held : that the second appeal was competent. [P. 491 C 1]

★ (*b*) *Limitation Act, S.* 23 — *Vendee undertaking to clear prior mortgage — Non-performance on date of sale is breach of covenant—Breach is not continuous one—Limitation Act, Art,* 115.

Where the vendee agreed to pay off a usufructuary mortgage on the property but no time was fixed for the payment of the money ;

Held ; that the vendee's failure to pay off the mortgage on the date on which the sale deed in his favour was executed, constituted breach of covenant on his part, that the breach took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiff (the vendor) to sue. 34 *All.* 429, *Foll.* [P 490, C 2]

★ (*c*) *Limitation Act, Art.* 116—*Money left in hands of vendee for clearing prior mortgage—Vendee not paying — Suit for damages after six years from sale deed is barred.*

A suit brought more than six years after the sale deed, for recovery of damages for failure to

pay the amount left in the hands of the vendee for cleaning a prior mortgage is barred by time. [P 490 C 2 ; P 491 C 1]

Peary Lal Banerjee—for Appellant.

N. P. Asthana—for Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for damages for Rs. 525. The Court of first instance decreed the claim for Rs. 349-11-6 on account of a period of five years. The defendants appealed to the Judge and their appeal was numbered as Civil Appeal No. 482 of 1921. In this they claimed that the whole suit ought to have been dismissed. The plaintiffs also appealed and their appeal was numbered as Civil Appeal No. 484 of 1921. In this they claimed damages for one year extra which had been disallowed by the Court of first instance. The learned Judge heard the two appeals together and disposed of them by practically one judgment. The result was that he held that the plaintiffs were entitled to claim damages for six years no part of which was barred by time, but he thought that the rate of damages allowed by the first Court was excessive. The net result of his finding was that the decree which had been passed by the first Court in favour of the plaintiffs was reduced in amount. There were two separate decrees prepared in two separate appeals. The defendants have come up to this Court and have filed an appeal only from the decree in appeal filed by them in which their objection that the whole suit ought to have been dismissed was not allowed. They have preferred no appeal from the decree in the plaintiffs' appeal.

There is a preliminary objection on behalf of the respondents that the present appeal is barred by the principle of *res judicata*. The law on this question is laid down in the Full Bench case of *Ghansham Singh* v. *Bhola Singh* (1). At page 469 it was remarked " where there are two decrees arising out of two appeals to a subordinate appellate Court, and only one of such decrees is brought up in second appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicatn* or at all by reason of his failure to appeal from the decree which does not prejudice him".

I have already stated that the result of the findings of the learned Judge was that the amount decreed to the plaintiffs by the first Court was actually reduced. In substance therefore the plaintiffs' appeal in which they had claimed a larger sum was really not allowed at all, nor was the question of their right to get any amount decided in it which was not raised in the other appeal. The present appeal is preferred from the main appeal in which the question as to whether the entire claim ought or ought not to have been dismissed was raised. In view of the pronouncement in the Full Bench case I am bound to hold that the hearing of this appeal is not barred by the fact that no formal appeal has been preferred from the decree in the other appeal which really was in favour of the defendants.

The learned Vakil for the appellants has not pressed grounds Nos. 1 and 2 taken in the memorandum of appeal. Only two points have been pressed, (1) that the plaintiffs not having delivered possession of certain *sir* land were not entitled to sue for damages and (2) that the entire claim was barred by limitation.

As to the first point it may be mentioned at the outset that there was no specific ground to that effect raised in the grounds of appeal before the lower appellate Court. That question in a quite different form was raised in point No. 4 mentioned in the lower appellate Court's judgment. I am however of opinion that there is no force in this contention. In 1910 there was a usufructuary mortgage of about 36 bighas of land by the plaintiffs in favour of Inder Lal and Sham Lal. Under S. 10 sub-clause (2) of the Tenancy Act ex-proprietary rights were created in respect thereof. According to the *rubkar* recorded by the Court of first instance the plaintiffs became ex-proprietary tenants of their previous *sir* lands and entered into possession as such. Subsequently on the 29th of May 1924, the defendants obtained a sale deed from the plaintiffs of 10 bighas out of the mortgaged lands. In this they included the ex-proprietary lands of the plaintiffs and called them both *sir* and ex-proprietary lands. Part of the sale consideration was left in the hands of the vendees for payment to the prior mortgagee. It is obvious that the

(1) 1923 All. 490=45 All. 506=4 L.R.A. Civ. 265=21 A.L.J. 465 (F.B.)

sale of ex-proprietary rights to the defendants, was altogether illegal and invalid. Such a transfer could never be enforced in law. The mere fact that in spite of the supposed sale the plaintiffs have not delivered possession of their ex-proprietary holdings to the defendants cannot be availed of by the latter or justify their non-payment of the amount due to the prior mortgagees. They must be presumed to have known that what they were trying to purchase could not be purchased by them. They entered into the contract with their eyes open and in violation of the express provisions of the law and they cannot take advantage if they find themselves unable to compel the plaintiffs to fulfil their illegal contract. The defendants vendees kept in their hands part of the sale consideration and it was their duty to pay this sum to the mortgagees. Had they paid it to the prior mortgagees the result would have been that the entire 36 bighas of land would have been redeemed, the plaintiffs obtaining possession of 26 bighas and the defendants of the remaining 10 bighas.

The real question in the case is whether the plaintiff's claim as brought in 1921 was barred by limitation. The Court of first instance held that it was barred by limitation with regard to the first year. The lower appellate Court has taken the view that it is not at all barred by time because the breach was a continuous breach and no question of limitation really arose.

In the sale-deed there was no time fixed within which the defendants vendees were to pay off the prior mortgage. The ordinary presumption would be that they were to pay the amount on the date of the execution of the sale deed in their favour. If they failed to make the payment they did commit a breach of the implied covenant in the sale-deed. The question is whether that breach is a continuing one that is to say whether as every day passes the defendants are continuously committing a breach of the covenant to pay off the mortgage or whether they committed the breach when they did not pay off either on the date of the execution of the sale-deed or at any rate within a reasonable time of it. In the case of *Raghubar Rai* v. *Haij Raj* (2) a Division Bench of this Court laid down very clearly that upon failure to pay money due by a vendor to a third party which the vendee agreed to pay and where no time was fixed for payment, the breach was committed on the date when the sale-deed was executed and there was no continuing breach within the meaning of S. 23 of the Limitation Act, nor successive breaches within the meaning of article 115. That ruling of the Division Bench is binding upon me as a single Judge. I am, therefore, bound to hold that the failure by the defendants to pay the mortgage money to the prior mortgagees was a breach of their covenant which took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiffs to sue. It is true that on the facts there is a slight difference between the present case and the reported case. In the present case the mortgage was a usufructuary one. The loss to the plaintiffs consists in their not getting the profits out of the mortgaged lands owing to the delay in redemption.

In the reported case the loss to the plaintiffs consisted in the continual accrual of interest on the mortgage money. In one case there is an actual loss by non-receipt of profits day after day and in the other there is a loss by a continual enhancement of liability. But the principle underlying both the cases seems to me to be identical.

In the reported case there are certain observations at pages 432 and 433 suggesting that even if subsequently the plaintiffs have themselves to pay off the mortgage money and redeem the property they may not have a fresh cause of action to recover the amount from the defendants. Those observations however are mere *obiter dicta* and they were not necessary for the purposes of that case inasmuch as there the suit had been brought before the plaintiffs had actually made any payment. It is, therefore, possible that in this case even though the present claim is to be held to be barred by time the plaintiff's remedy may be either for recovery of the amount treating it as their unpaid purchase money with a charge on the property transferred, or for recovery of damages after they have themselves redeemed the property by payment of the mortgage money. But in view of the reported case mentioned above I am bound to hold that the present claim brought more than six years after the sale-

(2) [1912] 34 All. 429=14 I.C. 244=9 A.L.J. 534.

deed for recovery of damages for failure to pay to the mortgagees the amount left in the hands of the vendees for such payment, is barred by limitation.

The result therefore is that this appeal must be allowed and the decrees of the Courts below set aside and the plaintiffs' suit dismissed. As however the plaintiffs have obviously suffered considerable loss owing to the deliberate default of the defendants to pay off the amount left in their hands for payment to the mortgagees, I think that this is a fit case in which the parties must be ordered to pay their own costs in all Courts.

In the view which I have taken of the case the cross-objection must be dismissed, the parties bearing their own costs.

Appeal allowed.

1925 ALLAHABAD 491

LINDSAY AND KANHAIYA LAL, JJ.

Ch. Sagar Singh—Plaintiff—Appellant.

v.

Sri Ram and another—Defendants—Respondents.

Second Appeal No. 1619 of 1923, Decided on 27th February 1925, from a decree of the Addl. Judge, Meerut, D/- 19th July 1923.

Pre-emption — Wajib-ul-arz — *Construction* — *Change of circumstances subsequent to preparation of* wajib-ul-arz *should be taken into account.*

One of the classes of pre-emptors in a *wajib-ul-arz* consisted of "*Hissadaran patti aur gaon ke*". The village which was undivided at the time the *wajib-ul-arz* was prepared, was subsequently divided into several mahals. The pre-emptor was a co-sharer in the same mahal as that in which the property sought to be pre-empted was situated. The vendee was a co-sharer in a different mahal.

Held: that though in the *wajib-ul-arz* for purposes of pre-emption the co-sharers in the patti and the co-sharers in the village (*gaon*) were placed upon the same footing, yet these words had to be interpreted in the light of existing circumstances. The class of pre-emptors referred to in the *wajib-ul-arz* consisted of co-sharers who were united by bonds of common interest and liability. In the new constitution of the village these bonds had been severed and the purchaser in the present case, whose property was situated in a different mahal had no community of interest or liability with any of the co-sharers in the other mahal, namely, that in which the property was situated and in which the plaintiff was a co-sharer. Hence the plaintiff was entitled to pre-emption. [P 491 C 2]

Peary Lal Banerji for Appellant.

Surendra Nath Gupta—for Respondents.

Judgment.—We have heard the learned counsel in this case and we think the decree of the lower appellate Court ought not to stand. In our opinion on the terms of the *wajib-ul-arz* the plaintiff was entitled to pre-emption. We cannot agree with the opinion of the two Courts below in this matter.

The *wajib-ul-arz* was one which was prepared at the settlement of M. Nasir Ali which took place about the year 1870.

Under the term "Custom" as recorded in that document the first class of pre-emptors consists of own brothers, the second class, of near brothers, and the third class consists of "*Hissadaran patti aur gaon ke*".

The village in which the property in dispute is situated is Kharkhauda, and it would appear from the evidence that this village, which was undivided at the time the *wajib-ul-arz* was prepared, has been divided into several mahals. One of these mahals is mahal Sagar Singh which is named after the plaintiff, and it is admitted that the property sought to be pre-empted is included in this mahal in which Sagar Singh himself is a co-sharer.

It is further clear that the purchaser is a co-sharer in another mahal of the same mauza which is named mahal Qaim.

The plaintiff has no claim to be brought within either the first or the second category of pre-emptors. The question is whether he can bring himself within the third category. We agree with the Courts below so far in holding that for purposes of pre-emption the co-sharers in the patti and the co-sharers in the village (*gaon*) were placed upon the same footing. But these words have to be interpreted in the light of existing circumstances. It seems clear enough that the third class of pre-emptors consisted of co-sharers who were united by bonds of common interest and liability. In the new constitution of the village those bonds have been severed, and the purchaser here, whose property is situated in mahal Qaim, has no community of interest or liability with any of the co-sharers in the other mahal, namely, mahal Sagar Singh.

Applying the language of the *wajib-ul-arz* to the altered constitution of the village arising out of partition it seems to us quite clear that the defendant must for purposes of pre-emption, be treated as

a stranger to the co-sharers in mahal Sagar Singh in which the property sought to be pre-empted is situated.

We agree therefore with the argument put before us on behalf of the plaintiff-appellant that in these circumstances the plaintiff is entitled to pre-emption, and we find accordingly.

The result is that we allow the plaintiff a decree for pre-emption.

As regards the sum which the plaintiff must pay we notice that according to the finding of the 1st Court the sale price of the property was Rs. 1,500-0-0 and it was stated that a further sum of Rs. 100-0-0 was given by the purchaser to the vendor in consideration of the relinquishment of *sir* rights.

The relinquishment of *sir* rights cannot form the subject of pre-emption, and in the circumstances we think the proper order to pass is that the plaintiff shall pay into Court a sum of Rs. 1,500 0-0 within two months from the date of this Court's decree. If the sum is deposited in Court within the time limit then the plaintiff will get his costs in all three Court's including in this Court, fees on the higher scale. On the other hand if he fails to deposit the sum of Rs 1,500-0-0 within the time fixed then his suit will stand dismissed in all three Courts with costs including fees in this Court on the higher scale.

Appeal allowed.

1925 ALLAHABAD 492

MUKERJI AND DANIELS, JJ.

Sheodarahan Singh—Appellant.

v.

Beni Chaudhari and others—Respondents.

Second Appeal No. 1696 of 1922, Decided on 18th December, 1924 from a, decree of the Dt. J. Ghazipur.

Mortgage—Redemption suit—Decree of appellate Court—Costs being a charge on property or not depends on interpretation of decree in each case— Per Daniels, J.—*Construction of decree should accord with Civil P. C., O. 34 R. 7*

In a redemption suit, the trial Court declared the plaintiff entitled to possession of the property on payment of Rs. 1816-10 6. The decree of the appelate Court said that it was increasing the amount of money payable to the mortgagees by a sum of Rs. 175. Then it said that a total sum of Rs. 1991-10-6 was payable by the plaintiff to the defendants on or before the 2nd of March 1921. After having said so much the Court went on to say that certain costs were payable by the plaintiff to the defendant. After making these statements the decree went on to say 'If the plaintiff paid the sum aforesaid within the 2nd March" 1921 etc, etc.

Held ; (*Per Mukerji, J.*) that it was open to the appellate Court either to pass a personal decree against the successful party or to make the costs payable out of the mortgage property. In every case it was a matter of interpretation what was intended by the appellate Court. In the present case it was not the intention of the Court to make the costs as stated in the decree a charge on the property. [P 493 C 1 2]

Held : (*Per Daniels, J.*)—Even if it be possible to read the words "the aforesaid sum" as referring only to the sum of Rs. 1991 that construction of the decree should be adopted which was in accordance with the law as laid down under O. 34 rule 7 and with the universal practice of the Courts in such cases which directs that the costs of the suit should form part of the sum payable in order to effect redemption. The costs in this case should therefore be held to have been intended to be made a charge on the property and the mortgagor was not entitled to recover possession without depositing the full amount of costs over and above the Rs. 1991. [P 494 C 2

Haribans Shahi—for Appellant.

Uma Shankar Bajpai—for Respondents.

Mukerji, J.—The facts of this case briefly are these :—The original plaintiff who is the appellant before this Court, *viz.* Sheodarshan Singh brought a suit for redemption in the Court of the Munsif of Ballia. He obtained a decree on the 22nd of April, 1919, on condition of payment of Rs. 1,747 8-6 for principal mortgage money and interest and Rs. 69-2-0 costs. In all he was declared entitled to obtain possession of the property on payment of Rs. 1,816-10-6. This sum was deposited in Court. The mortgagees however did not acquiesce in this decree and appealed. In the meanwhile the final decree was prepared on the 26th of June, 1919, in accordance with the preliminary decree passed by the first Court. The plaintiff obtained delivery of possession on the 15th of July, 1919. The appellate Court by its decree dated the 2nd of December, 1920, varied the decree of the Court of first instance and the main question to be decided in this appeal is what is the true interpretation of that decree.

The appellate Court directed that a further sum ought to be paid to the defendants in the case and extended the time for payment up to the 2nd of March, 1921. Within this period, it is common ground, a further sum of Rs. 175 was paid

by the plaintiff. The question is whether he ought to have paid as a condition precedent to his obtaining delivery of possession a further sum of Rs. 45-6-0.

The defendants alleging that the total sum payable to them had not been paid within the time allowed by the Court of appeal came to the Court asking for re-delivery of possession to them and they also asked for mesne profits. Possession has not so far been re-delivered to the mortgagees. But they have been awarded Rs 800 as mesne-profits for two years. This period of two years is the period between the 15th of July, 1919, the date of the delivery of possession and the 18th of June, 1921, the date of the defendants' application for restitution.

It is contended on behalf of the plaintiff-appellant who has appealed against the decree of the lower Court directing him to pay mesne-profits that he has really complied with the terms of the decree. His contention is that the decree did not make the payment of extra costs with which he was saddled a condition precedent to redemption. In the case of *Amina Bibi* v. *Ram Shankar* (1), two learned judges of this Court discussed the question how far the costs awarded by a Court of appeal were a charge on the property mortgaged. The learned judges, as I read those judgments, were of opinion that it was open to the appellate Court either to pass a personal decree against the unsuccessful party or to make the costs payable out of the mortgaged property. The learned Judges thought that in every case it was a matter of interpretation what was intended by the appellate Court. Mr. Justice Piggott said in his separate judgment in the case (P. 587 of 17 A. L. J.) "If these propositions of law are sound the question.....resolves itself into one of the interpretation of the decree actually passed by the appellate Court." I am of the same opinion as those learned Judges. It is entirely a matter of interpretation of a decree as to whether the appellate Court in a particular case has made the costs payable out of the mortgaged property or by the mortgagor personally.

Coming to the particular decree before us, we find that the appellate Court said that it was increasing the amount of the money payable to the mortgagees by a sum of Rs. 175. Then it said that a total sum of Rs. 1,991-10 6 was payable by the plaintiff to the defendants on or before the 2nd of March, 1921 After having said so much, the Court went on to say that certain costs were payable by one party to another. After making these statements the decree went on to say "if the plaintiff paid the "sum aforesaid" within the 2nd of March, 1921, etc., etc." Now the question is whether the decree meant that over and above the sum of Rs. 1,991-10-6 mentioned in a lump sum, the sums mentioned as costs in the cause were also to be paid as a condition precedent to redemption. As I read the decree it was not the intention of the Court to make the costs as stated in the decree a charge on the property. My reasons are two-fold. In the beginning of the decree the Court distinctly said that the amount payable to the mortgagees was being increased by a sum of Rs. 175. That was very definite. Then the Court fixed the amount payable by the mortgagees at a definite sum. Further, I am confirmed in my view from this fact that the sum of Rs. 1,991-10-6 already included the sum of Rs. 69-2-0 costs awarded to the mortgagees against the mortgagor by the Court of first instance. If we read the decree as awarding to the mortgagees not only the sum of Rs. 1,991-10-6 but also the amounts of costs mentioned therein we are forced to the conclusion that the appellate Court meant that the sum of Rs. 69-2-0 costs awarded by the Court of first instance to the mortgagees was to be paid twice over. It is nobody's contention that this was to be paid twice over. All that is contended for on behalf of the respondents is that after an adjustment of the costs a sum of Rs. 45-6-0 would stand decreed to the mortgagees on account of costs and this additional sum had to be paid. But it does not follow that the sum of Rs. 45-6-0 was a charge on the property. I am, therefore, forced to the conclusion that the appellate Court's decree meant this only and nothing more than this that redemption was to be had on payment of this sum, *viz.*, Rs. 1,991-10 6 if the said sum was paid within the 2nd of March, 1921.

In this view the mortgagor was right in paying only the sum of Rs. 1,991-10-6 within the 2nd of March, 1921.

(1) [1919) 41 All. 473=50 I. C. 730=17 A. L. J. 582.

The result of my view is that the mortgagees are entitled to mesne profits only for the period between the 15th of July, 1919, and the 2nd of March, 1921. It was during this period only that the mortgagor's possession was unlawful and it was during this period that the mortgagees should have continued in possession.

I would, therefore, remand an issue to the appellate Court to find out the amount of mesne-profits for this period.

Daniels, J.—I greatly regret that I am unable to agree with the judgment just delivered. In my opinion the appellant has no case and his appeal should be dismissed.

I would note at the outset that the point on which my learned brother would allow the appeal in part was not originally taken by the appellant in argument at all. The appellant's learned Counsel stated in answer to a question by the Court that he was obliged to concede that the interest awarded by the decree was legally a charge on the mortgaged property. He contended that the appellant had been misled by the form in which the decree was passed and therefore mesne-profits should not have been awarded aganist him.

The decree was one under Order 34, rule 7. Under that decree the Court is directed to take an account of what is due to the defendant for principal and interest on the mortgage and for his costs of the suit if awarded to him. The form of decree prescribed by the Code distinctly contemplates that the costs of the suit shall be a charge on the mortgaged property and shall be recoverable as such. The decree in this case stated the sum of Rs. 1,991-10-6 to be due upto 2nd March, 1921, then states the further sum which was due on account of costs and finally directs that if the aforesaid sum is not paid by a date three months in advance the property was to be sold.

The operative part of the decree clearly therefore, directs that the property was to be sold unless the entire sum was paid into Court. It is quite true, as has been pointed out by the appellant, that some portion of the costs has been included twice over, being included both in the sum of Rs. 1,991 and in the sum specified as being due on account of costs in addition to this. This clerical mistake, for it is nothing more, does not in my mind affect the merits of the appeal. If anything it makes the case of the appellant worse, for if the decree be read literally and not in connection with the judgment, the deficiency in the amount deposited by him would be appreciably greater than it has been found by the Court below to be.

Even if it be possible to read the words "the aforesaid sum" as referring only to the sum of Rs. 1,991, that construction of the decree should be adopted which is in accordance with the law as laid down under Order 34, rule 7, and the universal practice of the Courts in such cases which directs that the costs of the suit shall form part of the sum payable in order to effect redemption. (Even costs incurred after the decree can be recovered by the mortgagee at the time of redemption under Order 34, rule 10). This was decided in a reasoned judgment in *Dambar Singh* v. *Kalyan Singh* (2), where it was held that though the order of the Court merely directed the respondent to pay to the appellant a certain sum incurred on account of costs, the effect of the decree was to make this sum legally recoverable from the mortgaged property. It is suggested that this ruling has not been followed in *Amina Bibi* v. *Ram Shankar Misra* (1). I do not so read this case. The point in that case was not whether the amount could be recovered from the mortgaged property but whether the decree-holder had any remedy to recover the amount of costs as a personal liability from the decree-holder. The learned Judges held that in the case before them he had such a remedy. They carefully guarded themselves from suggesting that the case of *Dambar Singh* v. *Kalyan Singh* (2), had been wrongly decided. Mr. Justice Walsh says in the course of his judgement,

"The ordinary rule in equity is that a mortgagee is entitled to recover against a mortgagor all the costs and expenses of maintaining or enforcing the security provided he acts reasonably and according to law, and further to add them to his security, that is to say, he is given both remedies, the personal remedy against the debtor and, the remedy in *specie* against this security."

Mr. Justice Piggott in his concurring judgment says,

(2) [1918] 40 All. 109=43 I. C. 557=15 A. L. J 914.

"In a suit on a mortgage no one denies that the plaintiff is entitled to add to his mortgage debt and to recover as against the mortgage security any costs to which he may be put in enforcing the said security.....As regards the costs incurred in prosecuting or defending an appeal against a preliminary decree for sale, I think some learned Judges of this Court have used language suggesting a doubt as to whether such costs are covered at all by the provisions of Order 34, rule 10, above-mentioned, but I do not understand that the general principle as to the right of the mortgagee to claim to have these costs included in the final decree for sale against the property, where such final decree is sought and obtained after the decision of the appeal in which those costs were incurred, has been doubted".

He held that at the same time the Court had consistently held that it was in the discretion of an appellate Court to award the costs also as a personal money decree.

The appellant, therefore, in my judgment failed to deposit the full amount required by the decree and was, therefore, not entitled to recover possession of the property. His attention was called on 13th May, 1921, by the decree-holders to the fact that the sum paid in was insufficient but he did not upto the time when the suit was instituted, or indeed up to the present time, make any attempt to make good the deficiency. I would, therefore, dismiss the appeal with costs including in this Court fees on the higher scale.

By the Court.—The result is that the appeal is dismissed with costs which will include in this Court, counsel's fees on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 495

MEARS, C. J. AND PIGGOTT, J.

B. Ishwari Prasad and others—Defendants—Appellants.

v.

Babunandan Shukul and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 147 of 1923, Decided on 27th February 1925, from the judgment of Daniels, J, D/- 10th May 1923.

★ (a) *Hindu Law—Alienation—Widow—Payment of arrears of rent for lease taken by widow for her own benefit is not legal necessity.*

The arrears of rent due from a Hindu widow on account of the lease which she has taken up for her own personal benefit, is her personal debt and she cannot alienate the family estate in her hands in satisfaction of such a debt

[P. 497, C. 1]

★ (b) *Hindu Law—Alienation—Widow—Ex-proprietary tenancy created by widow selling zamindary property is not portion of estate as it devolved on her—Payment of arrears of rent for such tenancy is not legal necessity.*

Where the holder of a widow's estate sells zamindary property, the ex-proprietary tenancy which comes into existence cannot be said to constitute a portion of the estate as it devolved upon her. Hence it cannot be said that in paying off a decree for arrears of rent in respect of such ex-proprietary tenancy, the limited owner is saving a portion of the family estate in her hands. Therefore the payment of such arrears of rent is not legal necessity capable of supporting an alienation of the family estate.

[P. 497, C. 2]

★ (c) *Hindu Law—Alienation—Widow—Gift for religious purposes—Proportion of gift to estate in widow's hands at the time should be considered.*

In every case in which an alienation by way of gift for religious or charitable purposes is made by a Hindu widow, holding an estate with the limited interest of such widow, the Court is bound to take into consideration the proportion borne by the property gifted away to the total estate in the hands of such widow.

Where the estate that originally came into the hands of a holder of a widow's estate consisted of a 8 annas share of zamindary property but by various transfers, the estate had dwindled to a 2 annas share only, and where out of this, the limited owner gifted a six pies share to the family priest.

Held: that the gift could not be supported.

[P. 498, C. 1]

★ (d) *Hindu Law—Alienation—Widow—Consideration applied to pay debt—Whether alienation voluntary or involuntary, alienee gets limited or absolute estate according as debt is binding on husband's estate or not.*

In the case of voluntary as well as involuntary alienations of the estate of a Hindu widow, where the consideration has been applied to pay off a prior debt the same principles will apply. If the prior debt was in the nature of a personal claim against the widow, only her interest will pass to the alienee. But if the debt was binding on the husband's estate as well then the alienee will get an absolute estate in the property. 16 *Cal* 955 (*P. C.*) *Foll.*

[P. 499, C. 2]

Iqbal Ahmad—for Appellants.

M. L. Agarwala—for Respondents.

Judgment:—These are four connected appeals arising out of one single suit. We need not go into the circumstances under which four appeals have come to be filed. As a matter of fact a learned Judge of this Court disposed of all the questions now in controversy in one single judgment, and the appeals before

us challenge certain of his findings The essential facts are that the last male owner of zamindary property, consisting of an 8 annas share in a certain village, was one Sheo Dayal. He died without male issue. He left him surviving two widows and a daughter by each of them. The names of the widows are Mt. Gajra and Mt. Bachna. Of these the latter survived the former. The name of the daughter of Mt. Gajra is Chhutka, and Mt. Gaura is the daughter of Mt. Bachna. One Pashpat Nath was the son of Mt. Chhutka. On the 6th of June 1871 Mt. Bachna, being then in possession of the entire eight annas share, executed with the concurrence of Pashpat Nath a deed of gift, by which she purported to transfer the same to her own daughter Gaura. The latter between the years 1873 and 1917 executed a series of documents by which she alienated one fractional share after another of this property. The plaintiffs in the suit are three brothers, Babu Nandan, Jadu Nandan and Parmeshwar, and it is admitted that they have succeeded to the estate of Sheo Dayal as the nearest reversioners under the Hindu Law, Pashpat Nath having predeceased Mt. Gaura. The suit was brought to set aside all the alienations made by Mt. Gaura and to recover possession of the property. The plaintiffs met with varying degrees of success in three Courts. Finally a learned Judge of this Court partly decreed and partly dismissed their suit, and it is now necessary for us to set forth in detail the alienations complained of and the manner in which they were dealt with by the learned Judge of this Court. The first deed executed by Mt. Gaura was dated the 25th of May 1873 and conveyed to one Mulhai one-half of the estate of Sheo Dayal in her hands, that is to say, a 4 annas share. This transfer has been upheld by the learned judge of this Court, who was in agreement on this point with the lower appellate Court. On the 1st of August 1895 Mt. Gaura sold to certain persons a 1 anna share for Rs. 350. On the 8th of November 1906 she sold another share of 1 anna for Rs. 349-15-0 practically to the same persons. Her next alienation was on the 7th of March 1907, when she made a gift of a 6 pie share to her family priest, a man of the name of Mahadeo. Finally, on the 16th of October 1917 she sold another share of 1 anna for Rs. 350. It may as well be noted that Mulhai, the ostensible purchaser under the deed of 1873, was admittedly a *benamidar* for one Harihar Dat, and that the subsequent alienations have all been to members of Harihar Dat's family. Even the 6 pie share gifted to Mahadeo was sold by that donee to a member of the same family in July 1910. The suit is therefore being contested by the descendants of Harihar Dat. The deed of gift in favour of Mahadeo was set aside by the trial Court, but was affirmed by the lower appellate Court. The learned Judge of this Court came to the conclusion that he had to deal with a finding of fact which bound him to affirm the decision of the lower appellate Court. We shall return to this point presently. The remaining deeds of sale were dealt with as follows. In respect of the deed of 1st August 1895, the learned Judge of this Court held that, to the extent of Rs. 238-4-0, this deed was executed for legal necessity, but that there was no legal necessity for an item of Rs. 111-12. He has framed his decree accordingly. In respect of the deed of 8th November 1906, the learned Judge has held, differing from the lower appellate Court, that there was no legal necessity for the transaction, and he has set aside the alienation. With regard to the deed of 16th October 1917, he has held that only a sum of Rs. 128 out of the whole consideration was warranted by legal necessity, and he has framed his decree accordingly. The defendants have appealed against the decree of the learned judge of this Court in so far as it adversely affects them. Incidentally a difficulty has arisen owing to the fact that these defendants have allowed one of the original plaintiffs by name Jadu Nandan to die while their appeal under the Letters Patent was pending, and have failed to bring his legal representatives on record. This might have complicated the matter if we had come to the conclusion that any portion of the two appeals filed by the defendants must succeed, but the decision we come to is that the appeals fail on the merits. As regards the deed of the 16th of October 1917, we may say at once that the finding of the learned Judge of this Court has not been seriously challenged. He

proceeds upon certain findings of fact, and on those findings he is obviously right in law. We might be content to say the same of the deed bearing date 1st August 1895, but as introducing a curious question of law which we have necessarily to deal with. We may mention what the point for decision was in respect of this earlier deed. It appears that Mt. Gaura, after selling the 4 annas share in the year 1873, had taken a lease of some portion of that share from her own vendees. She allowed the rent payable by her to fall into arrears, and an item of Rs. 111-12-0 out of the consideration for the sale of 1st August 1895, was applied by her towards satisfying the arrears of rent thus falling due. Now, the learned Judge of this Court has pointed out that there is clear authority of Privy Council [vide, *Jugul Kishore* v. *Jotendro Mohun Tagore* (1)] for the principle that, if zamindary property in the hands of a Hindu widow be taken in execution of a simple money decree, the question whether the purchaser at auction takes the whole estate or only the right, title and interest of the widow depends on the nature of the suit. If the decree under execution was obtained upon a personal claim against the widow, then only her interest passes; but if the suit was one in respect of the family estate then the whole inheritance passes by the execution sale. The learned Judge of this Court was, in our opinion, obviously right in holding that the same principles would apply to a voluntary alienation by the widow. The arrears of rent due from Mt. Gaura on account of the lease which she had taken up, presumably for her own personal benefit, formed a personal debt of that lady, and she could not alienate the family estate in her hands in satisfaction of such a debt. The learned Judge of this Court has rightly held that this item of Rs. 111-12-0 was not raised for any justifiable legal necessity. This question crops up again in a somewhat more difficult form when we come to consider the sale-deed of the 8th of November 1906. The consideration for this deed also went to pay off arrears of rent due from Mt. Gaura on account of a certain tenancy. The distinction sought to be made between the two cases is that the tenancy in question now was one of a peculiar nature, namely, an ex-proprietary tenancy which had devolved upon Mt. Gaura by operation of law from the date on which she sold the zamindary share of 4 annas in the year 1873. The contention on behalf of the defendants-appellants is that in paying off the decree for arrears of rent in respect of this ex-proprietary tenancy Mt. Gaura was saving a portion of the family estate in her hands, and that this alienation must therefore be put on the same footing as such alinations, for instance, as a sale in order to obtain money to pay of arrears of Government revenue, which have been repeatedly upheld by this Court. On the whole we are satisfied that this contention cannot be upheld. The ex-proprietary tenancy came into existence by operation of law when Mt. Gaura sold a portion of the zemindary property. It cannot be said to have constituted a portion of the estate as it devolved upon her. She was not even bound in law to continue the tenancy, and a relinquishment of the same in favour of the zamindars as soon as she found that she could not carry on the cultivation and pay the statutory rent, would have put an end to the tenancy, leaving nothing which could possibly devolve upon any one after Mt. Gaura's death. It must be remembered also that the tenancy would devolve according to the strict rules laid down in S. 22 of the Local Tenancy Act. It by no means follows that it would have devolved upon the present plaintiffs who are reversioners of Sheo Dayal. Indeed, we may say without going into detail that it would have been extremely unlikely to so devolve. We find no adequate reason therefore for distinguishing between the arrears of rent due from Mt. Gaura on account of the ex-proprietary tenancy and the arrears due from her on account of the other tenancy which she had voluntarily taken up. The learned judge of this Court was, in our opinion, right in respect of each of these deeds, and the appeals filed by the defendants fail.

The two cross-appeals are on behalf of the plaintiff Babu Nandan, or of the said plaintiff jointly with his brothers and they challenge the findings of the single judge of this Court in respect of the sale of 1873 and the deed of gift of 1907. We

(1) [1884] 10 Cal. 955=11 I. A. 66=4 Sar. 553 (P. C.)

are far from saying that the question of legal necessity for the sale of May 25, 1873, is free from difficulty. We have listened to considerable argument on the point and we have had to examine carefully the judgments recorded by all three Courts. We think it sufficient to say, however, that, in our opinion, the learned judge of this Court was right in holding that he had before him findings of fact by the lower appellate Court, resting upon evidence which that Court was entitled to take into consideration and not to be disturbed in second appeal. The appeal in respect of this alienation therefore fails.

With regard to the gift in favour of Mahadeo, we have come to the opposite conclusion. To begin with, we think it very doubtful whether, as a question of law, a gift made to a family priest under the circumstances deposed to by Mahadeo himself, and with a mere recital in the deed itself that the object of the gift was to obtain advantage in the next world, could be upheld as within the authority of a Hindu widow. We might have hesitated to interfere with the learned Judge of this Court on this ground alone, as here also he purports to proceed upon findings of fact; but one important consideration has, in our opinion, been altogether overlooked by him. There can be no doubt that in every case in which an alienation by way of gift for religious or charitable purposes is made by a Hindu widow, holding an estate with the limited interest of such widow, the Court is bound to take into consideration the proportion borne by the property gifted away to the total estate in the hands of such widow. The learned Judge of this Court, laying stress on the fact that the gift is one of a 6 pies share only, treats it as amounting to no more than one-sixteenth of Sheo Dayal's estate in the hands of his daughter. Even this is a large proportion, particularly for a gift of the particular nature of the one which we are considering. But the fact of the matter is that it was a gift of a 6 pies share out of a 2 annas share, which represented all that was left of the estate in Mt. Gaura's hands on the date of the gift. On this ground we think that the alienation ought not to have been supported.

The net result therefore is that the appeals of the defendants fail and are dismissed with costs. The appeals of the plaintiffs succeed to this extent that in modification of the decree of the learned judge of this Court, we set aside also the deed of gift of a 6 pies share of the 7th of March 1907 and decree the plaintiffs' claim in respect of the same. The appeals of the plaintiffs both to the single Judge of this Court and under the Letters Patent must be held to have succeeded in the proportion of a 6 pies share to a 4 annas share, and they must pay and receive costs in the lower appellate Court and in this Court in proportion to such failure and success. Costs of both hearings in this Court will include fees on the higher scale.

Defendants' appeals dismissed;
Plaintiffs' appeals partly allowed.

1925 ALLAHABAD 498

STUART, J.

Amir—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 121 of 1925, Decided on the 24th March, 1925 from an order of S J., Cawnpore.

Arms Act (11 *of* 1878) *Ss.* 14 *and* 19 *(f)—Two empty brass* 405 *used cartridge cases found in accused's house in a locked box—Accused was held not liable.*

While the police were searching accused's house for stolen property (which was not present) they discovered in a locked box two empty brass 405 used cartridge cases which were incapable of being re-loaded in India.

Held: that accused was not guilty. [P 498 C 2]

Saila Nath Mukerji—for Applicant.

M. Waliullah—for the Crown.

Judgment.—I am of opinion that there is considerable force in Mr. Saila Nath Mukerji's argument that no offence has been committed because the empty cartridge cases in question are incapable of being re-loaded in India. In any circumstances I regret the zeal which has caused the prosecution of this particular applicant. While the police were searching his house for stolen property (which was not present), they discovered in a locked box two empty brass 405 used cartridge cases. It seems almost impossible to suggest that the man could have retained cartridge cases for an improper purpose and he probably was retaining them owing

to the incurable reluctance common to so many of his countrymen which prevents the throwing away anything, however useless it may be. He may have kept them as curious or possibly he thought that some day he might add them to a collection of rubbish and obtain something of the nature of one pice for their value as brass. In any circumstances it is difficult to understand why any police officer or Magistrate should have looked askance at his action.

I set aside the conviction and sentence and direct the fine to be refunded.

Conviction set aside.

1925 ALLAHABAD 499

MUKERJI, J.

Kanhai--Applicant.

v.

Amrit--Opposite Party.

Civil Rev. No. 221 of 1924, Decided on 17th February 1925, from an order of the Judge of Court of Small Causes, Budaun.

Limitation Act, Art. 75—Waiver—Mere abstinence to sue is not waiver.

Mere abstinence from enforcing a right at the time when the cause of action arose does not amount to waiver. 31 *Cal.* 297 *Rel. On.*

[P 500 C 2]

Baleshwari Prasad--for Applicant.

S. S. Sastry—for Opposite Party.

Judgment.--This is an application in revision against a judgment of a Court of small causes under the following circumstances:--

The applicant was the plaintiff in the Court below. He held an instalment bond by which he was to receive from the respondent a sum of Rs. 11 every year for eight years. There was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment, he would pay the entire amount due on the bond, irrespective of the instalments. None of the instalments were paid. The plaintiff stated in the plaint that his claim with respect to three of the instalments was barred by time, that he did not want to sue for the entire sum due and thus, leaving out the last two instalments, he sued for three which, according to him, fell due within three years of the institution of the suit.

The respondent met the claim with a plea of limitation. The learned Judge of the Court below held that the suit was time-barred, there being no evidence of any waiver.

In this Court it is contended that the applicant had an option to sue either for the whole money or for some of the instalments as he was advised and that as he waived his right to sue in respect of the first three instalments, he came within the period of limitation as laid down by Article 75 of schedule 1 of the Limitation Act.

Article 75 of the Limitation Act lays down that a suit based on an instalment bond which provides that in case of default made in payment of one or more instalments the whole shall be due, the period of limitation would be three years and would begin to run from the date of default, unless there has been a waiver with respect to any such default. It provides that where there has been a waiver in respect of any defaulted instalment, the period would run from such default in respect of which there is no waiver. In the case before me there is no allegation that on a default having occurred any payment was made after the default and was accepted. There is no allegatior whatsoever as to the parties having in any way agreed to change the terms of the bond. It is, however, argued that the mere fact that the plaintiff did not sue for the first three instalments amounted to waiver and the plaintiff's suit was within time.

As I read the provision of column 3 of the Limitation Act, I do not think that it was ever meant to lay down that the question of waiver would depend on the sweet will of the plaintiff. If that were the meaning, the result would be this, on the same facts, if a claim be made for a portion of the amount due the suit would be within time, but if a claim (equally maintainable on the terms of the bond) be made for the entire amount due on the bond, the suit would be time-barred.

Waiver is a technical word and, so far as I am aware, the word has never been applied to a circumstance which amounts to nothing more than this that the plaintiff has stayed his hands in seeking his remedy. In Wharton's Law Lexicon, 12th edition, the word 'waiver' is defined as follows:—

"The passing by an occasion to enforce a legal right whereby the right to enforce

the same is lost; a common instance of this is where a landlord waives a forfeiture of a lease by receiving rent, or distraining for rent, which has accrued due after the breach of covenant, causing the forfeiture, became known to him.....Mere lying by is not waiver for this purpose ; there must be some positive act on the part of the landlord, which act, however, if done, is a waiver in law, notwithstanding any protest".

The question of waiver was considered in some Calcutta cases and it was laid down that a mere staying of the hand in enforcing the remedy could not amount to a waiver. In the case of *Jadab Chandra Bakhshi* v. *Bhairab Chandra Chuckerbutty* (1) the learned Judges remarked as follows :—

"It is argued in support of the rule that his (plaintiff's) abstinence from suing amounts to a waiver of his right to sue for the whole. We do not agree with that contention, but we agree with the observation made by the learned Judges who decided the case of *Hurri Pershad Chowdhury* v. *Nasib Singh*, (2).

The same opinion was reiterated in the same Court in the case of *Abinnas Chandra Bose* v. *Rama Bewa* (3) by two other learned Judges. It was held that mere omission to sue was not such a waiver as was contemplated by Article 75 of schedule I of the Limitation Act.

The law of waiver has been considered in its various aspects by Lord Halsbury in his work, *viz*: "Laws of England". With respect to a contract the law laid down would appear in Volume 7 at page 423, Article 868. I need not quote all that is considered there. But what has been said there leads me to think that waiver is, in effect, a substituted contract for the previous one. This may be expressed or implied. As an illustration it is said that where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for etc , there is a waiver. Again the same authority in Volume 13 of the book, page 165, Article 197, lays down rules with respect to a waiver when it relates to enforcement of a right. It is said that waiver of this kind depends upon consent and the fact that the other party has acted upon it is sufficient consideration. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right. It is pointed out there that where the right is a right of action, an express waiver depends upon the same consideration as a release. I need not labour the point any further. But it seems clear to me that a mere abstinence from enforcing a right at the time when the cause of action arose will not amount to waiver.

As I have already said, if we accept the argument advanced on behalf of the applicant, the result would be that, on the same facts, if a claim is made for a part of the amount due it would be within time, while on the same facts, if the claim be made for a larger amount which is also due the suit must be treated as barred by time. This is a position which could not have been contemplated by the legislature, nor does such position follow from the language used. If the language used had compelled the Courts to come to the conclusion contended for, the matter would have been different.

On behalf of the applicant reliance has been placed on the case of *Ajudhia* v. *Kunj Lal* (4). In that the language to be found in the bond was materially different from the language in the bond before me. There it was expressly stated that in case of default the creditor "would be entitled to sue for the whole amount due etc". The learned Judges of this Court were of opinion that it would go very hard with the debtor if he was deprived of the benefit, which the creditor was prepared to give him, of his forbearance. At page 125 their Lordships remarked as follows :—

"It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occured."

This remark really distinguishes the case of *Ajudhia* v. *Kunj Lal* (4), from the case before me. Under the circumstances I need not express any opinion as to the value of that case as an authority.

The result is that the application in revision fails and it is hereby dismissed with costs.

Application dismissed.

(1) [1903] 31 Cal. 297,
(2) [1894] 21 Cal. 542..
(3) [1909] 13 C. W. N. 1010=4 I. C. 17

(4) [1908] 30 All. 123=5 A. L. J. 72=(1908) A. W. N. 36.

1925 ALLAHABAD 501
Full Bench

LINDSAY, SULAIMAN AND KANHAIYA LAL, JJ.

Rameshwar Prasad—In the matter of.

Misc. Case No. 442 of 1924, Decided on 21st November 1924.

Stamp Act, (1899) *Sch.* 1 *Art.* 5 *amended by U. P. Stamp (Amendment) Act*, (1923)—*Agreement by mortgagor to pay higher interest and by mortgagee to extend period of payment—No fresh mortgage—12 annas stamp is enough.*

A mortgage was executed in favour of three mortgagees. The period of redemption was fixed as one year. The mortgage was not redeemed within that period. By a partition among the mortgagees the mortgage was assigned to one of themselves entirely. About two years after the expiry of the period of redemption, the mortgagor executed another instrument in favour of the assignee of the mortgage. He recognised him as the sole mortgagee and enhanced the rate of interest. The period for the payment of the mortgage money under the original deed was extended to five years. The deed after referring to the terms of the original instrument stated that the other conditions of the mortgage were the same.

Held: that the latter document was not a fresh mortgage. It was merely an agreement whereby, in consideration of the mortgagor's promising to pay an enhanced rate of interest the mortgagee agrees to extend the period of the mortgage and that a stamp of annas 12 was enough.

[P 502 C 1]

Indu Bhushan Banerji—for Applicant.

Facts.—On 22nd March 1921, one Rameshwar Prasad executed a simple mortgage deed in favour of three men named Budhu Lal, Chhannu Lal and Kashi Prasad for Rs. 30,000. The interest stipulated was at the rate of 12 annas per cent. per month. The mortgaged property was to be redeemed in a year. The deed was duly stamped and registered. The property was not redeemed within the period mentioned in the deed. A partition was made among the three mortgagees. At this partition the mortgage deed was assigned to Kashi Prasad's share only.

On 14th January 1924, Rameshwar Prasad again executed another deed in favour of Kashi Prasad only on a Stamp of Rupee one. By this document Rameshwar Prasad acknowledged the loan of Rs. 30,000 He also recognised Kashi Prasad as the sole mortgagee. He raised the rate of interest from 12 annas to 13 annas per cent. per month. He got the period of re-payment of the mortgage money due under the deed of 22nd March 1921, extended up to five years. Neither Kashi Prasad nor the other original mortgagees signed the document of 14th January 1924. The instrument made a few changes in the conditions of the loan and after referring to the previous document stated that all the other conditions in the previous deed still held good. It did not mortgage the property afresh.

The instrument of 14th January 1924, was written on a stamp of Re. 1. The present was a reference by the Board of Revenue under S. 57 (1) (*b*) of the Stamp Act, as to the adequacy of the stamp.

Order of Reference:—[After setting out facts as stated above, the reference continued as follows.]

The executant relies on three authorities, *viz.*, (1) 13 A.L.J., 96 (or I.L.R. 37 All., 159), (2) I. L. R., 7 Bom. 34 and (3) B. B. Mitra's Stamp Act 1922 edition page 155. An extract from the relavant remarks from Mitra's Stamp Act as furnished by the Collector is herewith enclosed. These remarks are based on a ruling of the Chief Commissioner of Central Provinces, dated 1879, and Central Provinces Commissioner's Circular letter No. 1, dated 1886, which are very old. The Bombay ruling is not strictly relevant to the present case inasmuch as in the Bombay case the two documents executed by two opposite parties were interdependent and the second document was merely an explanation of the first.

The ruling in Allahabad Law Journal, page 96, also does not seem to apply inasmuch as the facts in that case were very different to those of the present case since the agreement was come to only about a month after the family arrangement and long before the date fixed for payment. Moreover, in that case both deeds were contingent upon the coming to pass of other events which were at the time of execution events in the future. There is no such contingency in the present case. In the opinion of the Board in the present case the new deed is a fresh mortgage liable to a duty of Rs. 195-1-0 since the term of the original mortgage had expired and it is practically a fresh mortgage for a term of five years. But as the matter is not free from doubt a reference is made under S. 57 of the Stamp Act. The instrument of the 14th January 1924, has not been endorsed by the Collector under S. 42 (1) of the Act.

The document of the 22nd of March 1921, and 14th of January 1924, are herewith submitted with their English translations and their return is requested.

Judgment.—We have read the reference of the Board of Revenue in this case. Our opinion is that the document which was executed on the 14th of January 1924, by Rameshwar Prasad is sufficiently stamped.

The document is an agreement upon which stamp duty is leviable under Schedule I, Article 5, of the Indian Stamp Act as amended by the United Provinces Stamp (Amendment) Act, 1923.

According to clause (c) of Article 5, the duty on the document would, under this amended schedule, be 12 annas. We are told that the document was stamped with a one rupee stamp. It is clear, therefore, that the document was sufficiently stamped.

We cannot accept the view that this document of the 14th of January 1924, is a fresh mortgage. It is merely an agreement whereby, in consideration of Rameshwar Prasad the mortgagor's promising to pay an enhanced rate of interest, the mortgagee agrees to extend the period of the mortgage.

Let this answer be returned to the reference.

Reference answered.

1925 ALLAHABAD 502

LINDSAY AND KANHAIYA LAL, JJ.

Durga Prasad—Appellant.

v.

Gangadin and others—Respondents.

Second Appeal No. 1708 of 1923, Decided on 27th February 1925, from a decree of the Sub. J., Mainpuri.

T. P. Act, S. 52 — Pre-emption suit pending — Vendee reconveying to vendor—S. 52 applies.

Where the purchaser during the pendency of a pre-emption suit reconveys the property to the vendor, the transaction cannot affect the result of the suit inasmuch as the doctrine of *lis pendens* applies. [P 502, C 1]

Baleshwari Prasad—for Appellant.

Girdhari Lal Agarwala — for Respondents.

Lindsay, J. — We have heard the learned Counsel for the appellant in this case. The appellant is the purchaser.

It appears that on the 16th June, 1922, the 2nd and 3rd defendants sold the property in suit to the 1st defendant. The plaintiff then brought his suit for pre-emption and after the institution of the suit and while the suit was pending the purchaser reconveyed the property to the vendor.

Both the Courts below have allowed the plaintiff's claim and given him a decree for pre-emption. The learned Judge of the lower appellate Court was of opinion that inasmuch as the purchaser had during the pendency of the suit reconveyed the property to the vendor that transaction could not affect the result of the suit inasmuch as the doctrine of *lis pendens* applied. In our opinion that was a correct view to take. We have been referred to a good many rulings of this Court. But it has been held that the doctrine of *lis pendens* does apply to pre-emption suit and it has been so applied in many cases. Here there can be no doubt as to the propriety of its application.

Mr. Baleshwari Prasad for the appellant has referred us to the case of *Herkeshi* v. *Mewa Ram* (1) which is a decision of the pre-emption Bench of this Court. It is sufficient to say that that case can be distinguished on the facts from the case now before us. As authority for the view that the doctrine of *lis pendens* applies to a suit of this kind we need only refer to the case of *Ghasity* v. *Govind Das* (2) and to the still more recent decision of a Bench of this Court in *Kamta Prasad* v. *Ram Jag* (3).

This appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

(1) 1923 All. 294=4 L. R. A. Civ. 347.
(2) [1908] 30 All. 467 = 5 A. L. J. 477 = (1908) A. W. N. 221.
(3) [1914] 36 All. 60=22 I. C. 266=12 A. L. J. 9.

★★ 1925 ALLAHABAD 503
Full Bench.

WALSH, KANHAIYA LAL AND MUKERJI, JJ.

Gajendra Singh—Applicant.

v.

Durga Kumari—Opposite Party.

Application in First Appeal No. 118 of 1922, Decided on 27th March 1925.

★★ (a) *Civil P. C., S.* 11 — *Decision among parties out of Court may be* res judicata.

Walsh, J.—Obiter ;—A decision between the parties out of Court in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of S. 11 of the Code. [P 504 C 1]

★★ (b) *Arbitration — Award by arbitrator chosen by parties — Claims irrecoverable in law Courts settled—Court cannot re-open the award.*

Walsh, J.—If parties choose to submit their disputes informally to a mutual friend and to agree to accept and do respectively, whatever he decides, it is no business of anybody else that they choose to include claims or demands which might not be recoverable in a Court of law, or which might be recoverable with great difficulty. [P 505 C 1]

(c) *Contract Act, S.* 2 — *Forbearance to enforce legal rights is good consideration.*

Walsh, J.—Forbearance to sue and forbearance to take definite steps to enforce legal rights, have always been held to be adequate consideration to support an agreement, particularly an agreement where there are mutual considerations and both parties are intending, and agree, to make an end of their dispute. [P 506 C 1, 2]

★★ (d) *Civil P. C., O.* 23, *R.* 3—*Party abandoning his claim voluntarily — Court may decline to allow appeal to proceed further.*

Walsh, J.—On general principles of law, independently of any provision in the Code the High Court has an inherent discretion to decline to allow an appellant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed, testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. [P 505 C 2]

★★ (e) *Civil P. C., S.* 89—*'Any other law' in S.* 89 *include 2nd Schedule.* (Per Kanhaiya Lal, J.—Mukerji, J.*contra.*).

Per Kanhaiya Lal, J.—The words 'any other law' in S. 89 do not exclude O. 23, R. 3 or any other portion of the Code of Civil Procedure, applicable to such a proceeding. The object of S. 89 clearly is to give effect to the provisions of Sch. 2 as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of the present Code of Civil Procedure, 1908, was really intended. [P 508 C 2]

Per Mukerji, J. (*contra.*)—Whatever meaning may be given to the words 'any other law for the time being in force' those words were never meant to apply to the schedule to be appended to the main Code oi Civil Procedure.

(f) *Interpretation of Statutes—Marginal notes may be used to explain the meaning of section if doubtful.*

Mukerji, J.—The marginal notes of a section in a Code of law are certainly no sure guide to the real object of the legislature. But they can sometimes be looked at if there be any doubt about the meaning of the words used.

★ (g) *Civil P. C., O.* 23, *R.* 3—(Per Mukerji, J., Walsh & Kanhaiya Lal JJ. *Contra*) *Award is no adjustment.*

Mukerji, J.—An award which has been arrived at by a reference of the subject-matter of an appeal to arbitration pending the appeal cannot be recognised as an 'adjustment by lawful agreement' by the parties to the appeal or as a 'compromise'. R. 3 of O. 23, deals with what is generally known as a compromise of a suit. A compromise is the direct result of an agreement between the parties. The rule 3, therefore, must be taken as directed only to cases where the parties have agreed that the Court should decide a matter between themselves in a particular way. Giving the words their plain meaning, an arbitration cannot come within the purview of R. 3. An award is not an adjustment by an agreement of parties within the meaning of R. 3, O. 23 and even if any contrary opinion could be entertained before the passing of Act 5 of 1908, S. 89 of the Act makes it impossible to maintain such an opinion. (*Case law fully discussed.*)

S. K. Dar, Harnandan Prasad, S. D. Sinha and *K. K. Verma*—for Applicant.

Iqbal Aamad—for Opposite Party.

Walsh, J.—This matter arises in the following way :—An appeal was filed in this Court on the 7th of April, 1922 on behalf of Rai Bahadur Chaudhri Gajendra Singh against Srimati Durga Kumari, the relief sought by which was to set aside a decree of the Subordinate Judge of Moradabad, dated the 23rd of January, 1922, and the value of such appeal was stated at Rs. 73,841/10. On the 23rd of January, 1924, that is to say, nearly two years afterwards, an application was filed on behalf of the respondent to the above-mentioned appeal, which, it should be mentioned, was an Execution First Appeal, asking that the said appeal should be dismissed. The application did not in terms ask this Court to record an adjustment, or to decide any question under Order 23, rule 3. The affidavit in support of it set out the fact that an agreement and what was called an award made under the said agreement, had been come to between the parties and alleged that the appellant in the said appeal had no right to continue the appeal. The appeal itself together with the application to which I have just referred, which was described by the office of the High Court as a miscellaneons application in Execution First Appeal No. 118 of 1922, were connected and heard together before a Bench consisting of my two brother

Mr. Justice Kanhaiya Lal and Mr. Justice Lal Gopal Mukerji. In an order, dated the 27th of June, 1924, which sets out very clearly the course of events and the authorities which have led to a difference of opinion between certain of the High Courts in India as to the applicability of Order 23, rule 3, they expressed the opinion that the matter ought to be referred to a larger Bench for decision, and it happened that I myself was then acting in the capacity of Chief Justice, and on the 11th of July, 1924, I made an order directing the case to be finally disposed of by a Bench consisting of these two learned Judges and myself. It came before us on the 31st of July, 1924, when the point was taken that on a question of fact with reference to the so called award and payment, the evidence of the Collector, Mr. H. G. Walton, who was away on leave, was material, and the case was adjourned generally and has now come before us for final disposal with the addition of Mr. Walton's evidence. Speaking for my own part, I am not satisfied that any question of law arises at all. The agreement before us is such that upon general principles of law I am not satisfied that it is necessary to apply any provision of the Code. The provisions of the Code only apply to such proceedings as purport to be taken thereunder. It happens from time to time that things are done by the consent of parties without reference to any special provision of the Code. It also happens sometimes that the parties are governed by some general principle of law, analogous to a provision in the Code, which is not actually to be found in the Code. The most familiar illustration of that is where there has been a binding decision in interlocutory proceedings, in the course of a suit, and one of the parties seeks to question it at a later stage. The Privy Council have held that a decision between the parties in the course of a suit is governed by the principles of *res judicata*, independently altogether of the special provisions of S. 11 of the Code, and indeed there is no provision of the Code which applies to it. In this case the unfortunate dispute, which is sufficiently described in the previous orders of my brothers and dealt with in great detail by my brother Mr. Justice Mukerji in the judgment he has prepared, was settled by a solemn agreement entered into in writing and executed by the parties on the 10th of February, which is admittedly binding upon both of them unless there is something outside the agreement sufficient in law to destroy it, or to render it of no effect. By that agreement the appellant, who seeks to appeal in Execution First Appeal No. 118 of 1922, agreed for certain consideration therein set out, that he would get his application for permission to appeal to the Privy Council, which was then under consideration in the High Court, and his appeal in the suit for mesne profits, which was pending in the High Court, struck off, and that after the appeal and the application were struck off, he should pay to the present respondent, the lady, the amount which might be determined by Mr. Walton, the Collector, on account of all kinds of mesne profits, debts of the time of Kunwar Sardar Singh which are alleged to have become time-barred, expenses incurred in connection with mutation cases, which of course were on the revenue side, civil suits, application for permission, which, although it does not say so, is the application for sanction to prosecute the appellant which had been applied for by the said respondent against the appellant for having forged a will, a suit for mesne profits, criminal case and enquires in connection therewith, High Court appeal, Privy Council appeal and appeal in the suit for mesne profits. The other party covenanted that she would accept the amount which might be determined by the Collector aforesaid on account of her demands, setting out the various heads under which she was making demands. In the event of these conditions not being carried out, that is to say, the amount determined not being paid, and the appeal and the application not being struck off, the agreement went on to provide that the lady's rights and decrees were not to become null and void. It is clear from this agreement that the striking off of the appeal and the payment of the demands determined by the Collector were concurrent conditions. That is to say, the actual date of the order of any Court withdrawing or striking the appeal off the list, would be of no importance. If the contracting party did not take the necessary steps to have his appeal struck off, the Court could do it for him on an application by his opponent, as the Court could treat that as done

which ought to be done. Certain arguments have been addressed to us as to the nature of the demands made by the lady, and as to the prospect of her being able to establish them either in a civil Court, or in any other Court, or in any other way as a matter of strict legal right. Such demands, which certainly cannot be complained of on the score of economy or moderation, are set out in the schedule to the agreement. If parties choose to submit their disputes informally to a mutual friend and to agree to accept and do respectively, whatever he decides, it is no business of anybody else that they chose to include claims or demands which might not be recoverable in a Court of law, or which might be recoverable with great difficulty. The whole essence and meaning of such an agreement is to make an end of legal proceedings and to avoid further controversy.

In the course of argument before us by the appellant, who claims to go on with this appeal, an effort has been made supported by his affidavit, to show that the agreement was really provisional. That is to say, its performance on both sides was conditional upon an event which was then uncertain, namely, the withdrawal of the prosecution which had been begun against him, Gajendra Singh, for forgery. The case had been actually committed for trial, and the date for the first hearing before the Sessions Judge had been fixed. There is no doubt that Gajendra Singh himself, and probably the Collector, would have been glad to see these proceedings abandoned or withdrawn. There is also no doubt that the lady, if she had been master of the situation and able to withdraw the case by the sole exercise of her discretion, would have been willing to have exercised the discretion for a price. So that if the matter were one of contract only, Gajendra Singh could have bought immunity from prosecution. But the matter was obviously not one of contract. Proceedings under S. 476 Cr. P. C. had been set in motion by the civil Court itself and the decision as to whether they should be allowed to continue, rested not with her, nor even with the Dist. Magistrate, but with the Local Govt. In fact the sentence upon Gajendra Singh was one year, and the Local Government released him after he had served for a month and a half. Hopes, however confident, and inducements, however strong, are not in themselves consideration for an agreement, and are only evidence what the learned Vakil called circumstantial evidence pointing to the possibility of the existence of some condition precedent of the kind suggested. I can only say, after reading the evidence of the Collector, that I am satisfied that whatever operated upon the mind of Gajendra Singh in entering into this agreement, it was no part of the contract between the parties that the execution of the agreement should be conditional upon the withdrawal of the prosecution. To my mind that condition in fact fails. A further suggestion is made that Gajendra Singh was not in fact a free agent, that is to say, that undue advantage was being taken by the lady of the position into which he had got himself by committing forgery, and that she was in a position to dominate his will, and that the circumstances of the contract are such as to show that it was made by him under undue influence. I will set out as well as I can what are the facts upon which we are invited to arrive at this conclusion. Mr. Walton, the Collector, undoubtedly recommended to the Local Government that the prosecution should be dropped. He evidently thought that it was not in the public interest that it should continue; that Gajendra Singh was a person who had earned by meritorious conduct in the past a reputation in the neighbourhood, and that if this unfortunate dispute with the lady came to an end, the matter might be quietly dropped. He was willing to pay and the agreement left it to Mr. Walton to decide how much the lady should get towards the costs which she had spent in obtaining sanction, and in attending the case for the prosecution before the Magistrate, and it is a just observation made by the learned vakil that a party does not as a rule voluntarily contribute towards the costs of his own prosecution unless at any rate that prosecution is withdrawn. Further, the case was adjourned from day to day and ultimately indefinitely, until the month of July no doubt by the order of some authority which had reason to believe that the possibility of a withdrawal was under consideration and there is the final observation of a Government official, I think the Legal Remembrancer, that the prosecution must proceed and that the Government had decided upon this course, even if it resulted in the re-open-

ing of what was called the arbitration. The difficulty about this allegation to my mind is two-fold. In the first place, in his affidavit filed in support of this application the appellant does not himself say that he was not a free agent, or that he entered into the agreement under undue influence, nor does he allege anything in the nature of undue influence, or any particular instance of it exercised by any particular individual at any particular moment, and, in the second place, I find it difficult to accept a case which sets up a charge of undue influence alleging that a party to an agreement was not a free agent, while at the same time it is contended, and some of the same material is cited in support of it, that he deliberately entered into a provisional agreement with a condition precedent that he should not be prosecuted. The conduct which is relied upon as indicating that he intended to enter into a conditional agreement seems to me inconsistent with the view that he was not acting as a free agent. I am satisfied that this agreement was absolute and unconditional, and that it was the result of the free will and contracting power of the appellant Gajendra Singh. I find myself unable to hold that there was no consideration for it. The lady was a decree-holder and she was executing her decree. She had claims which she was in a position to enforce in the execution Court. She had contingent rights, in the event of the appeals brought against her being unsuccessful, to receive costs already incurred in such proceedings. She had an alleged claim for damages in respect of a large number of bonds or documents of the late Sardar Singh which we call in England "choses in action," which she complains had been neglected and allowed to become time-barred by reason of the wrongful acts of her opponent, and although she or her advisers did not take much pain to lay the material with regard to this before the Collector, yet to the extent to which material existed, or could be obtained by the machinery of the law in the course of a civil suit, she would undoubtedly have been entitled to recover damages against Gajendra Singh for such loss as she had suffered in that matter. Forbearance to sue and forbearance to take definite steps to enforce legal rights, have always been held to be adequate consideration to support an agreement, particularly an agreement, of this kind, where there are mutual considerations and both parties are intending, and agree, to make an end of their dispute. On general principles of law, independently of any provision in the Code, I hold that this Court has an inherent discretion to decline to allow an applicant to prosecute an appeal the moment it is satisfied that the appellant by his solemn act and deed testified to by his signature, for what he considered adequate consideration, has expressly abandoned his right and undertaken to withdraw his appeal. To my mind to allow the appeal to go on under such circumstances would be giving effect to a breach of contract, and committing an injustice to the respondent, who is equally bound by the agreement, and would be, on the part of the Court itself, *pessimi exempli*, suggesting that this Court had sanctioned and approved a deliberate departure from the solemn act and deed of the party appearing before it. Under these circumstances, according to my view, this appeal, on the facts before us, ought to be dismissed without reference to any of the decided cases As the matter has been fully argued before my brothers on a previous occasion and before us, I do not hesitate to hold that whatever may be the state of the law under the Code with reference to a case where parties have submitted to arbitration the whole of their dispute arising in a particular suit without the intervention of the Court (which I may observe is not this case, the transaction proved before us seems to me to be an agreement, compromise and satisfaction of the whole of the subject-matter in this appeal), that the appeal has been adjusted by this compromise and if we were asked to do so, it seems to me that we ought under Order 23, rule 3 to pass a decree in accordance with such compromise. The matter has been argued before us as though this Court had been asked to record such a compromise. I cannot find that there is any actual application before this Court asking it to record such compromise, but even if we are entitled to treat the case upon that footing, I am satisfied that the facts in this case bring it within this provision of the Code. I do not propose to consider the differences which have arisen in the various cases cited to us from different High Courts with regard to the difficulties in applying rule 3 of Order 23. I agree in the main with the judgment in

the case of *Manilal Motilal* v. *Gokal Das Rowji* (1). The agreement of the 10th of February before us is really the decisive factor in my judgment The reference to Mr. Walton was only a secondary and consequential part of that agreement, though no doubt as regards the money a very important feature of it. It has been carried out, and whether you describe the machinery as an arbitration and award, or a reference, or a decision, or an opinion by a third person, seems to me unimportant. It has been carried out in every particular by both parties. It is merely ancient history, and the only thing outstanding is that in spite of his agreement to the contrary, and in spite of his having paid the money, which he agreed that he would pay, the present appellant has not struck out the appeal in accordance with his promise. I think we ought to dismiss the appeal and to direct it to be struck out with costs.

Kanhaiya Lal, J.—I agree generally with the view taken by my learned brother and wish to add a few observations regarding the facts which have given rise to the matter in controversy and the different aspects from which the question can be examined. It appears that Mt. Durga Kunwar was claiming certain property, which had been left by her father, Sardar Singh, and her claim was opposed by Choudhry Gajendra Singh and his son Shambhu Singh on the strength of a will alleged to have been executed by Sardar Singh in favour of Shambhu Singh who was then a minor. In the suit filed by Mt. Durga Kunwar for the recovery of possession of that property, there was also a claim for mesne profits. She succeeded in her suit and got a decree for possession and mesne profits which were left to be determined in subsequent proceeding. That decree was upheld by this Court. The mesne profits were subsequently adjudged at Rs. 73,841/10 on the 23rd of January 1922. The present appeal was filed by Gajendra Singh and Shambhu Singh from that decree.

While that appeal was pending, the prosecution of Gajendra Singh was started under S. 476 of the Code of Criminal Procedure. An application for leave to appeal to the Privy Council from the decree obtained by Mt. Durga Kunwar for the possession of the disputed property was also pending in this Court. On the 10th of February 1923, the parties to the present appeal entered into an agreement by which they provided that the application for leave to appeal to the Privy Council from the decree obtained by *Mt.* Durga Kunwar .or possession of the estate and the appeal filed by her from the decree adjudging the mesne profits at the figure above mentioned should be withdrawn and that the question of the amount of mesne profits to which *Mt.* Durga Kunwar claimed to be entitled should be determined by the Collector of Moradabad, who was appointed arbitrator for the purpose and for the settlement of certain other claims for costs and damages, which *Mt.* Durga Kunwar had put forward. The agreement provided that after the amount of the various claims put forward by *Mt.* Durga Kunwar was determined by the arbitrator the party made liable for the same should discharge it, and that until such discharge was made, the right of *Mt.* Durga Kunwar under her decree would remain unaffected. In other words, the agreement consisted of two parts, one of which provided for the withdrawal of the present appeal and of the application for permission to appeal to the Privy Council and the other was for the settlement of the disputed claims by the arbitrator. To that agreement was appended a schedule of the claims which were then said to amount to Rs. 2,72,255. The claim was subsequently reduced before the arbitrator to Rs. 1,55,000 exclusive of the expenses connected with the criminal proceeding, the exact amount of which was not then stated.

Gajendra Singh and Shambhu Singh were represented before the arbitrator by Mr. Jackson and *Mt.* Durga Kuar by Mr. Qadri. On the 23rd of February, 1923, the arbitrator made an award by which he declared *Mt.* Durga Kunwar to be entitled to the entire amount awarded to her by the decree which is now under appeal with interest thereon at 6 % per annum besides certain costs incurred extra-judicially in the previous litigation connected with the estate and that incurred in the committal proceeding. In regard to the debts due to Sardar Singh, which were stated to have become time-barred owing to the negligence of Gajendra Singh, the arbitrator stated that in absence of any evidence as to the exis-

(1) [1921] 45 Bom. 245=59 I.C. 53=22 Bom. L.R. 1040.

tence and value of those debts, he would not at present award anything to *Mt.* Durga Kuar on that account, but it was open to her to raise that question again, if she was so disposed, within three weeks. She did not, however, raise that question again, and the award, as it then stood, became final. The total amount awarded was Rs. 1,26,743-5-3 including the amount of the decree now under appeal, and the arbitrator directed that Rs. 1,00,000 out of the said amount should be paid within a week and the remainder within 15 days from the date of the award, and that order was communicated to Gajendra Singh and the counsel for the other side.

It is admitted that in pursuance of the above award Gajendra Singh made payments partly in March and partly in April 1923 in full satisfaction of the amount awarded against him and that *Mt.* Durga Kunwar subsequently withdrew that amount. The decree for mesne profits was thus adjusted and paid up.

The decree-holder-respondent contends that in view of the agreement and the award, followed by the adjustment and payment aforesaid, the appeal is no longer maintainable. The reply of the judgment-debtors-appellants is that the agreement was conditional on their criminal prosecution under S. 476 of the Criminal Procedure Code being withdrawn, that it was without consideration, that the award was incomplete and invalid, and that it could not be enforced except by a proceeding under schedule II of the Criminal Procedure Code.

The agreement does not say that the withdrawal of the criminal prosecution was a condition precedent to the enforcement of the agreement or the award The prosecutor was not the lady. She had applied for sanction to prosecute, but her application was refused. The prosecution was started under S. 476 of the Code of Criminal Procedure, and she could not have withdrawn it. Mr. Walton, the arbitrator, says that the withdrawal of the prosecution was not a condition precedent of the arbitration. He too could not have withdrawn it. At or about the time of making the award he has strongly recommended to the Government that the prosecution should be withdrawn, but the Government did not assent to it, and there the matter ended.

So far as the covenant contained in the agreement for the withdrawal of the present appeal was concerned, there can be no question that the agreement was, in view of the dispute then pending between the parties about the amount of the mesne profits, valid and for good consideration. The parties wanted to withdraw from the Court their dispute about the amount of mesne profits, and with that object they agreed that the appeal should be withdrawn, and the amount of the mesne profits determined by the arbitrator appointed by them. The arbitrator determined the amount according to the decree and that portion of the award cannot be seriously challenged. The respondent would have had to accept less, if a smaller sum than the amount of the decree had been awarded to her. That portion of the award is, therefore, good and binding.

The procedure provided by schedule II is by no means the only manner in which an award can be enforced. S. 89 of the Code of Civil Procedure provides that a reference to arbitration, whether by any order in a suit or otherwise, and all proceedings thereunder shall, save in so far as otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, be governed by the provisions contained in the second schedule. The other law above referred to is clearly the law other than the Indian Arbitration Act, which might be applicable to the matter. It does not exclude Order 23, rule 3 or any other portion of the Code of Civil Procedure, applicable to such a proceeding. In fact, as indicated by S. 121, Order 23, rule 3 is as if it were a part of the Code itself. The provisions relating to arbitration have only been relegated to a separate schedule for the sake of future legislative convenience with a view to their incorporation with the general law of arbitration, if it was hereafter necessary. Indeed, as pointed out in *Mani Lal Moti Lal* v. *Gokul Das* (1), the object of S. 89 clearly is to give effect to the provisions of schedule II as if they had been enacted in the body of the Code, and it cannot be said that any material change of procedure, differing from what was in force prior to the enactment of the present Code of Civil Procedure, 1908, was really intended. S. 96 of the Code of Civil Procedure similarly lays down that save where otherwise expressly provided in the body of the Code or by any other law for

the time being in force, an appeal shall lie from every decree, and it can hardly be argued that the reference there to "any other law" is not intended to apply to any law other than the law which is referred to in the immediately preceding clause.

On behalf of the appellant reliance is placed on the decision in *Amar Chand* v. *Banwari Lal* (2) where it was held that a submission to arbitration under the second schedule during the pendency of a suit could not be enforced in the suit under the general law of contract. S. 39 of the Specific Relief Act, however, lays down that an award is for purposes of specific performance treated *mutatis mutandis* as a contract. If an arbitration is entered into in a pending suit without the intervention of the Court, the Court may, on the application of any party, stay the hearing of the suit and, on an award being subsequently made, act on the award if it finds that it is otherwise valid, treating it as an adjustment of the suit. In *Mani Lal Moti Lal* v. *Gokal Das* (1) it was held that there was no reason why when an award was brought to the notice of a Court in a pending suit, it should not try the issue whether the award was not binding on the parties under the general principles of the law of contract by a proceeding under Order 23, rule 3 of the Civil Procedure Code. The difference between such a procedure and an application under the second schedule to enforce the award is patent. Under the former procedure the Court will only take cognisance of that portion of the award, which forms the subject-matter of the suit, leaving the rest out of consideration. Under the latter the Court can, if it finds that the award is valid, enforce it in its entirety and pass a decree in its terms. In other words, the failure to adopt the procedure provided by schedule II deprives a party of his right to claim the advantages which that schedule gives.

If does not deprive him of his right to enforce the contract embodied in the award otherwise, unless the subject matter of the reference has meanwhile been disposed of by suit.

It may further be mentioned that the award so far as it relates to the decree now in question has been complied with and the entire money payable under the decree has been deposited by the judgment-debtors concerned and accepted by the decree-holder. In the words of Voughan Williams, L. J. [*Doleman & Sons* v. *Ossett Corporation*) (3)] the award is now an executed award and must be treated as good so far as it operates as a complete accord and satisfaction of the decree under appeal. It makes no difference whether such a settlement is a direct settlement between the parties themselves or made by means of a third person to whom the party has referred the dispute after suit for arbitration. The payment was not made under protest. The appeal, therefere, ought to fail and to be dismissed with costs.

Mukerji, J.—I find myself in the unfortunate position of dissenting from my learned brothers.

This is an application by the respondent for an order dismissing an appeal on the ground that the decree under appeal has been adjudged and satisfied. The application is supposed to be one under Order 23, rule 3 of the Civil Procedure Code. The history of the case briefly is this. One Sardar Singh died. The appellant, Gajendra Singh, claimed the estate on behalf of his son, Shambhu Singh, on the ground that the deceased had given away the property to the latter under a will. The respondent, *Mt.* Durga Kunwar, is the daughter of Sardar Singh. She claimed as her father's heir. The Civil Court held that the will propounded by Gajendra Singh was a forgery. The learned Subordinate Judge made a decree in favour of the respondent and this Court upheld it. Mesne profits were adjudged against Gajendra Singh as he had been in possession as a trespasser. The amount decreed is Rs. 73,000 and odd. It is the decree for mesne profits that is now under appeal. Gajendra Singh was prosecuted for forgery and while the case before the Sessions Judge was still pending, it appears, the parties, *viz.* Gajendra Singh and his son on one side and *Mt.* Durga Kunwar on the other, executed an agreement by which they purported to refer their entire dispute under certain conditions to the decision of the Collector of the district, *viz.* Mr. Walton. Mr. Walton decided that a sum of Rs. 1,26,000 and odd should be paid by Gajendra Singh to *Mt.* Durga Kunwar, that Gajendra Singh

(2) 1922 Cal. 404=49 Cal. 608.

(3) [1912] 3 K. B.. 257=81 L. J. K. B. 1092=107 L. T. 581=76 J. P. 457=10 L. G. R. 915.

and his son should withdraw the appeal now in question and their application for leave to appeal to the Privy Council against the decree in the main suit for possession of the property of Sardar Singh and that Gajendra Singh should pay up the money in this way that a sum of Rs. 1,00,000 should be paid up within a week and the balance in 15 days. It is common ground that the entire sum found due by Mr. Walton was put into the Government Treasury by Gajendra Singh and the money has been withdrawn by the respondent.

The appellants' reply to the respondent's application is, mainly, two-fold. First, they contend that the reference to arbitration without the intervention of the Court which was seized of the appeal is not an adjustment of compromise by mutual consent within the meaning of Order 23, rule 3 of the Civil Procedure Code and, secondly, that the reference to arbitration was made under the distinct understanding that the Government would withdraw the prosecution against Gajendra Singh and his son and that, therefore, the payment which was made under the same understanding was not an unconditional payment. It is further urged on behalf of the appellants that as the Government refused to withdraw the prosecution, the whole arrangement, *viz.*, the reference to arbitration and the payment fell to the ground and could not be taken advantage of by the respondent.

The appellants did not file any written statement but filed an affidavit to explain the points taken up by them. The objections formulated by the learned counsel in his argument on behalf of the appellants as to the invalidity of the reference and award were as follows:—

(1). The arbitrator had no jurisdiction till the appeal and the application were withdrawn.

(2) The consideration and object for the reference were unlawful as they meant and implied a withdrawal of a criminal prosecution.

(3) The award was incomplete as the question of debts for which compensation was claimed by Mt. Durga Kunwar was left undetermined and,

(4) The award was not published.

Two main questions arise for determination by this Court, one of fact and the other of law. The question of law is whether, if the parties to an appeal make a reference to arbitration as to a matter being the subject-matter of the appeal without intervention of the Court, the award may be accepted by the Court as an adjustment by lawful agreement as a compromise by the parties even where the award is not accepted by one of the parties as binding on him. The question of fact is whether it was a condition precedent to the validity of the reference and the binding character of the award that the Government would withdraw the prosecution of Gajendra Singh and his son, and, if so, whether the award is invalid and the payment made thereunder cannot be accepted as a satisfaction by the appellants of the subject-matter of the appeal. I will take up the question of fact first.

As already indicated, the appellants' case is that they had already been committed to the Court of Session to stand a trial for forgery and it was on the distinct understanding that the prosecution would be withdrawn and the Magistrate would recommend the withdrawal of the prosecution that they agreed to an arbitration by the District Magistrate. Having regard to the facts disclosed by the affidavits of the parties and the testimony of Mr. Walton, I have not the least doubt that such was the case.

Before entering into evidence I may point out that a most unsatisfactory feature of this case is that we are going to decide most important questions of fact on mere affidavits. This remark of mine will have material bearing when I come to examine the question of law. If a reference had been made through the intervention of the Court, the submission to arbitration would have been done under the supervision of the Court and in objecting to the validity of the award, the parties would have been entitled to adduce oral evidence by examining witnesses in Court. As it is, we are called upon to decide most important facts on mere affidavits.

The affidavit filed on behalf of the appellants by one Ulfat Rai discloses that the appellants, being anxious to avoid the criminal trial, had petitioned to Local Government for the withdrawal of the prosecution. On the 1st of February, 1923, the Government passed an order, the language of which is quoted *in extenso* in the affidavit. It said *inter alia*: "The petition has been forwarded to the Dis-

trict Magistrate of Moradabad for such action as he considers necessary and that any further communication on the subject must be addressed to that authority." The parties live in the district of Moradabad and that is why the reference was made to the District Magistrate of that place. This order was made on the 1st of February, 1923. The date fixed for the Sessions trial was the 31st of January, 1923. The trial did not take place on that day and was adjourned to the 3rd of February. When the orders of the Government were received, they were communicated to the learned Sessions Judge and the trial was adjourned *sine die*. On the 10th of February, 1923 the parties entered into the agreement of submission to arbitration. These facts alone would indicate that the learned District Magistrate was taking a keen interest on behalf of the appellants and this was reflected in the fact that the learned Sessions Judge too had been persuaded to postpone the trial of Sessions case (always an important case) *sine die*. These facts would easily induce any person against whom serious criminal charges were pending, much less to mention men of position as the appellants were, to come to any terms whatsoever to escape the prosecution. If on the top of these circumstances we look to the agreement of submission, no doubt would be left in the mind as to the reason for that agreement. By this agreement which is dated, as already stated, the 10th of February, 1923, the appellants undertook to withdraw, at once, their application pending before this Court for permission to appeal to the Privy Council against the decree affirming the Subordinate Judge's decree awarding possession of the estate to the respondent. The appellants agreed to withdraw at once the present appeal. They agreed to pay whatsoever might be found payable by Mr. Walton on account of a number of claims amounting to the large sum of Rs. 2,52,000 and odd preferred by the respondent. The appellants agreed, unconditionally, to give up certain properties which could not be successfully claimed by Mt. Durga Kunwar on account of the operation of Order 2, rule 2 of the Civil Procedure Code. It appears that Mt. Durga Kunwar had omitted to claim these properties in her suit for possession against the appellants and accordingly she could not bring a fresh suit for these properties. As against all these agreements on the part of the appellants, the respondent, Mt. Durga Kunwar, agreed to accept the decision of Mr. Walton as to the several claims she was putting forward. She undertook to give up nothing except such part of her extravagant and untenable claims as Mr. Walton might disallow. She knew that as to many of these claims she could get no relief in a Civil Court.

The position was, therefore, this that the appellants were to give up their right of appeal and thereby allow the decree for mesne profits amounting to Rs. 73,000 and odd to become final. They were to give up property which the lady, Durga Kunwar, could not recover in any Court of law. The appellants agreed to give up their remedy or supposed remedy in the Privy Council and they further agreed to pay anything for all sorts of claims, including such preposterous claims as the costs of their own prosecution, incurred by the respondent. I do not think that it requires much argument to see that the agreement of submission to arbitration was an entirely one-sided one, the advantage lying entirely on the side of the respondent.

If we examine the award we shall see that the respondent got the entire amount of mesne profits decreed to her, with further interest. She got the costs she incurred in prosecuting the appellants and she got further costs to the amount of Rs. 30,000 with an addition of 50% for her worries etc.

Now, it does not require much persuasion to see that the whole affair was a one-sided one, all the advantages lying with the respondent. What could then have been the reason for all this transaction? My clear answer is that the parties understood and the learned arbitrator himself understood that all this was going to be done for the sake of settlement, not only of the civil rights of the parties, but also of the criminal prosecution.

The arbitrator, who was examined on commission, was asked if it was a condition precedent to his arbitration that the prosecution of the appellants should be withdrawn. He replied : "it was not to be dependent on the withdrawal of the criminal prosecution. So far as I know, Mt. Durga Kunwar was entitled to enforce the award even if the prosecution was not withdrawn." He further says : "It

is not correct to say that the consideration of the award was the withdrawal of the criminal prosecution." I consider these statements of Mr. Walton to be nothing more than an opinion. From his own evidence I gather that it was intended to settle not only the civil but the criminal affairs. It was never intended that the civil dispute should be settled even though the criminal dispute (prosecution of one party by another) should remain unsettled. The learned Magistrate says: "While the matter was in the Civil Court I and my predecessor-in-office made attempts to settle the dispute. The idea was if the dispute was settled it is possible to have the criminal proceedings withdrawn. I told the parties that if the matter went to the High Court, criminal proceedings would certainly be ordered whereas if the matter remained in the hands of the district authorities they might be avoided." Then the learned Magistrate says that he did see a copy of the Government order No. 393 of the 1st of February, *viz*: the order which referred the appellants to the District Magistrate of Moradabad, a portion of which has already been quoted above. Then Mr. Walton says: "It was certainly understood by the parties and myself that it was wished to have the criminal proceedings withdrawn." Again he says: "Referring to the respondent I believe that she wished to take advantage of the position he was in, owing to the criminal proceedings". Then the witness says: "I wrote to the Government at about the time of making the award strongly recommending the withdrawal of prosecution of Chaudhri Gajendra Singh". Then the learned Magistrate says: "If Mt. Durga Kunwar said that the arbitration is entirely unconnected with criminal proceedings, her statement is not true."

To my mind, the quotations from the learned District Magistrate's deposition are enough to show that the appellants entered into the submission with the sole view of the withdrawal of the prosecution. This would be made still clearer by the letter of the Government addressed to the District Magistrate on the 3rd of July, 1923. The sessions trial, that had been put off *sine die*, was still pending when this letter of the Government was received. A copy of the letter is on the record and the following is to be found in it:—

"The Government refuses to sanction (the withdrawal) even if this results in the arbitration award being reopened". When we remember that Mr. Walton says that he had strongly recommended to the Government the withdrawal of the prosecution, we can easily see that it was in reply to his letter that the Government said that they did not care even if the award had to be reopened if the prosecution went on. Putting two and two together, Mr. Walton must have indicated in his letter to the Government that a non-withdrawal of the prosecution would result in the futility of all his efforts to settle the other disputes between the parties and that the result of the non-withdrawal of the prosecution would be the setting aside and the reopening of the award. After this, speaking for myself, I would not require any further persuasion to come to the conclusion that the parties and even Mr. Walton believed that the result of the non-withdrawal of the prosecution would be that the award would fall to the ground. My conclusion, therefore, is that the appellants are right in their plea that the submission and the award have become void because it was a condition precedent to their validity and binding character that the prosecution should be withdrawn.

We may consider the position in a slightly different light. Even if we say that the withdrawal of the prosecution was not a condition precedent to the validity of the submission and the award, we can certainly say that the submission is an agreement which was obtained by exercise of undue influence. There is some amount of inconsistency between the two pleadings, *viz*: 'the withdrawal of the prosecution was a condition precedent' and 'the submission to arbitration was influenced unduly'. But I do not think that it is not open to a party to plead like this in the alternative.

I have already shown that the advantages to be derived from the reference to arbitration were entirely one-sided. It is the case that the respondent—the prosecutrix—was in a position to dominate the will of the appellants. It is common ground that the respondent asked for permission to prosecute the appellants and when her application was refused, she appended to the document of submission, the respondent claimed two items, one of Rs. 772 and the other of Rs. 858 on account of these two applications. Then, it is

clear that she herself and her people were to supply the evidence for the prosecution of the appellants. In the circumstances, she was clearly in a position to dominate the will of the appellants. The advantages due to the agreement of submission being almost entirely in favour of the respondent, the law would presume that the agreement for submission was influenced unduly, *vide* section 16 of the Contract Act. The respondent has shown nothing against the presumption thus raised against her. I would, therefore, be prepared to hold that the agreement to submit to arbitration is not binding on the appellants. It would follow that the award also is not binding on them.

In the view I take of the agreement of submission and the award it is not necessary for me to consider the other grounds on which the award is sought to be impeached. But it is desirable to mention briefly the contentions raised. One contention is that the award was incomplete because the question of debts, said to have become time-barred owing to the trespass committed by the appellants over the property of the deceased Sardar Singh, was left undetermined. I do not think this contention is sound because the award simply said that if the matter was to be re-agitated, evidence was to be adduced in three weeks. If the respondent did not want to re-agitate the matter decided against her, certainly it was no duty of hers to adduce evidence.

The next point is that the award was not published. It is conceded that as soon as the award was made an order was issued to the appellants by the District Magistrate directing them to pay up a sum of Rs. 1,00,000 within one week and the balance in two weeks. This would be a sufficient publication of the award.

The third point is that the object of the submission was that the prosecution should be withdrawn. I have already dealt with the question and have come to the conclusion that it was a condition precedent to the validity and the binding character of the submission and the award that the prosecution should be withdrawn. But the withdrawal was to be by the Government themselves and it was never contemplated that the respondent should do anything illegal to stifle the prosecution. In the circumstances I do not think that this ground will hold good.

To summarise. On the question of fact I am of opinion that it was a condition precedent to the validity and the binding character of the submission and the award that the Government should withdraw the prosecution. It being a fact that the prosecution was not withdrawn and one of the appellants was convicted and sentenced, the submission and the award cannot be regarded as binding on either of the appellants. I am also of opinion that the submission was voidable on account of exercise of undue influence.

It was finally suggested on behalf of the respondent that what has been termed as reference or submission to arbitration and what has been termed 'award' were really no 'submission' and 'award' in the strictest sense of the terms and that these are mere 'adjustment or compromise' within the meaning of Order 23, rule 3 of the Civil Procedure Code. I may, however, point out that the parties and the arbitrator himself regarded that parties were making a reference to arbitration and Mr. Walton was constituting himself an arbitrator. On this point I would merely refer to the reference itself and to the award. In the award Mr. Walton says that he had been asked 'to arbitrate on all outstanding questions' between the parties and that he had obtained the sanction of the Commissioner under Article 1292 of the Manual of the Government orders. This article requires that where a Government officer wants to act as an arbitrator in any matter he should obtain the permission of his superior officer. The reply of the Government that they did not care if the award had to be re-opened also indicates that Mr. Walton regarded his act as that of arbitration. I would, therefore, summarily dismiss the suggestion that what was done was not a reference to arbitration nor was an award given.

Coming to the question of law. It appears that it is a difficult one and that the High Courts of Madras, Bombay and Calcutta have given different answers to the question. Before the examination of the authorities it would be useful to examine the law itself. It is to be found within the four corners of the Civil Procedure Code, the law of procedure in India.

There can be no doubt that the Civil Procedure Code uses a recognised expression for the proceeding which involves a reference of their dispute by the contending parties to a third party for his decision. This has been described as an 'arbitration.' Nowhere in the Code has the word 'arbitration' been used in a sense co-extensive with that of an adjustment of a dispute by lawful agreement or compromise. Section 89 of the Civil Procedure Code runs as follows :—

"Save in so far as it is otherwise provided by the Indian Arbitration Act 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

In the second schedule, it will be noticed, provision has been made for three kinds of matter. Provision has been made in paragraphs 1-16 for reference to arbitration with respect to a matter, being the subject matter of suit (and an appeal) where the reference is through the Court. Then paragraphs Nos. 17-19 relate to procedure to be followed when parties have agreed to refer their dispute to the arbitration of certain parties and one of the parties wants that the reference should be made under the supervision of the Court: although no suit or appeal is pending before it. This is called the filing of an agreement for reference to arbitration in a Court. The remaining paragraphs in the schedule II refer to the state of affairs where a reference has been made without the intervention of the Court and an award has already been obtained. In this last mentioned case, it is provided that, if any of the parties to the reference so desire, he may apply to the Court to have the award filed in Court so that a decree might be drawn up in terms of the award. It will thus be noticed that every possible case of an arbitration has been recognised and provided for. To repeat, there may be an arbitration pending a suit or appeal ; then the reference should be through the Court. Then, there may be a reference without there being any suit pending. In such a case any party to a reference may apply to a Court to take up the conduct of the arbitration under its supervision. Lastly, when there has been an award after the completion of arbitration proceedings, any party may ask that the private award might be given the status of a Court by the award being filed and accepted in a Court of justice. Paragraph III, sub-paragrapb (2) of second schedule says that, where any matter has been referred to arbitration through the Court, the Court "shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit." This indicates that there is a complete ouster of the jurisdiction of the Court to decide the matter referred to arbitration, except in so far as the orders of the Court may be necessary for the conduct of the arbitration. Then paragraph 15, clause 2 lays down that where an award has become void or is set aside, the Court shall make an order superseding the arbitration and in such a case shall proceed with the suit. This rule indicates where the jurisdiction of the Court, which was taken away by the provision of paragraph III, returns to it. Some such rules, as are embodied in paragraph III and paragraph XV of the second schedule, were necessary, for otherwise the two jurisdictions, *viz.*, that of the Court and that of the arbitrator, were likely to overlap. It will thus be seen that the Civil Procedure Code provides a complete and self contained set of rules by which a conflict of jurisdiction may be avoided.

Let us now examine rule 3 of order 23 of the Civil Procedure Code. It runs as follows :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement or compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

The question is whether the words 'adjusted wholly or in part by any lawful agreement or compromise' can include an award obtained on a reference to arbitration without intervention of the Court. If we give the words their plain meaning, we must say at once that, an 'award' is not meant by the plain and usual meaning of the words employed. An award is not the immediate result of an agreement or compromise. An award

may be the ultimate result of an agreement, in so far as the parties have agreed to abide by the decision of a third party. But in that case we cannot say that the subject-matter of the dispute has been adjusted by an agreement by the parties. An award may be an adjustment of a dispute. But so is decision by a Court. But is an award an adjustment by an agreement? That is the question. The answer must be in the negative. Much less can we say that an award is the result of a compromise between the parties. As I have stated in an early part of this judgment, the law uses a particular expression, *viz*; 'arbitration' for the procedure by which parties agree to abide by the decision of a third party other than a Court. The legislature which uses the word arbitration, must have been aware of what the word meant. Can it be said that in using the words "adjusted wholly or in part by any lawful agreement" the legislature intended to include the proceeding by way of arbitration? To an unsophisticated mind only one answer is possible, namely, in the negative. The marginal notes of a section in a Code of law are certainly no sure guide to the real object of the legislature. But it can sometimes be looked at if there be any doubt about the meaning of the words used. In this particular case, to my mind, there is absolutely no ambiguity. Still if we look to the marginal note, we find the words used to express in brief the object of rule 3 are 'compromise of suit'. The marginal note, therefore, indicates that the rule 3 was to deal with what is generally known as a compromise of a suit. A compromise is the direct result of an agreement between the parties. The rule 3, therefore, must be taken as directed only to cases where the parties have agreed that the Court should decide a matter between themselves in a particular way. Giving the words their plain meaning, an arbitration cannot come within the purview of rule 3.

If, however, there were any doubt on the point, it is entirely set at rest by the language of S. 89, Civil Procedure Code already quoted. It lays down that (leaving out certain words in the beginning) all references to arbitration whether by order in a suit or otherwise and all proceedings thereunder shall be governed by the provisions contained in the second schedule. If the preliminary words left out from the quotation do not indicate otherwise, it must be admitted that a reference pending a suit which is not made through the Court in which the suit is pending cannot be recognised by the Court. Now, the question is whether there is anything in the words 'save in so far as is otherwise provided by the Indian Arbitration Act 1899 or by any other law for the time being in force which would exclude Order 23, rule 3, Sch. (i) Civil Procedure Code. We have nothing to do with the Indian Arbitration Act in the particular case before us. Then there remain the words 'or any other law' for the time being in force. It has been contended that 'any other law' referred to therein may indicate Order 23, rule 3 of the Civil Procedure Code. This agreement, in my opinion, should not carry any weight whatsoever. The schedule II and Order 23, rule 3 are as much parts of the Code as S. 89 itself. In the circumstances, if the legislature meant that an exception was to be made in the case of Order 23, rule 3, would not one expect that this would have been stated in clearer terms? Then, it has been argued that the 'any other law' mentioned by S. 89 is not known to be any definite law that may have been in the mind of the legislature and, therefore, it is possible that they contemplated that any rule of law, that was not contradictory, might come in under the exception. So far as I can see, the legislature used the words 'or any other law 'for the time being in force' with this intention. There might be in force at the time of the passing of the Civil Procedure Code 1908, any local law or law by the Indian legislature dealing with arbitration, for special cases. Or some law might be enacted in future laying down special rules for special cases of arbitration. It was intended that those special cases should not be governed by the rules laid down in second schedule. This idea is perfectly intelligible, *e. g.*, a local legislature dealing with say the indebted agriculturists of Bundelkhand, may desire that a certain kind of dispute among these people should be referred to the arbitration of the Collector of the district. With this view, if the local legislature should enact certain rules according to the language of S. 89 of the Civil Procedure Code, those rules would not clash with the provisions of S. 89,

Civil Precedure Code. Whatever meaning may be given to the words 'any other law for the time being in force', I am absolutely clear in my mind that those words were never meant to apply to the schedules to be appended to the main Code of Civil Procedure. Any such idea would suggest a clash between the main rule embodied in the Code and a rule contained in the schedule. Any High Court may add to or alter the rules in the schedule, but they can do so only subject to the provisions of the main Code. I am therefore, definitely of opinion that an award which has been arrived at by a reference of the subject-matter of an appeal arbitration pending the appeal cannot be recognised as an 'adjustment by lawful agreement' by the parties to the appeal or as a 'compromise'. I need not repeat that if it were the case that both the parties accepted the award, there would be no difficulty in the acceptance of it by the Court. But then the award would be accepted not as an award but as a document embodying what has been accepted by the parties as a proper basis for the settlement of their dispute.

Now, coming to authorities, there are some cases decided prior to 1st January, 1909 when the new Code of Civil Procedure came into force and there are others which were decided after the new Code of Civil Procedure was brought into effect. The earlier cases are *Sami Bai* v. *Premji Pragji* (4) and *Prag Das* v. *Girdhar Das* (5). These cases are no sure guide to us who have to construe the present Code. For chapter 37 of the old Code did not contain any such rule as has been enacted in S. 89 of the new Code, *viz.*, that all proceedings of arbitration whether by an order in a suit or otherwise should be governed by the provisions of second schedule. Indeed the learned Chief Justice Jenkins, who was one of the Judges who decided the later case, expressly stated this to be a ground for not applying the rules on arbitration to be found in the old Code. He says: "I can find nothing, however, in chapter 37 which invalidates a proceeding not in accordance with its provisions, beyond the result that non compliance deprives a party of a right to claim the consequences the chapter prescribes, and I, therefore, think that the objection cannot succeed." The case in 26 Bombay was decided in 1901 and of course the case in 20 Bombay is a much earlier one.

The case of *Rukhan Bai* v. *Adamji Shaikh* (6) was decided in April 1908 by Beaman, J. sitting alone. He held that where there was a reference to arbitration but it was an irregular submission, the award could not be accepted as an 'adjustment by lawful agreement. The judgment shows that Beaman, J. was not disinclined to follow the earlier cases of *Sami Bai* v. *Premji Pragji* (4) and *Prag Das* v. *Girdhar Das* (5). No other case under the old Code has been cited to us. I have already stated that any ruling given under the old Code cannot be a safe guide for us in construing Order 23, rule 3 read with S. 89 of the present Code of Civil Procedure.

After the passing of the new Code, there are four Bombay cases. The earliest among these is the case of *Harak Bai* v. *Jumna Bai* (7) decided by Davar, J. sitting alone. He had cited before him the case in 26 Bombay but he was asked not to follow that case in view of the new enactment contained in S. 89 of the Civil Procedure Code. Davar, J. confesses that according to the second schedule of the Civil Procedure Code, no reference to arbitration was contemplated in a matter pending before a Court, without reference to it. His judgment shows that he was inclined to hold that the validity or otherwise of the award must be enquired into and the only point in question was whether the rules in second schedule should be followed or an enquiry should be made under the provisions of Order 23, rule 3. For, he stated, that the opening words of rule 3, Order 23 showed that in case of dispute there must be an enquiry. Then the learned Judge found what he thought was a way out of the difficulty and he proposed to treat (*vide* page 643 of the report) the words 'any other law for the time being in force' in S. 89 as applicable to Order 23, rule 3 of the Civil Procedure Code. I have already given my reasons for this interpretation being erroneous. I shall content myself with pointing out that the learned Judge gives no reason whatsoever for his ruling, that the words 'any other law for the time being in force'

(4) [1896] 20 Bom. 304.
(5) [1902] 26 Bom. 76=3 Bom. L. R. 431.
(6) [1909] 33 Bom. 69=1 I. C. 622=10 Bom. L. R. 366.
(7) [1913] 37 Bom. 639=19 I. C. 786=15 Bom. L. R. 340.

had reference to the provisions of rule 3, order 23 as well, other than this that he found it expedient to do so. In my opinion the case in 37 Bombay, page 639 is entirely inconclusive and carries no weight. The next case cited to us is that of *Vankatesh* v. *Ram Chandra* (8). In this case no award had yet been delivered and the only matter that was before the learned Judges was the reference. The learned Judges held that the agreement to refer to arbitration could not be treated as an adjustment. Although there are remarks in the body of the judgment, which may be cited as authority for the contention of the appellant. I do not think that the case can be treated as an authority for the point raised before us. The judgment of Hayward, J. is very instructive. He referred to the Privy Council case of *Ghulam Khan* v. *Muhammad Husain* (9) and remarked that caution must be observed in giving weight to that distant authority, the case of *Prag Das* v. *Girdhar Das* (5), in view of the observation of the Privy Council. In the case of *Shavak Shaw* v. *Tyabji* (10) Macleod, J. held that it was not intended that a party might apply for a decree under Order 23, rule 3 if the award had been obtained by a reference to arbitration in a matter about which a suit was pending, without reference to the Court itself. In that case, however, the parties agreed, evidently in view of the previous decisions of the Bombay High Court, that the application (for acceptance by the Court, of the award as an adjustment) might be treated as an application under paragraph 21 of schedule 2 of the Civil Procedure Code. The application was thereupon ordered to be set down for hearing accordingly. The last case in the Bombay High Court is that of *Mani Lal* v. *Gokul Das* (1) and it entirely favours the respondent-applicant's contention. Macleod, C. J. went so far as to hold that either party could file a suit to enforce the award and apply for a stay of the original suit, where a reference to arbitration of the subject-matter of a suit was made without the intervention of the Court. Fawcett, J. thought, and he was right so far as the Bombay High Court was concerned, that there was a very considerable weight of authority in favour of the view that an agreement to refer the matter in suit to arbitration and the award made thereon might amount to an adjustment of the suit by the lawful agreement within the meaning of Order 23, rule 3 of the Civil Procedure Code (*vide* page 268 of the report). Then he considered the question whether S. 89 of the Civil Procedure Code prevented the operation of Order 23, rule 3. He admitted (page 273 of the report) that no doubt the words 'other law for the time being in force' were inappropriate for covering a provision of the Code itself such as Order 23, rule 3. But he thought that the legislature in enacting S. 89 probably had not that particular rule in their mind and had no intention of affecting it one way or the other. I have already attempted to show that S. 89 read with Sch. II provided a complete machinery for all kinds of arbitration and only required that proper methods should be followed. I have also attempted to show that Order 23, rule 3 was meant to apply to entirely different matters and if an arbitration award was ever in contemplation the legislature would not have taken a very very round-about and doubtful way of expressing their intention. I am clearly of opinion that no Judge has a right to over-ride the clear provisions made by the legislature on the plea that probaly the legistature forgot something or had not something in their mind. I may mention that this case in 45 Bombay was a Letters Patent Appeal against the judgment of Kajiji, J. and that learned Judge held an entirely contrary view.

Coming to the Madras High Court we have but one case and that was an exceptional one. It was the case of *Chinna* v. *Venkataswami* (11). In this case the parties agreed to abide by whatever was decided by the presiding Judge of the Court in association with two private persons. The three gentlemen came to a certain decision and the decree of the Court was made in accordance therewith. The question arose whether the decree could be appealed against. The learned Judges held that the decree must be taken to have been a consent decree and that no appeal lay. Further comment

(8) [1914] 38 Bom. 687=27 I. C. 46=16 Bom. L. R. 653.

(9) [1902] 29 Cal. 167 = 29 I. A. 51=6 C. W. N. 226=12 M. L. J. 77=4 Bom. L. R. 161 =8 Sar. 154 (P. C.)

(10) [1916] 40 Bom. 386=37 I. C. 140=18 Bom. L. R. 559.

(11) [1919] 42 Mad. 625 = 36 M. L. J. 291 = (1919) M. W. N. 221=51 I. C. 827=25 M. L, T. 397.

is needless. This case does not throw any light on the point in controversy before us.

Coming to the Calcutta High Court, there are only two cases. In the case of *Amar Chand* v. *Banwari Lal* (2) Rankin, J. held that where in a pending suit parties went to private arbitration without the consent of the Court, the award could not be enforced either under Order 23, rule 3 or under the provisions of the Indian Arbitration Act. The learned Judge bases his opinion on the remarks of their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Husain* (9). He points out that their Lordships of the Privy Council pointed out the scheme of the rules as to arbitration as contained in the old Code and held in effect that the rules covered all cases. Compare the remarks of Hayward, J. in *Venkatesh* v. *Ram Chandra* (8). Their Lordships of the Privy Council pointed out at page 182 of the report that, where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, all proceedings from first to last are under the supervision of the Court. Evidently the S. 89 of the Civil Procedure Code was enacted on the basis of this Privy Council case, and it provided that all references to arbitration, to be of binding effect, must be made according to schedule 2 of the Civil Procedure Code.

In the second case, Rankin, J. was associated with Sir Ashutosh Mukerji, J. and the two Judges in the case of *Rampratap Chamaria* v. *Durga Prasad Chamaria* (12), affirmed the opinion of Rankin, J. as expressed in the case in *Amar Chand* v. *Banwari Lal* (2) and in the still earlier case in 27 C. W. N., page 128.

The review of authorities shows that there is a complete divergence of opinion between the Calcutta and Bombay High Courts and that the opinion of the Madras High Court is inconclusive. The review further shows that the learned Judges of the Bombay High Court found it difficult to get over the provisions of S. 89 of the Civil Procedure Code and Kajiji, J. thought that it was conclusive that an award arrived at, on a reference out of Court, could not be treated as an adjustment under Order 23, rule 3. The learned Judge Davar found it expedient to read S.89 as if excluding Order 23, rule 3 out of its provisions, Fawcett, J. found that this was not possible to do, but he thought that the legislature had forgotten what provisions they were going to make in the schedules when they enacted S. 89 in the body of the Code. The authority of the Bombay High Court is therefore, of doubtful strength.

I have already given my own reasons for my conclusion, *viz.*, (1) an award is not an adjustment by an agreement of parties within the meaning of rule 3, Order, 23 and (2) even if any contrary opinion could be entertained before the passing of Act V of 1908, S. 89 of the Act makes it impossible to maintain such an opinion. I may point out that in this case the parties themselves contemplated that the appeal in which the present application has been made, and the application for leave to appeal to the Privy Council against the decree awarding possession to the present respondent, should be withdrawn before the arbitrator entered upon the arbitration.

On fact and law, therefore, I would hold that the respondent's application is without any force and I would dismiss it with costs.

By the Court.—In accordance with the view of the majority, the appeal is dismissed with costs.

Appeal dismissed.

(12) 1924 Cal. 567=28 C. W. N. 424.

1925 ALLAHABAD 518

STUART, J.

Kashi Nath and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision No. 136 of 1925, Decided on the 25th March 1925, from an order of S. J., Benares.

Gambling Act, (3 of 1867)—Act extended to north bank of Ganges—Gambling on Benares side of mid-stream is no offence.

By a Government Notification the Gambling Act, was extended to the North bank of the Ganges. The gambling took place in a boat which was on the Benares side of the mid-stream of the Ganges.

Held: that no offence was committed because the gambling took place outside the area to which the Act applies. [P 519 C 1]

Kumuda Prasad—for Applicants.

M. Waliullah—for the Crown.

Stuart, J.—The only point which has been argued on this application is the point of jurisdiction. The applicant's counsel maintains that the gambling did

not take place within the area to which the Act had been extended by the Government Notification of the 14th June 1910.

The gamblers were gambling in a boat which was on the Benares side of the mid-stream of the Ganges. After examining the Notification, I am of opinion that the Southern boundary of the area to which the Act extends is the North bank of the Ganges. Where the notification says "the Ganges" I understand it to mean the North bank of the Ganges and not the mid-stream.' It follows from this finding that no offence was committed because the gambling took place outside the area to which the Act applies.

I, therefore, allow this application and set aside the convictions and sentences. The fines, if paid, will be refunded. Those applicants who are in jail, will be released at once from custody. As I find that there was no case, I set aside the convictions and sentences even of those persons who have not applied in revision.

Conviction set aside.

★ 1925 ALLAHABAD 519

WALSH AND MUKERJI, JJ.

The Union Bank, Allahabad (in liquidation):—In the matter of.

Misc. Case No. 340 of 1924, Decided on 27th March 1925.

★ (a) *Companies Act,* (7 *of* 1913) *S.* 235—*Distribution of dividends when no profits are earned is misapplication of funds.*

Distribution of the monies of a Company to the share-holders in the shape of dividends or profits when in fact no profits are being earned is misapplication of the companay's funds.

★ (b) *Companies Act,* (7 *of* 1913) *S.* 281—*Directors being required by Articles of association to control management of company but blindly trusting dishonest manager are not exempt though honest.*

Under the Articles of Association of a company the directors were made responsible for the management of the company. The manager was to be entirely under their control and they had even the power to dismiss him. The directors blindly trusted a dishonest manager and allowed themselves to be in utter ignorance of the affairs of the company. The directors were not dishonest.

Held: "that the directors had not acted reasonably" and so could not escape liability for any charge against them (*English case law discussed.*) [P 520 C 2]

(c) *Companies Act,* (7 *of* 1913) *S.* 145—*Auditor should satisfy himself whether the books submitted to him show a true state of affairs—Honesty does not exempt from liability.*

Unless Auditors are to be held strictly to their legal liability, however honest they may be, the object of the Legislature in requiring a certificate from them is absolutely defeated. It is nothing to an auditor whether the business of a company is being conducted prudently or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit and his duty is confined to that. He is to ascertain that position by examining the books of the company. But his first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. If he fails in his duty he will be jointly and severally liable with those who are responsible for the management of the company, although he is not guilty of any dishonesty.

(d) *Lim. Act Art.* 118—*Registration with Registrar of companies is registration.*

Per Mukerji, J.—Registration with the Registrar of Companies is as much a registration within Art. 116 as registration under Act 16 of 1908.

★ (e) *Companies Act, S.* 235 (3)—*Lim. Act, Art.* 120 *alone applies—Time runs from appointment of liquidators—Lim. Act, Art.* 120.

Article 120 is the only article applicable to an application under S. 235 of the Companies Act; and time begins to run only after the appointment of the liquidator. [P 528 C 1, 2]

H. C. Desanges—for Official Liquidator.

Peary Lal Benerji and *Siva Prasad Sinha*—for the Directors.

Walsh J.—This is a claim by the Liquidator of the Allahabad Union Bank Ltd., liquidation, against several Directors, and also against a Director who, in the later years of the Bank's existence, became Auditor, for various alleged acts of mis-application of the Company's funds, and of misfeasance under section 235 of the Indian Companies Act of 1913. The particulars originally filed show a claim of Rs. 1,41,000 odd representing the cumulative liability of all the Directors in respect of all the charges. That total is divided into three classes, namely a sum for payment of dividends year after year when the Company was making no profit but a loss, and, therefore, out of capital, a further large sum of Rs. 56,000 described as value of grain but being in fact an alleged loss which the Company suffered by reason of the failure of certain of the Directors to obtain adequate security by way of grain from a Company called th

Annapurna Company Ld. and a further item stated at Rs. 42,000 described as a floating account. The latter claim was withdrawn in the course of the proceedings on the ground, as we understood it, that it was included in the mis-statements contained in the accounts in the Company's books and if it really represented a sum of money which had disappeared, it was for the purposes of this section included in and therefore overlapped the dividends which have been alleged to have been improperly paid. With regard to the second item, namely the loss which the Company incurred through the failure of certain of the Directors to obtain adequate security over the grain, we have come to the conclusion that although some of the Directors cannot be acquitted of the charge of negligence in respect of this matter, and although as will appear hereafter we are of opinion that the circumstances connected with this transaction were such as to put them on enquiry and to arouse their suspicion as to the way in which the business of the Bank was being carried on, on the other hand, the evidence which the Liquidator has been able to lay before us falls short of satisfying us that any amount of grain which the Annapurna Company had control of free from encumbrance, and which it could have, by proper steps taken on the part of the Directors of the Bank, given as a good security to the Bank, can be identified so as to be described as a direct loss resulting to the Company due to any specific act, or omission of which any particular Director or Directors can be said to have been guilty. We are, therefore, in substance, called upon only to deal with the very serious claim amounting to nearly Rs. 50,000 improperly paid by way of dividend which the Liquidator makes under this section against the various Directors jointly and severally who can be shown to be legally responsible for that undoubted loss. The matter has been very fully discussed before us both on the accounts, the report of the Liquidator and the conduct of each of the Directors repsectively and on the legal aspect of the matter, assuming that the Directors, as we hold, acted honestly, that is to say, without being guilty of any conscious fraud. Almost all the relevant English cases have been brought out in review before us with a view to showing what is the real legal test. I should have preferred to have taken time to consider my judgment but I am prohibited from so doing by the fact that this is the last day upon which it is possible for me to sit in this Court for at least another six months and it would be obviously undesirable from every point of view to postpone our decision in the matter especially having regard to the fact that the Court is unanimous with regard to all the matters which we have to decide. It seems to us that in the end the test of legal liability must depend upon our application of section 281 of the Companies Act to the established facts of this case, although in discharging that duty it is no doubt useful for the Court to be guided by the way in which higher authorities have regarded this subject in other cases of the same or of similar character. If we come to the conclusion, as we do, that the monies of the company were misapplied by being distributed to the shareholders in the shape of dividends or profits, when in fact no profits were being earned and that, therefore, such monies were part of the Company's capital and that such conduct on the part of the Directors was breach of the Company's articles, a misapplication of the Company's funds and a breach of such trust as the law holds Directors of a Company to be under, we then have to consider under section 281 whether in regard to each of these Directors who took part in such breach of trust, he has acted not only honestly, but also reasonably so as to show that he ought fairly to be excused for such breach of trust.

The story of the case is a painful and pathetic one. The Union Bank was established in 1905 with a nominal capital of Rs. 20,000 which was subsequently increased, and in a modest way appears to have done in its early stages, fairly satisfactory business and slowly to have earned a reputation and the confidence, at any rate, of the Bengali community, which is a very large one in Allahabad. The founder and moving spirit, and, as it is now shown, the master of its destinies was one Kedar Nath Mitra, himself a Bengali, a man no doubt of ability in whom everybody who knew him believed and in whose honesty his colleagues, friends, and persons associated with him in business placed confidence. The task of the Liquidator in this case, and the task of the Court, and the burden of meeting the

charge thrown upon the Directors, have not been rendered less onerous by the mysterious disappearance of this man. The company winding up, a Judge of this Court issued a warrant for his arrest. The Criminal Investigation Department have done their best to find him. The properties which he is alleged to possess and to have acquired from his ill-gotten gains out of this Company have been attached, but since June 1924 he has vanished, it may be said from off the face of the earth, and nobody seems to have the faintest idea what has become of him. It is to be put to the credit of the Directors charged in the case, and the main question which arises for decision is whether that fact affords them a complete defence or not that they and the share-holders and the creditors and depositors have been brought into the disaster which has attended the Bank by misplaced confidence in this undoubted knave.

One or two general observations seem to be relevant. Company business as understood and worked on a very large scale by business men in England is not understood and nobody would suggest that it was understood in India, and particularly in Allahabad to the same extent. It is to some extent and was no doubt to some of the gentlemen concerned in this Company to a considerable extent, unafamiliar ground. It is also relevant to observe that the Union Bank Ltd., is not such an institution as is ordinarily understood by the word "Bank". It had no investments in the ordinary sense of the word, no gilt-edge securities, no current accounts or anything substantial in the way of current accounts, and nothing in the way of a large floating cash balance passing between itself and its customers daily, such as an ordinary old-fashioned Bank has with a large number of customers on its books dealing with it on current account. It was, if we may use the expression, a sort of glorified money-lender, or bania holding itself out to the Bengali community as willing to take charge of their savings on fixed deposit with a satisfactory rate of interest and to take care of those savings so common to many members of the Indian community which are put on one side to provide for the important domestic event, which occurs to most of them, of marrying their children. But the substratum of its business, and the source to which it looked for any profit which it could reasonably hope to make at any time, took the form of loans to customers upon securities. Now it does not require a high degree of business training or even of education to appreciate that the essence of such a business and the hope of its success must depend in the long run, as a matter of daily consideration by those responsible for its conduct, upon the solvency of the debtors to whom the money is lent, and the adequacy of the security which they are prepared to give. A bank of this kind, or a money lender who contented himself with lending money at random without regard to the solvency of the customers and without requiring either adequate or any security at all, would merely be rushing to his own ruin, and it cannot be disputed in considering the conduct of this particular Bank that if it was to make any profit at all, its debtors ought to be responsible persons who were able to keep up their payments of interest or who, if they got into arrears, had provided security adequate to enable the Bank to recoup its original loan with a reasonable profit by way of interest thereon. The Memorandum of Association describes the objects as including every description of banking, trading and mercantile speculation, and to any body acquainted with this class of business in India, it is common knowledge that banking business of this kind is largely done by the deposit of ornaments, and the substantial business of the Company was that of granting loans upon ornaments. That this part of the business was not only the principal feature, but was also intended to be controlled by the Directors so that the Manager in carrying out the daily transactions of the Bank should not have a free hand, is clearly shown by Articles 74 and 75 which restrict his powers in that respect. One further observation ought to be made, because it has an essential bearing on testing the degree of diligence and due care which these Directors from time to time exercised. The premises of the Bank were not on a large scale. Originally the Bank and also the Annapurna Company Ltd. of which Kedar Nath was also the moving spirit and which figures to some extent in this case, were both of them situate in a room in the actual house in which he resided, such room constituting the offices of the two com-

panies. There Kedar Nath Mitra, who was to a large extent the Company's Secretary and to some extent his own clerk, was always to be found and transacted the daily business of the Bank. There were kept under the same roof in a safe or locked almirah, some such modest receptacle as was considered safe and convenient, such ornaments as the Bank held by way of security against its debtors. There also the Board Meetings of the Directors were held. So that if, for example, at the time of the discussion of any monthly statement or abstract or at the time of the preparation or discussion of the balance-sheet, the amount of securities by way of ornaments which the Bank held, and which they ought to have held having regard to the loans which they had issued, was to be tested, all that was required was for one of the Directors to ask Kedar Nath Mitra to open the safe or almirah and show them what was there, and it would not be difficult for anybody to know whether the accumulated ornaments deposited in this Bank by way of security amounted at any one time to a lac of rupees or anything like that sum or whether they represented in value no more than Rs. 20,000 or Rs. 10,000. That observation is important because the Directors are not charged here with breach of duty in failing to obtain or make an accurate valuation of actual securities, which they took after having accepted security by way of ornaments nor is it said that they failed to take care to prevent such an accident as may happen such as a sudden theft or a dishonest Manager surreptitiously and suddenly removing a large quantity of such securities. The charge against them substantially is that they carried on unprofitable business and allowed Kedar Nath Mitra to make loans of large sums to worthless insolvent debtors. If the Directors had troubled to enquire into even their names, they would have known at once that many were unable to pay and that large sums were issued by way of loans without any security whatever. So that at any time during the years in respect of which these Directors are charged with neglect of their duty, a comparison of the paper statements of securities in possession of the Bank with the actual ornaments at that time in existence within the four walls of the Bank's premises, would have shown that the Bank was unsecured and on the road to ruin. The relevant articles to which our attention has also been drawn are Article 81 dealing with payments of dividends, Article 88 dealing with the keeping of accounts and of the monies received and Article 73 dealing with the relation of the Manager to the Directors and the superintendence and control which they undertook to exercise over him.

With regard to the history of the Bank and its financial position from time to time and the causes which brought about its failure, the Liquidator's report, was admitted in evidence with the consent of the Advocate for the defendants, and of Mr. B. L. De who appeared in person, as showing accurately the figures to be found in the books subject to the defendants' objections to any omission, modification, addition or explanation which they might establish by their evidence and from the report and from the evidence of Mr. Maurice Govia who although not actually responsible for the report, has worked as the representative of the Liquidator in Allahabad and investigated the affairs of the Company on behalf of the Liquidator—the principal of the firm himself being unfortunately prevented from giving evidence by indisposition—it was clearly established, and not challenged by the defendants, that although possibly profits were made in the early years of the Company's existence—to what extent he was unable to say—all profit ceased in the year 1915, and that from that year the Company was carrying on at a loss. Inasmuch as it was paying a large dividend through the course of the years with which we have to deal, namely 1915 to 1923, things were slowly but steadily going from bad to worse, and at the date of the liquidation, it had substantially no securities in its possession against a liability of considerably more than 2 lacs. The Liquidator says that such ornaments as there had been in the possession of the Company as against this liability of 2 lacs, namely about Rs. 21,000, had been surreptitiously and dishonestly re-mortgaged by Kedar Nath for his own purpose to other persons. This transaction of re-mortgaging was to some extent authorised by a resolution of the Directors. It has formed the subject of another litigation between the Liquidator and the sub-mortgagee, and need not be further considered as it has

no real bearing on the question we have to determine. It merely illustrates one of those acts of a dishonest Manager which the most competent Board of Directors exercising due care may be unable to prevent. That is to say, they may authorise by a resolution the raising of a loan on security to a limited amount, and thereby give a dishonest Manager an opportunity of surreptitiously misappropriating securities not covered by the resolution and so rob the Company. The Directors are not charged in regard to this matter, but an inspection of the balance-sheets from year to year shows, when the statements in them are compared with the state of things disclosed when the Company came to grief, a startling contrast and a state of things, the knowledge of which could not have been withheld from any Director who took the least trouble to acquaint himself with the affairs of the Bank. The Company were paying and advertising themselves as paying to depositors 6¼% interest on fixed deposits for 12 months, 5½% on 9 months deposit, 4½% on 6 months, and no less than 6¼% on the Family Endowment Fund. They were at the same time paying to their shareholders dividends varying in the years with which we have to deal between 9% and 7 & 1/2% on paid up capital of about Rs. 64,000. They were advertising on the front page of their balance-sheet a yearly increasing working capital which amounted in the last year to Rs. 2,18,743. That sum represented the total of the paid-up capital to which I have just referred and of the amounts of deposits and Endowment Fund which the public and their customers had entrusted to them. Substantially as against this liability the Bank was said to hold assets in the form of debts considered good, in respect of which the Bank was fully secured in the last year stated at Rs. 2,18,600. The truth about that is that year after year nobody could possibly have considered the majority of these debts to be good at all. In substance, the only person who knew anything about them was Kedar Nath Mitra, and, as will appear in a moment, he knew perfectly well that a very large quantity of them were hopelessly bad. The Directors, as appears from their admissions, knew nothing whatever about them at all and certainly never considered them, and as to the securities, they never took the trouble to enquire into or to see the ornaments which were actually in the Bank's premises visible to the eye and which were the only goods which the Bank purported to hold. It is idle to contend that the Directors were not expected to exercise some judgment with regard to the acceptance of loans on security. No complaint, as I have already stated, is made in this charge against them that they are not experts in jewellery and that they have failed to estimate the value of the securities accurately. But from time to time loans were submitted to them for their approval and a statement was made of the security offered, and such matters were of course in the strict conduct of business bound to be submitted to them because of Articles 74 and 75. But a very simple calculation will show that the amounts which each Director yearly stated to be debts fully secured, had no relation whatever to the amount of actual loans which they had approved during the past 12 months. It is admitted that not one of these Directors ever asked a question of the Manager with regard to the names of the customers, the character of the customers, their position in life, or the securities which they had either individually or cumulatively desposited with the Bank. If any single Director had spent a casual half hour either in perusing the list of the debtors, or in calling for the security or in looking at the books of the Company in which the debtors, names appeared, he must have discovered certain obvious facts. To take one salient illustration, amongst the debts alleged to have been fully secured and entered in the Company's books as an asset was at the time of the liquidation an accumulated liability of principal and interest due to the Union Bank from the Tata Industrial Bank. At the time when these entries were made and the Tata Industrial Bank was being treated as a debtor of the Union Bank, the Tata Industrial Bank, it is not too much to say, was known by name throughout India as a substantial and, as far as the public knew, a very flourishing concern in Bombay, bearing the name of a distinguished and successful man of business in Bombay. It is not disputed that the notion of the Tata Industrial Bank coming to Allahabad to borrow money

from the Union Bank, was ridiculous upon the face of it, and would be bound to arouse the suspicion of any body. The account of the Tata Industrial Bank showed that they had borrowed from time to time not very large sums, Rs. 1,500 or 2,000 or perhaps even more and that they had agreed to pay for the advantage a high rate of interest. Of course they never paid a pice, because they had never borrowed the money. But the account, if looked at, shows on the face of it that they were in default and although there were cash entries suggesting that they had made payments which took the original date of the loan out of the mischief of the statute of limitation, the principal and high rate of interest was running against them year by year so that the ultimate result bore to the original loan the proportion which is only to be found where an exhorbitant money-lender is charging a high rate of compound interest against a poor defaulting debtor in need of immediate cash. Mr De, who, was a Director during a large portion of the currency of this loan, and the Auditor who included it in the debts fully secured, and therefore the assets of the Bank, said about this : "If I had properly examined the accounts, I would have found that the Tata Bank had not paid a farthing of interest. I think it was my duty to have insisted upon an explanation why the Tata Bank had not paid a pice. It would have aroused the suspicion of any ordinary man. The entry against the Tata Bank now looks to me as a palpable sham. I did not take the slighest trouble to ask the Manager, Kedar Nath Mitra, 'the history of this debt." It is inconceivable how any Auditor doing his duty could possibly, finding the Tata Industrial Bank defaulters to such a large amount at such a high rate of interest with a small concern like the Union Bank in Allahabad, have failed to ask the Manager about it. The same observation applies to all the Directors who failed as they did undoubtedly fail, to ascertain from the Manager the names of their customers. Had one of them discovered this fact, he must have known at once that the Bank's business was being fraudulently conducted. The Directors' attention was specifically called to the Tata Industrial Bank in this way. Kedar Nath Mitra suggested to the Board, on the 19th of March, 1919, as appears in the evidence, that he should be allowed to invest the money of the Union Bank in the purchase of one hundred Tata Industrial Bank shares. The fact is that this is almost the only attempt the Directors ever made to invest any part of the capital of the Bank in outside security, if not the only. The Directors in 1919, and those who approved the next balance sheet, never took the least trouble to ascertain whether these shares had been purchased, in whose name they were, and where they were kept. They were never seen. All we know about them is that according to the statement of the Company with which the Tata Bank has now been amalgamated shares of the Tata Bank were purchased from Kedar Nath Mitra at some subsequent date, and the money was paid to Kedar Math Mitra's agent in Bombay. That investment of the Union Bank authorised by the Directors apparently went straight into the pocket of Kedar Nath Mitra, and no one appeared to take any trouble to ascertain where the shares were, nor was the investment specially referred to in the subsequent balance-sheet. But one would have thought that a transaction out of the ordinary course of the Bank's business of that kind placed upon the Directors the business duty to see that it was carried out and if, as I have already pointed out, the name of the Bank had been searched for in the books of the Company, the state of this fictitious account would have been discovered. It is true to say and we accept the view that if the Directors had discovered the truth or anything like it, they would have immediately put down their foot and brought it to an end. The same observation, as has been made about the Tata Bank, may be made about the series of family loans which at the date of the liquidation were outstanding against Kedar Nath Mitra's family. These loans included a deceased brother, a penniless brother, who has admitted in this Court that he signed a promissory note for Rs. 5,000 for an alleged loan made to him by Kedar Nath Mitra when no money passed at all and Kedar Nath Mitra's wife. The total amount of irrecoverable loans advanced by the Company through Kedar Nath Mitra to his own family together with accumulated interest amounts to Rs. 56,172. The figure includes his own overdraft of Rs. 18,000. Here again it must be observed that this class of debt which the Directors unknowingly permitted to

be entered in the balance sheets as debts fully secured, was not a sudden phase. They were all debts long outstanding carried forward year by year with the accumulation of interest which added to the total liability appearing year by year in the Company's books represented a large portion of the apparently substantial business of the Bank. When it is said against the Directors that this money, alleged to have been lent to the Tata Bank and alleged to have been lent to the family of Kedar Nath Mitra, simply went into the pocket of the Managing Director and was a dead loss to the Company, can a Director be heard to say: "We knew nothing of all this, because we did nothing, we asked questions, we never knew who the debtors of the Bank were, we never troubled to ascertain what the securities were which the Bank held." To pay as the Bank purported to pay a high rate of interest to depositors and a large yearly dividend, the Bank must have been earning a substantial gross profit. It could not do the business, and pay the dividends, which it was doing without earning substantial profits. Where did the Directors suppose that these large profits were coming from? The law, according to my view, clearly established by the authorities in the English reports, makes them at any rate fiduciary custodians of the money entrusted to the company by the depositors, and of the ordinary capital subscribed by the share-holders, and the more satisfactory on the face of it, the more glowing in character the success of the Bank appeared to be, the more the Directors, one would have thought, were called upon as ordinary responsible business men to satisfy themselves that these large profits were really being made. In the course of the cross-examination of Mr. Govia a question was put to him suggesting that a Bank might in the case of a good debtor treat as realised, income due by way of interest which had not been paid or, in other words, that according to sound banking business, it is legitimate in the case of a good debtor to treat as profit earned that which has accrued due although it has not been paid, and Mr. Govia said that he would not be surprised if he found that Banks were in the habit of doing that. But of course a Bank can only justify doing that, and the Directors can only justify a payment out of profits, which means realised profits. If they have satisfied themselves that the debtor, whose particular liability for interest has fallen due but has not been paid is a man whose liability is as good as cash, and if in a succeeding year he again does not pay, it is their duty to write that off as a loss in the following year's profits and loss account until the sum is realised. That is to say that which is a legitimate risk for a business man to take in a sound business concern, can only be justified where the Directors have taken reasonable care to satisfy themselves that the debtor is a solvent person, and that though he is temporarily in arrears, the liability is a good one, and it seems to me that where it is shown afterwards that the debt was a bad one, a Director cannot escape from liability by merely saying: "I shut my eyes. I knew nothing about the debtor. It did not matter to me whether it was good or bad. I knew nothing about it." In matters of this kind it seems to me as an ordinary business consideration, that the share-holders must be taken to say to the Directors: "We select you as Directors and we entrust all our monies and the management of our interest with you, and we look to you to protect us." Taking the last year or two as an illustration of the extent to which the capital had disappeared, the working capital, as I have already mentioned, is there shown to be something more than two lacs. That capital is a security to the depositors who look for payment of the amounts which they have deposited, to the creditors who look to the Bank for payment of what is due to them, and to the share-holders who look for recoupment of their investments. Taking a general view of the matter, it appears that in this case something more than half a lac, namely Rs. 56,000, disappeared in the loan to the Mitra family, something like Rs. 56,000 or more than half a lac, disappeared in the bad debt which was never secured, of the Annapurna Company; something like Rs. 4,000 a year, representing, according to the evidence of the liquidator, the actual loss that this company was making multiplied by the 9 years with which we are concerned brings the figure to about Rs. 36,000; while the amount which was divided between the share-holders in dividends during the same period amounts to nearly 45,000 rupees. Without being able at this date to affirm positively, one

can only say that these calculations appear to explain the disappearance of the capital which year by year the Directors were showing to the shareholders, the depositors, and other creditors, was in the possession of the Bank fully secured. The liquidator in the course of his evidence showed how he arrived at the conclusion that the Company, was carrying on at a loss. He drew our attention to the fact that at the end of 1917 the total arrears of interest were Rs. 30,819 but the way he put it was this. The interest which was actually paid by the debtors to the Bank in 1917, as shown by the books, was Rs. 4,660 as against expenses of Rs. 8,600 showing that on the actual working of the business there was a loss of Rs. 4,000 per annum, and inspite of that a dividend was declared of Rs. 4,464. He further stated that a study of the books shows that in order to justify on the face of the books the payment of these dividends, the interest which they were earning was roughly speaking 1/5th of the outstanding principal, or, in other words, 20% on the outstanding loans, and he also showed that a careful examination of the books by the Auditor or any Director, who was desirous of checking the monthly statements or the yearly balance-sheet, would have shown, for example, that whereas in the year 1919 Rs. 11,862 was due as interest, only Rs. 5,000 was realised, in 1920 where Rs. 13,034 was due by way of interest, only Rs. 3,964 was realised, in 1921 whereas Rs. 13,638 was due by way of interest, only Rs. 5,256 was realised. It seems to me that all this, which appears from a cursory examination of the books, throws upon the Directors, the defendants to this charge, the onus of showing that they acted reasonably and had real grounds such as would operate upon the minds of business men, for believing that these false balance-sheets and false statements, that had been published, were really true. They have said over again—it is not necessary to repeat at length their depositions—that they had no reason to suspect. Mr. Ghose, for example, who was a Director throughout the whole period, and whose attitude fairly represents that of the others, said : "Had I looked at the books, I would have come to know the state of things. I never saw the Tata shares. I never saw any security. I did not know anything about them, and I did not know anything about the ornaments which the Bank held. I did my best at the meetings. I had no reason to suspect that anything was wrong." From time to time it does appear that an effort was made by individuals to keep some check upon the conduct of the Manager. In 1915 a Mr. Bhargava complained, and wrote a note in the minute book of the general meeting of share-holders, drawing the attention of the share-holders to doubtful debts,and saying that dividends should not be paid out of capital, and that the Articles of Association had been ignored.It is not clearly shown that this pretest was brought home to any of the persons before us, as none of them, it appears, were Directors at that time. But it merely illustrates the sort of standard which a business man would ordinarily set himself as a Director who undertook to the share-holders to look after the business and control the management. Again in 1923 Mr. Asotosh Mukerji in the month of June complained that the Directors of the proceeding meeting in May had given the Manager too wide a power to deal with the investments of the Bank and he was overruled by the other Directors in that particular meeting. It was that resolution which Kedar Nath used as the authority for re-mortgaging the ornaments. These are matters which indicates when certain Directors chose to open their eyes to anything at all, what they thought it their duty to do. The transaction with regard to the Annapurna Company, which came to the knowledge of many of them and which was a debt which was a constant source of enquiry, was one of those circumstances which, according to ordinary business standards, ought to have put the Directors for the time being upon enquiry with a regard to the other transactions of the Bank. In 1915 the liability of the Annapurna Company had amounted to Rs. 42,000 for which there was no security. A share-holders' meeting was called, a committee of the Directors was appointed and a resolution was passed distinctly prohibiting any further business with this company without further security, but as the result of this, little or nothing was done. It looks from the Liquidator's report on page 9 as though inspite of the resolution that no further business should be transacted, further business was transacted. It is true that interest would be accumu-

lating upon this account automatically. There is no evidence before us as to how the amount was accumulating. The Annapurna Company is hopelessly insolvent, is in liquidation, and its books of account are said to be in a state of utter disorder, but between 1915 and 1917 the amount increased by 4,000 and between 1917 and 1919 it increased by Rs, 8,400. A committee was appointed containing several persons besides Directors, and in the result the Bank was supposed to have secured possession and control of the Annapurna grain as a preliminary step to a complete mortgage. Ultimately in 1923, 8 years after the resolution of the share holders, a mortgage-deed was brought into existence. It probably surprised nobody that by that time there was no grain. Where the grain went to—which so much trouble had been taken to capture and secure and to put under double locks, with one key in the pocket of each independent authority interested in it—nobody to this date has been able to explain, and probably nobody ever will. Its disappearance as an asset of the Annapurna Company and as a security to the Bank, is as mysterious as that of Kedar Nath himself. But can any reasonable person say that the absence of security for this loan, as far back as 1915, and the complete failure on the part of Kedar Nath and of the Board to secure the Bank with regard to this large liability was not sufficient to create suspicion and doubt in the mind of any reasonable person with regard to the satisfactory nature of the business ?

A further observation must be made with regard to the statement in the balance-sheet relating to the Reserve Fund. The Auditor, Mr. De, who signed this balance-sheet was recalled, and all he could say was that it was a misnomer. It is idle for Directors to say that they are not responsible to the share-holders or to the creditors, or under this section for failure to carry on their duty, because they did not understand the business or because they knew nothing about it. To accept such a dictum would involve holding that the less the Directors, knew, the less their liability for misfeasance committed in the conduct of the business, and here although the ordinary meaning of a reserve fund is perfectly well-known and must have been perfectly well-known to all as an accumulation from annual profits put by as security against some contingency for which it may be required, this reserve fund with accumulations entered in the balance-sheet with all the appearance of a flourishing and well secured Bank, had no meaning whatever. If it is put into the balance-sheet as the liquidator, Mr. Govia, explained to the Court, as a liability being treated for that purpose in the same way as profits actually earned in the year's working there ought to be an asset upon the other side corresponding to it generally in the shape of some gilt-edged security, or other sound investment. As a matter of fact this reserve fund was not only a misnomer, as Mr. De called it, it was a sham and a fraudulent statement, and was in fact money which had been issued by way of loan to the debtors of the Company.

Under these circumstances I come without hesitation, or perhaps I ought to say, I should come without hesitation, independently of any authority cited to us, to these definite conclusions. This company made no profit whatever from and including 1915 ; every rupee distributed by way of dividend was part of its capital ; all the dividends for the year 1915 onwards were paid out of capital ; I am satisfied of that as a fact that although the Directors honestly did what they did trusting in Kedar Nath, the duty imposed upon them by the Articles was such—giving due weight to everything which they have said—as to place the onus upon them of showing that they acted reasonably. I, therefore, hold that they are *prima facie* liable under S. 235, and that they have failed to discharge the onus which the law imposes upon them by S. 281. Out of respect, however, to the learned arguments addressed to us on behalf of the defendants, and recognizing that the principle underlying the administration of these sections must be governed by the authorities upon the question in England, which of course I am prepared in every way to follow as far as I can where they apply to the particular case before the Court, I propose to deal shortly with the cases upon the subject. The first point taken on behalf of the defendants—and it applies to every defendant in a greater or less degree, except Shanker Prasad, whose claims to be a Director, and whose understanding of the matters which he professed to carry out was less than that of anybody connected with

this case—is whether this claim is, and to what extent, barred by sub-S. 3 of S. 235. It has been held in India by the High Court of Lahore—the case is not reported in the authorized reports -*Bank of Multan* v. *Hukam Chand* (1), that under this provision, Article 36 applies to a claim by a Liquidator under S. 235. With great respect to the learned Judges who decided that case, I am unable to adopt that opinion for the reason that Article 36 deals with compensation for malfeasance and misfeasance independent of contract, and I am of opinion that this claim is not independent of contract. I am unable also to see how Articles 115 or 116 can be made to apply to a claim under this section. To my mind these deal with claims for compensation made in respect of a specific breach of a specific contract made by one or more individuals with the person making the claim. In the case of Article 115 a reference to successive breaches or continuing breaches rather emphasises that view, and I find a difficulty in applying this Article to a claim by a Liquidator. It has been said that S. 235 creates no new rights, but as is pointed out in the latest edition of Buckley on Companies (1924), the statement is only partially accurate. No doubt it provides machinery for enforcing claims which exist independently of the section, but so far as a Liquidator is authorized by this section to apply, in the interest of creditors and depositors who have lost their money, to enforce a claim against the Directors under the section, it seems to me that a new right in him is created. If any Article is to be applied at all to the date from which the liability first came into existence by reason of the act of misfeasance, or breach of trust, which the person is proved to have committed, it seems to me that the only Article which at all fits the case is Article 120, which provides a term of six years for every case not otherwise provided by the Act. If one were driven to do so, the fact that it would result in destroying the value of the section, would be no reason for refusing to apply a particular Article, but in asking myself the somewhat difficult question what the Legislature had in view when it enacted sub-S. 3 to S. 235, I cannot shut my eyes to the fact that if they intended that the liability of a Director for breach of trust and misapplication of funds should be barred, either from the point of view of tort after two years, or from the point of view of breach of contract after 3 years, they might just as well not have enacted S. 235 at all. I do not hesitate to say that after an experience of 9 years in this Court of winding up business, such a provision would render in India S. 235 almost a nullity. This much is clear, that the Legislature distinctly retained from segregating the various claims which can be made under S. 235, and applying to them the appropriate Article in the Schedule. It may be said that they threw that extremely delicate and difficult task upon the Judges instead of discharging it themselves, but giving the best effect I can to the apparent intention disclosed by the language used, I am of opinion that it is only a statutory bar to the right of the Liquidator to make his application against a defaulting Director, and that whatever article of the statute of limitation is applicable, the time begins to run from the date when the liquidation took place, when the Liquidator first had the right vested in him. The result is that no Article of limitation can possibly be a bar to this application, and I hold that sub-S. 3 is no bar. *In re. National Funds Assurance Company* (2), it was held that the powers of liquidator of a limited company are more extensive than those of the company prior to the winding up order. With regard to the meaning of S. 235 and the mischief which it aims at, and the question whether *bona fides* is an answer to a charge of having misapplied monies of the Company by payment of dividends out of capital, I refer to what the Master of the Rolls said at page 128: "That being so, the only question which remains is, have the directors, in the words of the Act of Parliament, misapplied any monies of the company? I think they have misapplied them by dividing the capital among a portion of their shareholders. That appears to me to be a plain case of misapplication within the very terms of the section." The next authority which is material is the well-known case, *In re. Oxford Benefit Building and Investment Society* (3), a case which so far as the Directors were responsible for having paid dividends out of capital

(1) 1923 Lah. 58.

(2) [1878] 10 Ch. Div. 118=48 L. J. Ch. 163=39 L. T. 420=27 W. R. 302.

(3) [1886] 35 Ch. Div. 502=56 L. J. Ch. 98=55 L. T. 598=35 W. R. 116.

in consequence of having invested the Company's funds on bad securities, is very like this case, and in principle almost on all fours with it. I refer to what Mr. Justice Kay said on page 511 :

"Now the basis of this estimate in every case was an assumption that every one of the securities on which the company were advancing money was ample to provide for principal, interest and costs in respect of the advance. And for this they had nothing but the assurance of the surveyor and secretary, Mr. Galpin. He it was also who estimated, according to the 5 per cent. table, the present value of the instalments which each mortgagor had to pay. The auditors neither checked the valuation of the securities nor the actuarial estimate of the mortgagors' repayments, and yet the directors, who were forbidden by their Articles to pay any dividends, except out of realized profits, paid every dividend out of whatever monies they happened to have in hand, which has been called in the argument the floating capital, and never attempted in any report or balance-sheet to distinguish realized profits from the estimated profits which they thus purported to divide, or to ascertain out of what fund the dividends were actually paid.

It has been argued that this was done *bona fide*, and that where directors in good faith have made an error in the computation on which their balance-sheets are founded, the Court will not lightly visit them with the consequences of a *bona fide* mistake I confess I hardly know what is meant by *bona fides* in such an argument. I inquired whether there was any evidence that the Directors had considered the meaning of the Articles or had taken any advice upon them. There is no suggestion that they ever did so.

There is nothing obscure or difficult in the construction, and it seems to me incredible that any man of business could suppose that this course of proceeding was a division of realized profits "

That case was followed by Mr. Justice Stirling in the case of *Leeds Estate, Building and Investment Company* v. *Shepherd* (4). With regard to the liability of an auditor he held :

"that it was the duty of the auditor in auditing the accounts of the company not to confine himself to verifying the arithmetical accuracy of the balance-sheet, but to inquire into its substantial accuracy, and to ascertain that it contained the particulars specified in the Articles of Association, and was properly drawn up so as to contain a true and correct representation of the state of Company's affairs."

With regard to the Directors who in that case were ignorant of the true state of the Company's affairs, but had neglected to enquire into or do anything by way of checking the conduct of the officials, Mr. Justice Stirling said this:

"The conclusion at which I have arrived, upon a consideration of the whole evidence, is that the Directors never exercised any judgment at all with reference to these accounts, but accepted without inquiry or verification whatever Crab tree and Locking told them. In this respect they failed, as I think, to perform the duty cast upon them by the Articles of Association. That duty was to cause estimates of account to be prepared, and upon those estimates to recommend a dividend. In the performance of that duty they were no doubt entitled to avail themselves of the advice and assistance of their Secretary and Manager, and to obtain by that advice and assistance such materials as were proper for the purpose of enabling them to decide upon the questions they had to consider; and having so done, they were bound to exercise their judgment as mercantile men on the materials which they had obtained. This, in my opinion, they never did; but in truth they delegated to Crab-tree the exercise of that judgment and discretion which it was their duty to take upon themselves. Upon the whole, although the Directors were, I believe, ignorant of the true state of the Company's affairs, and although I find no trace of their having acted with the view of obtaining any improper benefit for themselves, I feel compelled to hold that they have fallen short of that standard of care which, having regard to the *Oxford Case* (1) they ought to have applied to the affairs of the Company in the following respects:—(1) They never required the statement and balance-sheets to be made out in the manner prescribed by the Articles : (2) They failed properly to instruct the Auditor, or, at all events, to require him to report on the accounts

(4) [1887] 36 Ch. Div., 787=57 L. J. Ch. 45= 57 L. T. 684=36 W. R. 322.

and balance-sheets in the mode prescribed by the Articles: and (3) they were content throughout to act on the statements of Crab-tree without inquiry or verification of any kind other than the imperfect audit of the accounts by Locking. Those accounts and balance sheets did not truly represent the state of the Company's affairs: and that being so, I think that according to what is laid down in *Rance's* case (2) the onus is laid upon them to show that the dividends they paid were paid out of profits. This upon the evidence before me they fail to do."

Finally it seems to me that the principle laid down *In re Sharpe*, *In re Bennett*, *Masonic and General Life Assurance Company* v. *Sharpe* (5) governs this case. We were, on behalf of the defendants, strongly pressed by the decisions in the cases of *Kingston Cotton Mill Company* (No. 2), (6) and *Dovey* v. *John Cory* (7). I do not propose to discuss the *Kingston Cotton Mill Company* (6) at length. I think it may be said to represent the high water-mark of the immunity from legal liability of the ornamental and "do-nothing" Company Director. It seems to me that there is a broad distinction between the circumstances of that case and the circumstances of this case. It may well be that a director or a body of directors having apparently an honest Manager cannot be, under section 281, called upon to keep a constant watch and check upon a fluctuating stock like yarn which is going in and out of the mill and which is being used daily in the handling of the company's business. To impose such a duty upon directors, as the Courts have said, would lead honest men to refuse to undertake such a responsibility. But that is a very different thing from a Bank Director taking no steps whatever to see that the Manager does not lend the funds and the depositors' and shareholders' capital to worthless debtors and to persons who offer no security. It seems to me that the case of the *Kingston Cotton Mills Company* (No. 2), (6) gives no assistance in deciding whether the Directors are liable in this case. The same I think must be said about the case of *Dovey* v. *Cory* (7). Mr. John Cory was in a very special position. Lord Davey said, and everybody must recognise that the case was a difficult one. Mr. Cory certainly was guilty of doing very little but in that case in addition to the Manager, there was a Chairman of the Board who was actively interesting himself in the conduct of the Company's business, and was no doubt trusted by the Directors, and allowed, so to speak, to do their work in seeing that the Manager did his, and it so happened that this Chairman was not only dishonest, like the Manager, but was a brother of Mr. John Cory, and the Lord Chancellor emphasised the fact in his judgment that he desired to be understood as dealing only with the facts of that particular case. It does not seem to me that the conduct of Mr. John Cory, which was in that case excused, has any relation to the conduct of these Directors. Finally Mr. Peary Lal Banerji pressed upon us as being binding upon us with the force of a statute the dictum contained on pages 109 and 110 of the opinion of their Lordships of the Privy Council in the case of *Prefontine* v. *Granier* (8), where it is said by Sir Arthur Wilson, apparently in general terms, that attempts had been repeatedly made to render directors personally liable on the ground that they had trusted various officers of the company and had failed to detect and had been misled by misrepresentation and concealment by such officers when there was no reason for doubting their fidelity, and that such attempts had not been successful, and it was further said in the course of that passage that it was sufficient to refer to the case of *Dovey* v. *Cory* (7). Paying all the respect which is due to any dictum in an opinion of their Lordships of the Privy Council, I can only say that if it is to be taken as a historical statement of fact, it cannot be accepted as accurate. In fact in that particular case, no negligence was found against the Directors. An appeal was brought against the decision of the Court below, but so little headway did it make on the facts that the respondent's counsel was not called upon, and the judgment does not profess to discuss the cases. I have already pointed out that the study of the case *Dovey* v. *Cory* (7) does not quite bear out the statement

(5) [1892] 1 Ch. Div. 154=61 L. J. Ch. 193=65 L. T. 806=40 W. R. 241.

(6) [1896] 1 Ch. Div. 331=65 L. J. Ch. 290=73 L. T. 745=44 W. R. 363.

(7) [1901] A. C. 477=70 L. J. Ch. 753=85 L.T. 257=50 W. R. 65=17 T. L. R. 732.

(8) [1907] A. C. 101=76 L.J. P. C. 4=95 L. T. 623=13 Manson 401=23 T. L. R. 27

made with regard to it in Sir Arthur Wilson's opinion, and I hold myself not to be bound by that dictum if it is to be taken as laying down the law that wherever a Director honestly trusts a fraudulent Manager, he is free from all liability.

Finally I prefer to base myself upon what was said by Lord Lindley in *In re National Bank of Wales, Limited*, (9). It is the same as the case of *Dovey* v. *Cory* (7), and the judgment from which I quote, is the judgment of the Court of appeal read by Lord Lindley, Master of the Rolls, overruling Mr. Justice Wright, who held John Cory to be liable. He says :

"The question arose, was it his duty to distrust the accuracy and confidence of what he was told by the General Manager and the Managing Director."

(It is to be observed that John Cory was relying on two persons each of whom was supposed to be independent of the other, one being in a position of authority.)

"It is a question," says Lord Lindley "on which opinions may differ."

After further discussion Lord Lindley continues as follows :—

"Cases such as these are always cases of degree. In *Leeds Estate, Building and Investment Co.* v. *Shepherd* (4) (to which I have already referred) the Directors trusted their manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their function to him."

The case of *In re. Denham* (10) is more like the present case, and there the Director was held not liable. It appears that the ruling of the House of Lords in the case of *Dovey* v. *Cory* (7) does not question the principles laid down in the judgment of Lord Lindley from which I have just made these extracts, and does not question the other authorities which were well-known at the time, from which I have cited passages in this judgment. I find myself unable to come to the conclusion that that case altered the law in any respect or made any modification of the principles on which this section had been administered in England.

I come without hesitation to the conclusion following the principles laid down in England, and with due regard to the sections in the Indian Companies Act, that the Directors have failed to show that they had any reasonable belief, and that they are liable, each of them, for the payment which they approved either by resolution, or by signing the balance-sheet, and the report by which it was recommended for dividends paid out of capital from 1915 to 1923. This of course disposes of the case against Mr. De, so far as his liability as a Director is concerned, but it still leaves the question of his liability as Auditor to be disposed of. In my opinion Mr. De was guilty of signing a false statement of a balance-sheet as Auditor. Unless auditors are to be held strictly to their legal liability, however honest they may be, the object of the Legislature in requiring a certificate from them is absolutely defeated. I acquit Mr. De of any conscious dishonesty. I am not satisfied that he deliberately left the Board in order to become an Auditor. I believe he is both in the ordinary way, and so far as the conduct of this business was concerned, a perfectly honest man. But, on the other hand, I hold that he was utterly reckless and indifferent in his conduct as an Auditor. He had been in the employment of the Government in the Accountant-General's office and was a certified Government Auditor. He was trusted to discharge his duty having regard to the experience which he had derived from his previous service, and, in my opinion, he allowed Kedar Nath to throw dust in his eyes and to deceive him in the most obvious manner. Mr. De says that if he had examined the books and asked for an explanation about the Tata Industrial Bank's liability, he would have discovered in two minutes that the affairs of the Bank were in a very critical state and that the depositors and creditors were being defrauded. He never asked a question and he signed a statement in the balance-sheet saying that he had received all the needed informations and explanations. These words are put in for the reason that an Auditor is not a mere arithmetical machine to check the figures in the book. He should have satisfied himself not

(9) [1899] 2 Ch. Div. 629=68 L. J. Ch. 634 =81 L. T. 363=48 W. R. 99

(10) [1883] 25 Ch. Div. 752=50 L. T. 523= 32 W. R. 487.

only that the accounts were correct, but that the books represented the true state of affairs of the Bank. This Mr. De admits he did not do. He also admits that he never took the slightest trouble to ascertain the facts. Here again I do not think it necessary to quote from the authorities. I think the statement which Mr. De himself signed, which I have just read, sets out the standard which the law confers upon him without reference to any authority. But, in conclusion, I will refer to what I believe to be the correct statement of the Auditor's duty, and one which has never been challenged, contained in the judgment of Lord Lindley in *In re. London and General Bank* (No. 2) (11).

"An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question: How is he to ascertain that position? The answer is: By examining the books of the Company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves show the Company's true position. He must take reasonable care to ascertain that they do so. Unless he does this, his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance-sheet showing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do show, but also for the purpose of satisfying himself that they show the true financial position of the Company.

As Auditor, therefore, Mr. De must be declared to be liable for the last two years' dividends, namely 1922 and 1923. In this respect Mr. De is jointly and severally liable in each year with the Directors whom we hold responsible for that year.

Mukerji, J.—After the very exhaustive judgment which has been just delivered by my learned brother, I would hardly consider it necessary for me to say anything by way of addition. But having regard to the importance of this case to the community, which has been hard hit by the failure of the bank, I think I may as well state, very briefly, the reasons which have induced me to agree with the judgment of my brother.

The liquidator has called upon the Auditor and the late Directors of the Union Bank to make good a large sum of Rs. 1,41,000 and odd on the ground that, between themselves, they have allowed so much money of the Company to be mis-spent. The application is one under S. 235 of the Indian Companies Act, 1913.

Two questions have been raised by way of defence on behalf of the Directors. It has been urged that the application was time-barred and, secondly it has been urged that the Directors acted in good faith and honestly and, therefore, they are not liable.

The two defences raised are really the two main points to be considered in the case.

On the question of limitation I think Article 120 of the Limitation Act is the only Article that can be applied to the case. The claim is by liquidator who had no existence at the dates on which the amounts claimed are alleged to have been mis-spent. If the liquidator is given permission by the law to claim these monies, certainly it would be unfair and unjust to say that the claim became time barred before he came into existence. This is one of the reasons why I am unable to agree with the argument of the learned counsel for the Directors that Article 36 of the Limitation Act should be applied. Another reason which seems to be strongly against this contention is the fact that Article 36 relates to cases of tort which are not provided for by the previous Articles relating to particular cases of suits of that character. Article 36 clearly mentions that it would apply in cases of misfeasance etc., arising out of matters independent of contract. The liability of the Directors is certainly not a matter independent of contract. They

(11) [1895] 2 Ch. D. v., 682.

are bound by the Articles of Association; and by Article 50 of the Articles of Association relating to this Company, the business of the Company is to be managed by the Directors. It can hardly be said that the Directors were men in the street and it was a sheer act of trespass that they committed in ordering payment of the dividend. A case of the Lahore High Court was cited to us by the learned counsel appearing for the Directors, *viz.*, *Bank of Multan* v. *Hukum Chand* (1). It appears that three learned Judges of the Punjab High Court were of opinion that Article 36 did apply to an application by the liquidator for recovery of money. One of the reasons given by the learned Chief Justice in favour of the application of the Article was that if that Article did not apply, old and stale claims might be recovered. But a clear answer to this objection is provided in S. 235 itself. It gives the liquidator power to question the conduct not only of the Directors but of the promoters of the Company. It is clear that all transactions smelling of breach of confidence may be called into question by the liquidator. The only check to be applied is that afforded by S. 281 of the Companies Act. If an act has been done honestly and reasonably, nobody need be liable. Further, if Article 36 applied, a fraudulent Director has only to keep the shareholders and others in ignorance of their mischievous acts for two years, and he would be immune. It is clear therefore, that we cannot be guided by sheer considerations of policy in choosing what Article to apply.

It was argued by Mr. Banerji, the learned counsel for the Directors, that if Article 36 did not apply, Article 115 would. He argued that if it was a matter of contract then Article 115 ought to apply. But if Article 115 applied, in this particular case Article 116 would apply as the Articles of Association have been registered under the law. Registration with the Registar of Companies is as much a registration within the Article 116 as registration under Act 16 of 1908. This was held in *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (12). However, I agree with my learned brother that Article 115 or Article 116 has no application. They are meant to apply to particular and specific contracts that are broken. As indicated above, Article 120 would seem to be the only Article applicable and the 'right to sue' would accrue only after the appointment of the liquidator, if not after he discovers the mis-application of the money.

On the question of liability of the Directors in general, I have to examine the contention of the learned counsel for the Directors, *viz*: if the Directors act honestly they are immune. I should think that the Directors, for being exempted, must also show that they have acted 'reasonably.' It is not necessary for me to explain the reason of the rule but if one should seek it, it can be easily found. The directors of a company are really trustees on behalf of a large body of share-holders and people who deal with the company and the least that can be expected of them is that they should act honestly and reasonably. In so acting, they may become guilty of negligence. The law is prepared to excuse their negligence provided the acts are honest and reasonable. If they are dishonest, of course, there is no escape. But if they are not prepared to act reasonably, the men should not take upon themselves the onerous duty of discharging the functions of a Director.

The authorities on the point, apart from the law as enacted in sections 235 and 281 of the Companies Act, have been considered by my learned brother and I do not propose to go over the same ground. I will content myself with the examination of facts and figures which go to establish that the Directors have not acted reasonably in the matter of their charge.

All the Directors were examined in open Court on a previous occasion and they have all admitted those statements to be correct and they were given further opportunity to add to their statements if they were so inclined. Those statements are evidence in this case. A mere reading of the statements will show that each and every one of the Directors has contented himself with stating that he acted blindfold, that he trusted the manager Kedar Nath implicitly and did just what he asked him to do. This implies that the servant of the Directors became their master and the masters submitted their judgment to the servant. Under No. 73 of the Articles of Association, the manager was to be, in all matters relating to the

(12) [1918] 42 Mad. 33=35 M. L. J, 253=24 M. L. T. 246=48 I. C. 903=8 L. W, 354.

Company, subject to the superintendence, orders and control of the Directors. The Directors were even given power to dismiss the manager. If after all this power and if after the clear provision that it was for the Directors to manage the business of the Company, the Directors submitted their judgment to the disposal of the manager, it can hardly be said that these gentlemen acted reasonably. [His Lordship here discussed facts and proceeded :—]

The facts noted above will clearly show that none of the gentlemen who figure as the Directors took any genuine interest whatsoever in the affairs of the Company. They may have acted under the direction of Kedar Nath and with blind faith in him, but it can never be said that they exercised any discretion whatsoever, much less to say that they acted reasonably.

I agree, therefore, in holding that the several Directors are responsible for having paid out, out of the capital, dividend during the several years in suit.

Coming to the case of Mr. De, the Auditor, I agree with my learned brother that although no dishonesty can be imputed to him in the sense that he misappropriated any money of the Company, he really shut his eyes and passed any accounts, as correct and good, that were brought forward before him by the manager Kedar Nath. I will give a few illustrations to show how that gentleman acted. His own evidence is nothing but a string of confessions. At almost every step he admitted that many things that he did he ought not to have done and many things that he did observe ought to have aroused suspicion and he should have called upon the manager for genuine explanation. In the cash book dated the 16th of December, 1922, the loan account of Mahendra Nath Mitter, a brother of the manager Kedar Nath, is shown. According to this account, Mahendra paid Rs. 3,900 principal amount and Rs. 4,290 as interest. In the account of the same date, and really on the right hand side of the same page, the whole amount is shown as having been lent out to Mahendra Nath Mitter. This was clearly a manipulation of figures and nothing else. Mahendra Nath Mitter had long delayed payment and never paid anything, yet it was shown in his account that he had paid up his old debts and if anything was due by him it was on account of a fresh loan advanced to him. No explanation, however clever, can really explain away this state of affairs. Yet Mr. De says that he examined the accoun; books and found them in order.

I have already mentioned that year after year a very large sum of money was shown as interest earned by the Company. Mr. De as the Director of the Company from 1915 to 1921 might have known and subsequently as the Auditor must have been aware that the sum shown as earned had not really been realised by the company and that the balance-sheet was so designed as to show that the Company had an income large enough to justify the distribution of dividend.

Coming to the reserve fund, Mr. De had to admit that there was really no reserve fund. He said that the money supposed to have been set apart as the reserve fund was as much invested in granting loans as any other portion of the capital. The statement, therefore, in the balance-sheet, that there was a reserve fund was absolutely false. Yet Mr. De had no hesitation in putting his signature and his certificate down to that statement and declaring that the statement was correct.

Mr. De admits that he never examined the security supposed to have been in the custody of the bank although he had no hesitation in certifying that loans exceeding Rs. 2,00,000 were fully secured. Before he certified to the fact, he ought to have satisfied himself that there was something on which he could base his certificate although it may not have been his duty to count the security and to assess the market value of several articles. If a bank possesses mortgage-deeds as security, I suppose, it would be the duty of the auditor to examine the deeds. Similarly it would be the duty of the auditor to satisfy himself that there really was in the possession of the bank the security, so as to justify him in saying that the loans advanced were fully secured.

We find that by resolution dated the 4th of June 1916, Mr. De, as one of the Directors, authorised the manager to raise a loan of Rs. 15,000 by pledging the ornaments in the custody of the bank. To be accurate, he ought to have examined whether the security which was in the possession of the bank was still in its possession or had been pawned away in order to raise money. This was an im-

portant fact which the share holders and the public had a right to know and this fact was concealed. As a matter of fact, as already stated, the liquidator found no ornaments or only just a few and of no value, in the possession of the bank when it failed.

In my opinion, Mr. De has not acted in accordance with his duty as an auditor and must share the responsibility of the acts with the Directors.

The liability of each Director and of Mr. De has been described in detail in my brother's judgment, and I fully agree with his views. The dividends paid out of capital must be made good by the Directors who induced the payment on false balance-sheets and the responsibility must be shared by the Auditor in years 1922 and 1923.

The manager, Kedar Nath, not having been served with notice of these proceedings could not be proceeded against, and for the time being at least, he escapes a just liability.

Thus the claim of the liquidator in respect of the dividends paid out of the capital is fully established.

The liquidator claimed a sum of Rs. 56,000 on account of the value of grain said to have been lost to the Company owing to the negligence of the Directors. This charge fails for the simple reason that there is no evidence to show what was the actual weight or value of the grain which it was supposed, Annapurna Co. possessed and offered to give as security. This branch of the case has been dealt with at length in the judgment of my learned brother and I do not feel called upon to discuss it. Suffice it to say that I am in full agreement with him.

The third and the last claim related to certain 'floating account'. This part of the claim has been withdrawn and very properly. It was brought under a certain misapprehension of facts.

The result is that I fully agree in the order proposed by my learned brother.

By the Court—The order of the Court is that Mr Ganendra Nath Ghose and Mr. B. L. De are jointly and severally liable and must pay to the Liquidator the sum of Rs. 4,991 in respect of the year 1915, the sum of Rs. 4,247 in respect of the year 1916, the sum of Rs. 4,310 in respect of the year 1917, the sum of Rs. 4,379 in respect of the year 1918. Mr. B. L. De, Mr. J. N. Ghose and Mr. M. M. Banerji are hereby declared to be liable and must pay to the Liquidator the sum of Rs. 4,707 for the year 1919. Mr. B. L. De, Mr. J. N. Ghose, Mr. M. M. Banerji and Mr. Ashutosh Mukerji are jointly and severally liable and must pay to the Liquidator the sum of Rs. 4,824 for the year 1920, the sum of Rs. 5,002 for the year 1921, the sum of Rs. 5,121 for the year 1922, and the sum of Rs. 5,323 for the year 1923, which will also include Mr. Shanker Prasad.

The Liquidator must have his costs of these proceedings from all the defendants, except Shanker Prasad, jointly and severally, the amount to be certified by us.

The total amount we certify is Rs. 2,500 which is as follows:—To the learned counsel from Calcutta Rs. 250 for reading the case, and Rs. 1,200 at the rate of Rs. 150 a day for 8 days, making a total of Rs. 1,450; Rs. 150 to Mr. Sanyal, Rs. 600 to Mr. Desanges for 6 days: and Rs. 300 special allowance to the Liquidator for preparing the case. The defendants must pay their own costs.

Application allowed.

1925 ALLAHABAD 535

WALSH AND SULAIMAN, JJ.

Begg Sutherland and Co.—In re.

Civil Mis. No. 123 of 1925, Decided on 16th February 1925, on a reference made by the Commissioner of Income-tax.

(a) *Income Tax Act, Ss.* 26, 2 (14) *and* 55—*Successor is not bound to pay in respect of the predecessor any tax which the predecessors would not have been liable to pay.*

There is nothing in the Act which would justify the Income-Tax authorities in imposing on a successor during the first year of assessment after the conversion a liability in respect of its predecessor which its predecessor would not have been liable to pay if it had continued in existence without any conversion. So a new Company is not liable to pay super-tax in respect of a year for which its predecessor was not liable for super-tax. [P 537 C 1]

Where a firm which, as it was a registered one, was not liable to pay super-tax was succeeded by a Company which not being registered was liable to pay super-tax,

Held; that the Company was not liable to pay super-tax in respect of the profits made by the firm before the conversion. [P 537 C 1, 2]

J. M. Banerji—for the Company.

L. M. Banerji—for the Crown.

Walsh, J.—This is a reference, or a case stated, under S. 66 of the Indian Income-Tax Act of 1922 by the Commissioner of Income Tax for the opinion of the High Court. The facts are very clearly stated in the case and are as follows:—

The business of the well-known firm of Begg Sutherland and Co., Cawnpore, was carried on by a firm which consisted of certain individual partners under the title of Messrs. Begg Sutherland and Co. up to the 30th of April, 1922. On that date that firm, as a commercial or legal person, ceased to exist, and was succeeded by a private limited company which was known by the same name with the addition of the word "limited." The agreement is not exhibited, but the point taken at one time on behalf of the Company by one of its representatives before the Commissioner, that the Company, was not the successor of the firm within the meaning of S. 26 of the Income-Tax Act has not been urgued by Mr. J. M. Banerji on behalf of the Company. and therefore it must be taken to be admitted that it is no doubt because it could not be reasonably contested. In a Company of this prosperity making profits at a rate which involved them in liability for super-tax, some slight complications necessarily arose by reason of the conversion, for this reason. Under S. 2, sub-S. 14 a firm may take advantage of a provision therein contained for registering itself, and where it does so, by operation of S. 55, the firm, being from that moment a registered firm, is not liable for super-tax. In other words where a registered firm exists, it is not liable for super-tax on the whole of its profits made as such firm,but the individual partners are liable for such super-tax as individuals. On the other hand if the firm is an unregistered firm, then it is directly chargeable with super tax if it makes profits at a rate sufficient to create liability for super-tax, and in that event the partners are not chargeable for super-tax if their firm has already paid it. The date of the conversion of the firm into a company, and the date of their annual accounting did not correspond with the dates adopted as the terminal of the financial year by the Income-Tax authorities. There was therefore a broken period to be dealt with and a broken continuity to be dealt after the date of the conversion, and for reasons best known to themselves, by mutual consent, the Income-Tax authorities and the new Company dealt with the profits in respect of which Income Tax was payable from 1921 to 1922 and from 1922 to 1923 in one year of assessment, namely 1923-1924. There was no attempt to shirk any liability, or to dispute the facts as they were. In the result the profits which the firm had in fact made during the last year of its existence were assessed at the maximum rate for Income-Tax. In addition the individual partners were, in accordance with the law, which we have just described, assessed to super-tax on their shares of the profits, the firm as a registered one, being exempt from super-tax. In addition, for the first eleven months of the existence of the Company which brought the assessment up to the 31st of March, 1923, thereby making the company's accounting year co-terminous with the financial year of the Income-Tax authorities, the new Company was assessed in Income-Tax and also charged super tax at the rate payable by a company. It is not contended on the part of the Income-Tax authorities that in the ordinary use of language, unless there is some special provision in the Income-Tax Act by which they are caught, the new Company and the old firm had not discharged in every way their legal liability, or what might be supposed to be their legal liability up to 31st March, 1923. But the case raises the further question whether the Company is to be assessed in respect of the last year of existence of the firm, not merely on what was undoubtedly payable in law by the Company on the profits which the firm had made and on which it would have been assessed if it had continued to exist as a firm, but whether it is not also liable to be treated as a super-tax paying person, because although its predecessor was not a super-tax paying person, it itself is by the express language of the Act, and must be treated as what it is, even in respect of profits made anterior to its existence. We can only say that the proposition is sufficiently startling to cause surprise and to lead one to look for language absolutely unambiguous and positive in its terms to create a special liability of that sort, which it would be unlikely that any legislature would intend to impose if it really understood what it was doing. The only argument submitted to us by the Govern-

ment Advocate on behalf of the Income-Tax authorities, is suggested by S. 26. But it certainly cannot be said that S. 26 contains any express provision upon the point, and the answer to the argument on behalf of the Income-Tax Commissioner really is that the conversion of the firm into the Company does not in any way affect the profits made by the firm before the conversion, or the legal liability to Income-Tax which already existed before the conversion. All that the conversion effects is to cause the Company to step into the shoes of the defunct firm as assessee for the period of assessment, but it goes without saying, and is recognised throughout the scheme contained in the Act, that the liability to assessment is not conclusive as to the chargeability in respect of the period for which such assessment is made. To make the matter clear—if it is desirable further to do so—it is only necessary to point out that S. 26 provides that where any change in the ownership of business is made, the assessment shall be made on the person at the time of making the assessment. But the assessment has to relate to periodical profits made as defined in the Act, and S. 3 provides that Income-Tax shall be charged for any year in respect of all profits of the previous year of every firm. What therefore was to be assessed amongst other things upon the new Company after the conversion in pursuance of the arrangements come to, to which we have already referred, were the profits, and the Income-Tax payable thereon as provided by law, of the year previous to the conversion. These profits admittedly did not include a super-tax, and there is nothing in the Act which would justify the Income-Tax authorities in imposing on a successor during the first year of assessment after the conversion a liability in respect of its predecessor which its predecessor would not have been liable to pay if it had continued in existence without any conversion.

Our answer therefore to the first question is that the profits for the period 1st May, 1921 to 30th April, 1922 are to be assessed as profits of a firm but the Company is to be called upon to pay the amount which we understand they have done.

To the second question to avoid ambiguity we would say that there is nothing in the Income-Tax Act of 1922 which makes a new Company liable to pay super-tax in respect of a year for which its predecessor was not liable for super-tax.

We think that this is a case which required careful handling and that the maximum fees should be payable on either side. We, therefore, direct the Government to pay Rs. 200 the costs of the other side, and we certify that that is a reasonable amount for the Government Advocate

Reference answered.

★ 1925 ALLAHABAD 537

SULAIMAN, J.

Gajraj Singh and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Rev. Nc. 70 of 1925, Decided on 17th March 1925, from an order of the Addl. S. J., Cawnpore.

★ *Criminal P. C., S. 436 (Proviso) and S. 203—Complaint dismissed under S. 203—Prov. to S. 436 does not apply.*

The Proviso to S. 436 cannot apply to a dismissal of a complaint under S. 203; it only applies to the case where an accused person has been discharged. Hence, when a complaint is dismissed under S. 203, it is necessary to issue notice to the accused person before ordering further inquiry. [P 537, C 1]

G. W. Dillon—for Applicants.

M. Waliullah—for the Crown.

Judgment.—This is a criminal revision from an order dated the 20th of December 1924, contained in the judgment in a case against the opposite party, directing that a case against the present applicants be started under Ss. 147 and 323 of the Indian Penal Code to be tried by a Deputy Magistrate.

The police challaned the members of the opposite party under Ss. 147 and 325 of the Indian Penal Code. A cross-complaint was filed by the accused persons in that case against the complainants under S. 147 and 323. A police report on this complaint was called for and after the accused in the case challaned by the police had been convicted, the learned Magistrate dismissed the complaint of these accused persons against the complain-

ants under S. 203 of the Code of Criminal Procedure.

The accused persons appealed to the learned Sessions Judge who, upholding their convictions, dismissed their appeals. He felt inclined to hold that there was a free fight between both parties and neither could have claimed a right of private defence. That finding of course is in no way binding on the party consisting of the complainants, nevertheless it was open to the learned Judge to order that further enquiry should be made into the complaint which had been dismissed under S. 203 of the Code of Criminal Procedure The learned advocate for the applicants contends that this order is improper because it was passed without any notice to his clients and his contention is that no further enquiry should have been ordered without first giving an opportunity to the applicants to show cause.

Under the old Code of Criminal Procedure it was held that when a complaint was dismissed under S. 203, it was not necessary to issue notice to the accused person before ordering further enquiry. In the case of *Angan* v. *Ram Pirbhan* (1), Tudball, J. pointed out that such a notice was quite unnecessary. That case has been followed subsequently by Banerji, J.' in the case of *Emperor* v. *Liaqat Husain* (2).

S. 436 of the old Code, however, has been amended under the new Code and a proviso to the following effect has been added :—

"Provided that no Court shall make any direction in this section for enquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made." It is clear, however, that this proviso cannot apply to a dismissal of a complaint under S. 203 ; it only applies to the case where an accused person has been discharged. When no process is issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily under S. 203, the accused person cannot be said to have been "discharged." It is only after he has appeared in Court and the evidence against him is found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. Under the old Code the Courts were unanimous that in the case of the dismissal of a complaint under S. 203 notice was not necessary. The amendment has, in my opinion, left these rulings untouched, for it is confined to the case of discharge only and does not apply to the dismissal of a complaint either under Ss. 203 or 204.

The application, therefore, has no force and is dismissed.

Application dismissed.

(1) [1913] 35 All. 78=10 A.L.J. 531=18 I.C. 146=14 Cr L.J. 218.
(2) [1918] 40 All. 138=16 A.L.J. 30=43 I.C 622=19 Cr.L.J. 206.

★ 1925 ALLAHABAD 538

MUKERJI AND DALAL, JJ.

Chander Sen—Plaintiff—Appellant.

v.

Mohar Singh — Defendant — Respondent.

Second Appeal No. 670 of 1923, Decided on 22nd July 1924, from a decree of the Dt. J.. Budaun, D/- 23rd February 1923.

★ *Civil P. C., O. 6, R. 17—Allegations in plaint determine nature of suit—Suit brought under one section—Defendant objecting—Offer to amend plaint to suit another section should be allowed.*

The nature of the suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply. [P 539 C 1]

Where a suit was brought under S. 165 of Agra Tenancy Act, but on the objection by defendant, the plaintiff offered to amend the plaint so as to be one under S. 164, and the Court disallowed the same,

Held: that the amendment ought to have been allowed. [P 539 C 1]

P. L. Banerji and *U. S. Bajpai*—for Appellant.

Kailas Nath Katju—for Respondent.

Judgment.—The judgment of the learned District Judge is entirely untenable. The suit out of which the appeal arose was for profits brought by a co-sharer against a son of a deceased *lambardar*. The *lambardar* was not the *lambardar* for the whole *mahal* but he was the *lambardar* for a ten biswa *patti*. The plaintiff accordingly described the defendant and his late father as co-sharer and he headed his plaint as a suit brought under S. 165 of the Tenancy Act. The defendant took no exception to this description of the suit in the written statement and no issue was framed in the

Court of first instance which can indicate that any such objection had been taken before it. The suit was decreed partially and there was an appeal by the defendant. There was also a cross-objection by the plaintiff. The first ground taken by the defendant before the District Judge was that the suit instituted under S. 165 of the Tenancy Act was not maintainable. The learned Judge was of opinion that this was a very valid argument and the suit should fail The plaintiff offered to amend his plaint but the learned Judge was of opinion that there was a radical difference in the natures of the suits under Ss 164 and 165 and therefore no amendment could be permitted. It may be true that there is a difference in the character of the two classes of suits ; but if S. 164 was the proper section for a suit like the present one, no harm could be done by the amendment proposed. The nature of the suit is indicated by the allegations made in the plaint and not by quoting a section which does not apply.

We set aside the decree of the Court below and remand the appeal to it with the direction to re-enter it on the register of appeals and dispose of it according to law. Costs here will, at all events, be awarded to the successful appellant. Costs in the Court below will be in the discretion of that Court.

Case remanded.

1925 ALLAHABAD 539

MEARS, C. J.

Har Bhajan Lal—Plaintiff—Applicant.

v.

Har Charan Lal and another—Defendants—Opposite Party.

Civil Revision No. 2 of 1925, Decided on 8th May 1925, from an order of the Judge, Sm. C. Court at Bareilly.

Contract Act, S. 2—Boy running away from home—Boy's father advertising reward to anyone tracing boy and bringing him home—Taking boy to Ry. Police Station, making report and sending telegram to boy's father are substantial performance of conidtion — Advertisement of reward is offer capable of an acceptance by any person fulfilling the co dition.

A young boy ran away from his father's home. The father eventually issued a pamphlet, offering a reward in these terms:—"Anybody who finds trace of the boy and brings him home, will get Rs. 50." The plaintiff was at the *dharamshala* of a railway station, there he saw a boy, overheard part of a conversation, realised that the boy was the missing boy and promptly took him to the Railway Police Station where he made a report and sent a telegram to the boy's father saying that he had found his son.

Held: that the hand-bill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition and that the plaintiff substantially performed the condition and was entitled to the amount offered.

[P. 539, C. 2]

Kailas Nath Katju—for Applicant.

Hazari Lal Kapoor—for Opposite Party.

Mears, C. J.—This application in revision must be allowed, the decision of the learned Judge of the Court of Small Causes, Bareilly, set aside, and judgment entered for the plaintiff for Rs. 500. It is a curious case. A young boy of 13 or 14 years, Ram Kishen, ran away from his father's home at Baberi on the 9th of June, 1924. The father eventually issued a pamphlet, offering a reward in these terms:—"Anybody who finds trace of the boy and brings him home, will get Rs. 500." That is the translation that has been put to me as the correct translation, and there seems to be no substantial difference about the matter. It happened that one of these hand-bills came into the possession of the plaintiff, and the plaintiff undoubtedly had the boy's name in his memory. On the 19th of July the plaintiff was at the *dharamshala* of the Bareilly Junction railway station. There he saw a boy, overheard part of a conversation, realised that the boy was the missing Ram Kishen and promptly took him to the Railway Police Station where he made a report and sent a telegram to the boy's father saying that he had found his son. The question is whether he had not substantially fulfilled the terms offered. The hand-bill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition. The real condition of the promise in the hand-bill was, "I will pay Rs. 500 to any one who finds my son and brings him home". I am of opinion that the plaintiff substantially performed the condition and that the judgment of the Small Cause Court is extremely artificial. In these circumstances that decision must be reversed and there must be a decree in favour of the plaintiff for Rs. 500 with costs.

Application allowed.

1925 ALLAHABAD 540

MEARS, C. J., AND MUKERJI, J.

Motilal—Applicant.

v.

Emperor through Kanhaiya Lal—Opposite Party.

Criminal Revision No. 144 of 1925, Decided on the 27th April, 1925, from an order of S. J., Cawnpore.

(a) *Penal Code, S. 448—Property must be in actual possession of person to be annoyed etc.*

Actual possession by the person alleged to be intended to be annoyed, insulted or intimidated, is essential for an offence under S. 448, 2 *A.* 465 and 12 *A. L. J. R.* 151 *Foll.* [P. 540, C. 2.]

(b) *Penal Code, S. 448—Intent to assert title and gain possession against complainant is no offence though accused is aware that annoyance will be caused by his act.*

The words of the section must be closely adhered to and there must be found an intent to cause intimidation, insult or annoyance. A conviction cannot follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance. 38 *All.* 517 *Foll.* [P. 541, C. 2]

Where accused's intention in doing the act complained of was to assert his title and gain and hold possession of the premises as against the complainant.

Held: that he was not guilty. [P. 541, C. 2]

Kailas Nath Katju—for Applicant.

Waliullah and *J. M. Banerji*—for Opposite Party.

Mears, C. J.—One Moti Lal has applied in revision to this Court against his conviction and sentence by a first class Magistrate. The conviction and sentence were upheld by the learned Sessions Judge of Cawnpore on appeal. Moti Lal was convicted of the offence under S. 448 of the Indian Penal Code, and the contention of his learned counsel is that on the facts found by the Courts below, the conviction cannot be supported. The facts are briefly these:—One *Mt.* Basanti was in possession of her husband's property which consisted *inter alia* of some shops. On the death of the lady, there were two claimants to the property—one Kanhaiya Lal, a cousin of her late husband, and the other the applicant before this Court. He claimed to be an adopted son. The property immediately in question was a shop which was in the occupancy of a tenant, Yusuf. Both Kanhaiya Lal and Moti Lal appeared as witnesses in support of Yusuf's defence. The defence failed and Kanhaiya Lal got a decree. Subsequently there was another suit for rent by Kanhaiya Lal which was again successful. Yusuf, thereafter gave a notice to Kanhaiya Lal of his intention to vacate the premises and eventually left them on the 2nd of October, 1924. The same day, and before Kanhaiya Lal had been able to take possession of the shop, Moti Lal occupied it and locked it up. On these facts the learned Magistrate and the learned Sessions Judge were of opinion that an offence under S. 448 of the Indian Penal Code had been committed. The learned Sessions Judge, from certain other circumstances, namely, that Moti Lal was trying to induce the tenants to pay rent to him by offering to accept one-half of the ordinary rent, and the fact that Moti Lal did not attempt to obtain a declaration from the Court that he was an adopted son of the deceased, came to the conclusion that Moti Lal's object in locking up the shop "must obviously have been to annoy Kanhaiya Lal, the rightful owner."

In this Court the learned counsel for Moti Lal has urged two points: (1) That the house was not in the possession of Kanhaiya Lal within the meaning of S. 441 of the Indian Penal Code, and (2) that the intention of Moti Lal was only to assert his own title and right to possession and that it was not his intention to annoy Kanhaiya Lal.

If, therefore, the applicant is right on either of these points, he is entitled to have the conviction set aside. S. 441, as far as material, is as follows:—"Whoever enters into or upon property in the possession of another with intent to commit an offence, or to intimidate, insult or annoy any person in possession of such property.....is said to commit criminal trespass."

First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant. The point as to actual possession being essential is not a

new one, and indeed there is direct authority upon it. The earliest case on the point to which our attention has been called is that of *King-Emperor* v. *Gyvind Prasad* (1). On the facts of the case it was abundantly clear that there could be no successful prosecution of criminal trespass. But the law was discussed by Straight, J., and he expressed his deliberate opinion that possession must be "actual in the sense and meaning of S.530 of the Criminal Procedure Code." S. 530 of the Criminal Procedure Code, of 1872, related to maintenance of possession in case of apprehended breach of peace. The person who was in actual occupancy of a property, whether he has any title in him or not, is to be maintained in possession, in case of an apprehended fight over the property. Thus Straight, J., was clearly of opinion that the person to be annoyed must be on the premises, otherwise there could be no criminal trespass. At page 467 he remarks :—"But with intent to annoy whom? Any person in possession is here intended, express or implied, constructive in the sense of 'legally entitled to', or actual as contemplated in S. 530 of the Criminal Procedure Code." Then the learned Judge came to the conclusion already stated.

This case was followed in *Kunji Lal* v. *King Emperor* (2). In this case the alleged offenders had taken possession of the zamindar's property, but the property itself was in the immediate possession of a person who did not objebt to possession being taken of it. It was held that the constructive possession of the zamindar was not enough to sustain a conviction for criminal trespass.

Applying the law to the fact of this case, it is clear that Kanhaiya Lal was not in possession of the house at the moment the trespass was committed, either by himself or through any other person. The house was absolutely empty. He no doubt had the legal right to possession, but that is different from being "in possession" within the meaning of S. 441 of the Indian Penal Code. We, therefore, are of opinion that as regards the first point, that has been made good by the applicants.

That in itself is sufficient to dispose of the case but we wish also to deal with the question of intent.

On the facts we have no doubt whatever that Moti Lal's intention in doing the act complained of was to assert his title and gain and hold the possession of the premises as against Kanhaiya Lal. The fact that he was holding 7 out of 8 adjoining shops against the will of Kanhaiya Lal points strongly to this conclusion and we accept the principles of the decisions to which we have been referred. They are *Vallappa* v. *Bheema* (3) and *KingEmperor* v. *Gaya Bhar* (4).

In our opinion the words of the section must be closely adhered to and there must in all these cases be found an intent to cause intimidation, insult or annoyance. A conviction cannot, in our opinion, follow merely because one can pronounce with certainty that the accused must have known that his act would, as one of its inevitable incidents, cause annoyance.

Indeed in the ordinary case where a man steals into a house by night to carry on a secret intrigue with, say, a widowed woman of age, he must be well aware that his conduct would cause great annoyance to the other members of her family who may at the time be within the house. If that is the only state of facts, he cannot be convicted under this section as his presence in the house was in consequence of a purpose and intent quite other than of annoyance. Therefore upon this ground also we are of opinion that the contention put forward on behalf of Moti Lal was right.

In the circumstances we allow this application in revision and we set aside the conviction and sentence, and if Moti Lal has in fact paid the fine, that amount must be refunded to him.

Application allowed.

(1) [1879] 2 All. 465.
(2) [1914] 12 A. L. J. 151=21 I. C. 681=14 Cr. L. J. 633.
(3) [1918] 41 Mad. 1[illegible]6=33 M. L. J. 729=6 L. W. 794=(1918) M. W. N. 81=43 I. C. 578=19 Cr. L. J. 162 (F. B.)
(4) [1916] 38 All. 517=14 A. L. J. 719=35 I.C. 979=17 Cr. L. J. 419.

1925 ALLAHABAD 541

DANIELS, J.

Jai Mangal Chand—Applicant.

v.

Ganpat Chand—Opposite Party.

Civil Rev. No. 153 of 1924, Decided on 26th November 19 4, against an order of the Addl. Dt. J., Gorkhpur.

Civil P. C. Such. 2 P. 16—Decree duly passed—No revision lies.

No revision lies against a decree which has been passed in accordance with an award under para. 16 of the second schedule, after hearing and determining in accordance with law the objections raised against the validity of the award. [P 542 C 1]

Shiva Prasad Sinha—for Applicant.

Narmadeshwar Upadhya—for Opposite Party.

Judgment—This is an application in revision against a decree which has been passed in accordance with an award under para. 16 of the second schedule of the Code of Civil Procedure. A preliminary objection is taken that no revision lies and that objection must prevail. The case is covered by the ruling in *Ajudhia Prasad* v. *Badar-ul-Hussain* (1). The learned Judge of the Court below proceeded strictly in accordance with the law. After the award was made certain objections to its validity were put in. He heard and determined those objections in accordance with law and decided that they were not valid. He thereupon proceeded under para 16 to pass the decree in terms of the award. From that decree no appeal lies. Still less can a revision lie on the grounds which are now urged. I dismiss this application with costs.

Application dismissed.

(1) [1917] 39 All. 489=41 I. C. 257=15 A. L. J. 427.

1925 ALLAHABAD 542

KANHAIYA LAL AND LINDSAY, JJ.

Sarju Prasad—Defendant—Appellant.

v.

Bhagwati Prasad—Plaintiff—Respondent.

Second Appeal No. 332 of 1925, Decided on 6th March, 1925, from the decree of the Addl. Sub. J., Gorakhpur.

(a) *Government of India Act*, (5 & 6 *George V C.* 61) *S.* 80 (*a*)—*Legislature of a province can repeal its own enactment.*

S. 80 (a) cannot be interpreted to mean that no local legislature can, by reason of those words, repeal or alter any enactment of its own. [P 543 C 1]

(b) *Agra Pre-emption Act*, (1923) *S.* 12—*Section lays down preference* inter se.

S. 12 lays down an order of preference by which any person in class 1 is entitled to pre-empt as against any person in any of the other classes, namely, classes 2, 3, 4 and 5. [P 543 C 2]

Where the pre-emptor and the vendor were co-sharers in one *Khata* and the vendee was a co-sharer in another *khata* and was also a joint sharer in a third *khata* which was joint relating to *shamilat* lands,

Held: that the pre-emptor belonged to class 2 and the vendee to some class below class 2, therefore the pre-emptor had the better right. [P 543 C 1]

M. L. Agarwala—for Appellant.

Lindsay, J.—This appeal is up for admission under Order 41 rule 11, and from the date of the sale which took place in November 1923, it appears that the law to be applied is that contained in the Agra Pre-emption Act, Act XI of 1922.

Two *wajib-ul-arzes* were filed in the case, one of the year 1833 and the other of 1860, and Dr. Agarwala, who appears for the vendee-appellant, informs us that the *wajib-ul-arz* of 1860 contains no provision for pre-emption. He, therefore, refers us to the language of S. 5 of the Agra Pre-emption Act, Act XI of 1922, as it stood before it was altered by the amending Act, Act VIII of 1923. According to the former state of things, S. 5 laid down that a right of pre-emption should be deemed to exist only in mahals or villages in respect of which the *wajib-ul-arz* prepared prior to the commencement of this Act recorded a custom, contract or declaration etc.

On the language of this section as it stood, it necessarily followed that the *wajib-ul-arz* to be considered was the last one prepared prior to the commencement of the Act. The amending Act, Act VIII of 1923, however, altered the language and laid down that the right was to be deemed to exist in mahals in respect of which any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom etc: and it is to be observed that this Act was given retrospective effect so as to apply from the date on which the Agra Pre-emption Act came into force, that is to say from the 17th of February, 1923.

As the Act now stands, therefore, it seems quite clear that in the case with which we are concerned the Court below was entitled to refer to the *wajib-ul-arz* of 1833 which admittedly contains a record of the custom of pre-emption.

Dr. Agarwala, however, has argued that the amending Act, Act VIII of 1923, was *ultra vires* of the local legislature, and in this connection he refers to S. 80 (*a*) sub-sec. 2 of the Government of India Act.

Sub sec. 2 of the section just mentioned gives authority to a local legislature to repeal or alter, as to its own province, any law made either before or after the commencement of the Government of India Act by any authority in British India other than that local legislature.

From the words "other than that local legislature" Dr. Agarwala desires us to infer that no local legislature can, by reason of these words, repeal or alter any enactment of its own.

We do not think that S. 80 (*a*) sub-S. 2 is to be construed in this sense. Without sub-S. 2 no local legislature would have authority to repeal or alter, as to its own province, any enactment made by the legislature of any other province, and it was for that express purpose that power was given under sub S. 2. But under S. 80 sub-S. 1 we find that the local legislature of any province has power, subject to the provisions of the Act, to make laws for the peace and good government of the territorties for the time being constituting that province and we have no doubt whatever that the power to make laws for peace and good government, includes the power to amend and alter or, if necessary, repeal laws previously enacted by that local legislature. We cannot, therefore, accept the argument that the amending Act, Act VIII of 1923, was *ultra vires* of the legislature of these Provinces.

The only other question which is raised is with regard to preference. The contention for the vendee-appellant is that the pre-emptor in this case had no better right to pre-emption than he had.

S. 12 lays down the classes of persons who are successively entitled to exercise the right of pre-emption. The second class consists of co-sharers in the subdivision of the mahal in which the property is situated.

In the present case the pre-emptor and the vendor are co-sharers in *Khata* 21. The vendee is a co-sharer in another *khata* and is also a joint sharer in a third *khata* which we understand to be a joint *khata* relating to *shamilat* lands.

It is clear to our minds, therefore that the pre-emptor is a person who falls within class 2 and that the vendee, whatever class he falls in, must be in some class below class 2, and that being so, we think that the plaintiff, as a person in class 2, has the better right. It has been sought to be argued that these classes only lay down an order of preference when the sale has been to a stranger, but we do not think that that is the meaning of the section and we have interpreted it already in a different sense. We think that S. 12 lays down an order of preference by which any person in class 1 is entitled to pre-empt as against any person in any of the other classes, namely, classes 2, 3, 4 and 5.

We dismiss the appeal under Order 41 rule 11, C. P. C.

Appeal dismissed.

1925 ALLAHABAD 543

SULAIMAN AND DANIELS, JJ.

Sital Rai and another—Defendants—Appellants.

v.

Ram Khelawan Pandey—Plaintiff—Respondent.

First Appeal No. 235 of 1923, Decided on 21st April 1925, from an order of the D. J. of Ghazipur.

Contract Act, S. 24—Mortgage of occupancy holding and other lands for single consideration—Mortgagee in possession of occupancy holding suing for possession of other land—Suit should fail as otherwise result would be to enforce entire contract part of which is illegal.

Where a mortgage was made of occupancy holdings, along with certain other properties which were legally transferable, for a single consideration and the mortgagee was given and he admittedly retained possession of the occupancy lands which were not transferable and he sued to recover possession of the remaining lands.

Held: that if the suit were to be decreed, the result substantially would be to enforce the entire mortgage contract, part of which was illegal and that therefore he was not entitled to seek any relief in Court at all. 39 *All.* 539 *Dist.*

[P 544 C 1]

A. P. Pandey—for Appellants.

Surendra Nath Sen—for Respondent.

Sulaiman, J.—This is an appeal by the defendants arising out of a suit brought by a mortgagee for recovery of possession of certain lands and, in the alternative, for recovery of a proportionate amount due.

It appears that the defendants made a mortgage of occupancy and fixed-rate holdings in the year 1911 for a sum of Rs. 999-15 in favour of the plaintiff. The plaintiff's case is that he has been in possession of the occu-

pancy lands all along and is in possession of them even now, but that as regards the fixed-rate tenancies, he was put in possession but has since been dispossessed. The defence was that the mortgage was void and the plaintiff had no right to seek the assistance of the Court.

The Court of first instance dismissed the suit on the ground that the mortgage was one transaction and the whole of the mortgage was illegal. It also came to the conclusion that inasmuch as the plaintiff wanted to retain possession over the occupancy lands, he did not come to Court with clean hands and was not entitled to any relief. The suit was accordingly dismissed. On appeal the learned District Judge has taken a contrary view. Relying on the case of *Rajendra Prasad* v. *Ramratan Rai* (1), he is of opinion that it was open to the mortgagee to claim relief against the fixed-rate tenancies which were transferable. He has accordingly allowed the appeal and remanded the case for disposal of the other issues.

In our opinion it is unnecessary in this case to decide the question whether when a mortgage is made of occupancy holdings along with certain other properties which are legally transferable for a single consideration, the whole transaction is or is not void. It is therefore, unnecessary to consider the ruling in *Rajendra Prasad* v. *Ramratan Rai* (1). It is quite sufficient for the purpose of this case to say that the plaintiff is not entitled to seek any relief in Court at all He admittedly retains possession of the occupancy lands which are not transferable and he wants to recover possession of the remaining lands. If his suit were to be decreed, the result substantially would be to enforce the entire mortgage contract, part of which is admittedly illegal. It seems to us that such a relief ought never to be granted. In the case of *Rajendra Prasad* v. *Ramratan Rai* (1), the mortgagee had actually given up all claim to the occupancy lands which were not transferable. In the present case the mortgagee actually retains possession of the occupancy lands and has not given them up. He cannot, therefore, be entitled to a decree for possession.

(1) [1917] 39 All. 539=39 I. C. 785=15 A. L. J. 544.

The learned advocate for the respondent has urged that in any case he is entitled to a proportionate money decree. If such a claim were allowed, the result would be to split up the mortgage money which was one single consideration for the transfer. It is impossible for a Court to say how much of the entire consideration was intended to be for the occupancy lands and how much for the fixed rate tenancies when the mortgage deed makes no such apportionment. We cannot, therefore, even give the plaintiff a decree for a proportionate amount of the mortgage money.

We accordingly allow this appeal and setting aside the order of the lower appellate Court, restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

1925 ALLAHABAD 544

BANERJI, J.

Ramcharan Das—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 250 of 1925, Decided on 4th May 1925 from an order of S. J. of Mainpuri:

(a) *Criminal P. C., S. 476-B—Appellate Court should reconsider entire matter on merits*—prima facie *case not being made out, withdrawal of complaint should be directed.*

The appellate Court, in case of appeals under S. 476-B should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. [P 545, C 1]

Hazari Lal Kapoor—for Appellant.

M. Waliulla—for the Crown.

Banerji, J.—This is an appeal under S. 476-B of the Code of Criminal Procedure against an order of the District Judge of Mainpuri directing the appellant to be prosecuted under S. 193 of the Indian Penal Code in respect of certain false statements. The first point to consider in this case is what are the duties of an appellate Court in cases in which an order is made by the lower Court directing the prosecution of any one. S. 476-B has been enacted by Act 18 of 1923, and the same Act has omitted original sub-

section 6 of S. 195, which gave the appellate Court power of reviewing an order granting sanction, or an order by a Court instituting a complaint. Chapter 31 of the Code of Criminal Procedure lays down the ordinary procedure and powers relating to appeals against convictions or acquittals. S. 476-B empowers the appellate Court in appeal to direct the withdrawal of the complaint, or in cases where the first Court has refused to complain, may itself make a complaint. I am of opinion that the legislature intended that the appellate Court, in cases of appeals under S. 476-B of the Code of Criminal Procedure, should reconsider the entire matter on the merits, and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts If the appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. The words "offence which appears to have been committed" seem to me to have been used by the legislature to mean that the facts before the Court unless rebutted, show that an offence has been committed.

Now coming to the facts of the case, on the 18th of October, 1924, one Shiam Lal brought a suit for recovery of Rs. 134 on a bond dated the 18th of April, 1920 in the Court of the Munsif of Shikohabad. The Munsarim of the Munsif's Court, in the ordinary course of business, reported that the bond on which the suit was based had the words "chhah mah" after the words "ek sal," and that the former words appeared to be written in a different ink. He further reported if one year was the stipulated period the suit was not within time. On the office report being brought to the notice of the learned pleader for the plaintiff, he made a statement which appears to me not to contest the Munsarim's report. The Munsif directed the plaintiff to appear before him personally on the 25th of October. On the 24th of October a compromise was filed in Court in which it was stated that the defendant had paid the entire money sued upon, and the plaintiff admitted having received the money from the defendant, and the plaintiff did not claim his costs. On the 25th of October this application was verified by both parties. It appears that the Munsif was very surprised that the defendant who had contracted the original loan on the 18th of April, 1920, should have at once satisfied the plaintiff's claim after the plaint had been filed.

The Munsif held an enquiry into the question of whether the bond in suit was for one year, or whether the words "chhah mah" had been interpolated. After taking down the statement of the present appellant, Ram Charan Das, on the 31st of October, 1924, he recorded the statements of Shaim Lal, Kharagjit, marginal witness, and the defendant Randhira Chamar, and passed an order under S. 476 of the Code of Criminal Procedure, and made a complaint against Shiam Lal to the District Magistrate of Mainpuri. An appeal was filed by Shiam Lal before the District Judge under S. 476-B of the Code of Criminal Procedure. The learned Judge allowed the appeal of Shiam Lal and directed notice to issue to the petitioner, Ram Charan Das, to show cause why he should not be prosecuted under S. 193 of the Indian Penal Code for having falsely stated, on the 31st of October, 1924, that the words "chhah mah" were not written by him, and that the time for repayment in the bond was only one year and not one year 6 months. On the 27th of February, 1925, the learned Judge passed an order in the following terms :—

"In pursuance of the notice issued by the Court against Ram Charan Das he put in appearance through a counsel. I have heard the learned Advocate for Ram Charan Das but I see no good grounds why the prosecution of Ram Charan Das under S. 193 of the Indian Penal Code should not be ordered. There is a strong *prima facie* case to prove that he made the following false statement before the Munsif of Shikohabad on 31st October, 1924 knowing that the statement made by him was false and not true."

He then set out the false averments and directed that the appellant be prosecuted under S. 193 of the Indian Penal Code, and he further directed that the case be sent to the District Magistrate of Mainpuri for trial. It is against this order that an appeal has been filed. As no reasons are given to enable me on appeal to decide whether a *prima facie* case has been made out, I have examined the record of the case against Shiam Lal.

The learned Judge, in his order of the 3rd of February, 1925, in the appeal of Shiam Lal said :

"I think the view taken by the Munsarim of the Munsif's Court and the learned Munsif himself is erroneous. I see absolutely no difference in the ink of the words "ek sal" and the words "chhah mah", and I wonder how it was that the Munsarim came to report that the words "chhah mah" were in different ink."

I have examined the document in question and I am unable to agree with the view taken by the learned Judge. The words "chhah mah" are not only written in a different ink, but the angle at which the lines forming the words "chhah mah" are written, is different from that of the whole of the rest of the document. The learned Assistant Government Advocate, who also examined the document, was unable to say that the ink with which the words "chhah mah" were written was the same as the rest of the document. An examination of the document was made with the help of a powerful magnifying glass. I am of opinion that the view taken by the learned Munsif about the document was correct. I have also examined the other evidence in the case, and cannot understand how Kharagjit, an illiterate person, could have identified the bond, and could have remembered the exact period for which the loan was given. I am not impressed by the evidence of Randhira Chamar as it seems to me surprising that he waited for such a length of time to repay the bond, and a few days after the suit was instituted, he satisfied it out of Court.

The result is that no case has been made out for the prosecution of Ram Charan Das, the appellant. I allow his appeal and set aside the order of the District Judge dated the 27th of February, 1925 directing the prosecution of the appellant under S. 193 of the Indian Penal Code and direct him to withdraw the complaint. *Appeal allowed.*

1925 ALLAHABAD 546

SULAIMAN AND DANIELS, JJ.

Mahip Narain Pandey—Defendant—Appellant.

v.

Mannu Singh—Plaintiff—Respondent.

First Appeal No. 6 of 1924, Decided on 21st April 1925, from an order of the Second Addl. Dt. J., Gorakhpur.

Civil P. C., S. 11—*Co-defendants*—Res judicata *applies if conflict of interest existed and if decision of suit rested on the issue.*

For *res judicata* to arise between co-defendants there must have been a conflict of interest between the co-defendants, and it must have been necessary for the decision of the suit for the Court to decide the question on which they were at issue. [P. 546, C. 2, P. 547, C. 1.]

If the issue was one the decision of which was sufficient for the decision of the suit and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised, not only between the plaintiff and the defendants, but between the co-defendants as well, the rule of *res judicata* applies as between co-defendants also.

[P. 547, C. 1]

It is not necessary for an issue to operate as *res judicata* that it should have been the only ground on which the Court could have decided the case.

Surendro Nath Sen—for Appellant.

Peary Lal Banerji and *Sankar Saran*—for Respondent.

Daniels, J.—The decision of this appeal depends on a question of *res judicata*. The plaintiff-respondent, Mannu Singh, together with one Jang Bahadur Singh, purchased certain property from the defendant-appellant, Mahip Narain Pandey. Mahip Narain's sons brought a suit to set aside the sale on two grounds. The first ground was that the sale was without consideration, and the second ground was that even if there was consideration, there was no legal necessity. The suit was decided *ex parte* and the Court which tried it, on the evidence tendered by one of the plaintiffs before it, found in favour of the plaintiffs on both questions. It found that the sale was without consideration, and therefore there was no legal necessity for it. The vendees then filed the present suit to recover from Mahip Narain Pande the alleged consideration of the sale-deed. The trial Court held that it was *res judicata* between the parties, and that no consideration had passed. The lower appellate Court has taken a different view, and has remanded the case for decision on the merits. The defendant appeals.

The principles which govern the question of *res judicata* between co-defendants have been laid down in a number of cases of which we may instance *Muhammad Ahmad* v. *Zahur Ahmad* (1). The rule is that there must have been a conflict of interest between the co-

(1) 1922 All. 19=44 All. 334=20 A. L. J. 193.

defendants, and it must have been necessary for the decision of the suit for the Court to decide the question on which they are at issue. In this case there certainly was a conflict of interest between the co-defendants in the former suit, for the appellant, Mahip Narain, made common cause with his sons and pleaded that the sale-deed was without consideration. The issue was also one which, having been raised before it, the Court was bound to enter into and decide. If there was no consideration for the sale-deed, the suit of Mahip Narain's sons was bound to succeed. The learned vakil for the respondent contends that for an issue to operate as *res judicata* between co-defendants, it must have been the only ground on which the Court could have decided the case. In this case he urges that as the previous suit might have succeeded on either of two grounds, namely because there was no consideration, or because there was no legal necessity, therefore the decision on the former point, though logically it comes first in order, could not operate as *res judicata*. We think that this is giving too narrow a scope to the rule. If the issue was one the decision of which was sufficient for the decision of the suit, and the issue was raised and the suit was actually in fact decided upon it, then, if that issue was one which was raised, not only between the plaintiff and the defendants, but between the co-defendants as well, the rule of *res judicata* applies. The case of *Kunj Man* v. *Jagan Nath* (2) is an illustration. There a suit was brought by the managing member of a joint Hindu family against a third party for an injunction. The plaintiff's brother, a member of the joint family, was joined as a *pro forma* defendant. His interest was identical with that of the plaintiff. The suit having been dismissed, it was held that the matter was *res judicata* as between the plaintiff's brother and the defendant.

For the reasons which we have given, we consider that the view taken by the learned Subordinate Judge was right. We accordingly set aside the order of the District Judge and restore the decree of the trial Court with costs in all Courts. *Appeal allowed.*

(2) [1920] 42 All. 359=55 I. C. 846=18 A. L. J. 326.

1925 ALLAHABAD 547

SULAIMAN AND DANIELS, JJ.

Ram Prasad Singh and others—Plaintiffs—Applicants.

v.

Jagtamba Prasad Singh and others—Defendants—Opposite Party.

Civil Rev. No. 47 of 1924, Decided on 28th April 1925, from an order of the Sub. J., Jaunpur.

Civil P. C., O. 33, Rr. 1 and 5—Hindu minor having share in joint family property is not necessarily entitled to sue as "pauper."

Where a minor member of a Hindu joint family sues to set aside an alienation of joint family property by his father and where there is a share which has not been transferred the minor cannot sue as a pauper unless an attempt has been made and it has actually been found impossible for the minor to obtain funds. 25 *All.* 407 (*P. C.*) *Ref.* and *explained.* [P 547 C 2]

A. Sanyal—for Applicants.

Surendro Nath Sen — for Opposite Party.

Daniels, J.—This is an application for revision of an order holding that the applicants were not entitled to sue as paupers.

They are minor sons suing to set aside an alienation by their father of joint family property. The learned Judge has found that there is a share which had not been transferred at the time when the suit was filed and that, therefore, they are possessed of sufficient means to enable them to pay the Court-fee. This is a finding of fact which we must accept in revision. It is argued for the applicants that this share is useless to them because they could not raise money on it, as the Privy Council have held in the case of *Gharib-ullah* v. *Khalak Singh* (1), that no guardian can be appointed for a minor member of a joint family. If this argument is correct, then every minor member of a joint family, except in the rare case of his possessing separate property, must be *ipso facto* entitled to sue as pauper. We are not prepared to accept this result or to believe, until an attempt has been made, that it is impossible for the minors to obtain funds when it is found that they are possessed of sufficient property. The Privy Council had not before them the case in which there was a conflict of interest between the

(1) [1903] 25 All. 407=30 I.A. 165=5 Bom.L.R 478=7 C. W. N. 681=8 Sar. 483 (P. C.)

minor member and the head of the family and the former was engaged in litigation against the latter. In fact the defendants, through their vakil in this case, had actually offered to purchase a part of the plaintiff's share in case a guardian was duly appointed. We accordingly dismiss the application with costs on the higher scale.

Application dismissed.

1925 ALLAHABAD 548

STUART, J.

Sultan and another—Appellants.

v.

Hardhiyan—Respondent.

Second Appeal No. 1070 of 1923, Decided on 25th March 1925, from the decree of the D. J., Saharanpur.

Civil P. C., O. 32 R. 3 (4) and S. 99—Non-compliance with O. 32, R. 3 (4)—Minor not prejudiced—Proceedings are not vitiated.

Failure to comply with the provisions of O. 32, R. 3 (4) is only an irregularity covered by S. 99 of the C. P. C., and where such failure has not prejudiced the minor in any way, the proceedings are not vitiated. [P 548 C 2 ; P 549 C 1]

Nehal Chand—for Appellants.

Kailas Nath Katju—for Respondent.

Stuart, J.—The facts in the suit under which this appeal arises, afford a good illustration of the difficulty to which a person may be put when he is endeavouring to enforce a document, which he holds against the heirs of a deceased executant.

The plaintiffs' father, Surja, had transferred property on more than one occasion. In 1897 he executed a mortgage in favour of a certain Bakhshi. In 1900 he executed a usufructuary mortgage of the same property in favour of Hardhiyan, the present defendant respondent. It is not clear how the mortgage of 1897 was satisfied, but it apparently was satisfied, for we hear no more of Bakhshi. Surja, although he executed the deed of usufructuary mortgage, did not give up the possession of the property, and executed another deed in 1905 by which his retention of possession was regularised and by which he mortgaged his equity of redemption under the deed of 1905 in security for the repayment of the rent due upon the property, the satisfaction of which formed the consideration of the deed of 1905. It will thus be seen that he executed the deed of 1905 in payment of amounts that were actually due by him by way of rent and that, had he not executed that deed, he would have been liable to ejectment from the property in respect of which he had already executed a deed of usufructuary mortgage. Surja then died and Hardhiyan instituted a suit upon this deed against the present plaintiffs-appellants, who are Surja's sons and who were then minors. It is Hardhiyan to whom I referred as the plaintiff who has had trouble in obtaining satisfaction of the amount due on his deed after the death of the executant.

When he instituted his suit in 1909, he nominated the defendants' mother as their guardian *ad litem*. As far as I can gather, she was the most suitable person to be nominated for that position and there does not appear to have been anybody else who could have been nominated. A notice was served on her personally, to which she did not pay the slightest attention. It appears to me that the plaintiff knew no other relation or friend who could be appointed guardian *ad litem*. Then the plaintiff came to the Court to appoint the Nazir of the Court as guardian *ad litem*. It is palpable that a Nazir of Judge's Court is not usually a very suitable person to appoint as a guardian *ad litem* of a minor ; but the question, which few Courts appear to have tackled in the past, is what has the plaintiff to do when the person, who ought to be guardian *ad litem*, refuses to accept the responsibility without any reason at all ? The plaintiff has, in these circumstances, to seek the assistance of an officer of a Court.

He applied that the Nazir should be so appointed, and the Court proceeded to appoint the Nazir. Unfortunately overlooking the provision of Order 32, rule 3, clause 4, it omitted to serve a fresh notice upon the minors and a fresh notice upon their mother. It is almost certain that, had a fresh notice been served on the mother she would have treated it as she treated the previous notice, and paid no attention to it. But the omission was made and undoubtedly an irregularity was committed. I have examined the record of the previous case and am satisfied that the Nazir did not in any way neglect his duties. He appears to have endeavoured to get into touch with the mother of these minors, who refused to have any communication with him.

He could not receive information of any sort or kind. On the face of it, the mortgage-deed of 1905 was a good deed actually executed by the minors' father and was executed for binding consideration. On the face of it it would appear that the consideration had been taken for legal necessity. That is how the Nazir would ordinarily have read it. When the mother of the minors refused to come near him or to give him any information he could hardly be blamed for taking the position that there was no defence to the suit. He did not defend it accordingly, and a decree was passed against the minors. In execution of this decree the property was purchased by Hardhiyan, the present defendant-respondent, without apparently the slightest objection on the part of any person representing the minors.

Several years after the sale had taken place, the minors (one of whom has attained majority) instituted the present suit to set aside the sale of the property to Hardhiyan, which took place in execution of the previous decree. The learned District Judge has dismissed the suit holding that, although an irregularity had been committed it was an irregularity which is covered by present S. 99 of the Civil Procedure Code (corresponding to old S. 578 of the old Code) and that it did not affect the matter, because no prejudice had been caused by the irregularity to the present plaintiffs. This view appears to be in complete accord with the principles laid down by their Lordships of the Privy Council in *Mt. Bibi Walian* v. *Bankey Behari Prasad* (1). I do not consider that the present appellants were prejudiced in any way by the appointment of the Nazir as their guardian *ad litem* without notice, to the effect that his name has been proposed, having been served on their mother or themselves. From what I have seen of the case, I am under the impression that no effective defence could have been put in, and that the guardian *ad litem* had he contested the case, would have merely involved his wards in unnecessary expense. I, therefore, dismiss this appeal with costs on the higher scale.

Appeal dismissed.

(1) [1903] 30 Cal. 1021=30 I. A. 182=5 Bom. L. R. 822 = 7 C. W. N. 774 = 8 Sar. 512 (P. C.)

1925 ALLAHABAD 549

SULAIMAN AND DANIELS, JJ.

Niadar—Appellant.

v.

Ramji Lal—Respondent.

First Appeal No. 19 of 1924, Decided on 23rd April 1925, from an order of the Dt. J., Meerut.

Prov. Insolvency Act, S. 75 (2)—Creditor can appeal.

A creditor is a person aggrieved and is entitled to appeal. 39 *All.* 152 *Dist.* [P 550, C 2]

Panna Lal—for Appellant.

Kailas Nath Katju—for Respondent.

Daniels, J.—This appeal arises out of an insolvency proceeding. The crops in suit were attached by the receiver in insolvency at the instance of the appellant, Niadar, who is a creditor of the estate. The insolvent, Baldeo, is the brother of Mt. Kesar, the recorded proprietor of the property, but it appears that they are not at present on good terms as there has been a criminal case between them. The crops are claimed by the respondent, Ramji Lal, and the District Judge has decided on the evidence that they were sown by him and belonged to him.

A preliminary objection is taken that no appeal lies on the ground that a creditor is not a person aggrieved and, therefore, has no right of appeal. The respondent relies on the decision of this Court in *Jhabba Lal* v. *Shib Charan Das* (1). This was a decision under the Act of 1907. Under that Act there was a difference of opinion between this Court and the Madras High Court. This Court held that the receiver was the only person who could appeal in such cases, whereas the Madras High Court in *Tiruvenkatachariar* v. *Thangayiammal* (2) held that an individual creditor was a person aggrieved and was entitled to appeal. This conflict of opinion has been set at rest by an alteration in the language of the present Insolvency Act. S. 46 of Act No. III of 1907 gave a right of appeal to "any person aggrieved by an order made in the exercise of insolvency jurisdiction". In S. 75 of Act No. V of 1920 these words have been changed to

(1) [1917] 39 All. 152=37 I. C. 76=15 A.L.J 1.

(2) [1916] 39 Mad. 479=29 M.L.J. 755=29 I.C. 294=17 M.L.T. 429.

"the debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction". In sub-section (2), under which the present appeal is preferred, these words are summed up as "any such person aggrieved by any such decision". In our opinion the alteration in the language of the present Act indicates an acceptance of the Madras view that a creditor is a person aggrieved by the decision in a case of this kind. The decision clearly is adverse to his interest for it reduces the amount of property out of which he is entitled to claim a dividend.

On the facts, however, we see no reason to differ from the view of the Court below. It is common ground that this land was cultivated by a tenant named Mare who was given a lease by Mt. Kesar. The evidence which the learned Judge has accepted goes to show that when Mare gave up the land, it was let to the respondent, Ramji Lal, who sowed the crops on it. It is true that the patwari supports the case of the appellant but the learned Judge has given reasons for not accepting his evidence in preference to that tendered on the other side. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1925 ALLAHABAD 550

SULAIMAN, J.

Mt. Nur Bibi—Appellant.

v.

Sk. Ali Ahmad—Respondent.

Second Appeal No. 1057 of 1923, Decided on 6th March 1925, from the decree of the Sub. J., Jaunpur.

(a) *Mah. Law—Divorce—Divorce-deed not signed before wife is not invalid.*

A deed of divorce is not defective merely because it is not signed in the presence of the wife. 8 *W. R.* 23 *Foll.* [P 551 C 1]

(b) *Mah. Law — Divorce — Intention to make irrevocable divorce clearly expressed—Triple form need not be used.*

When the language of the document clearly indicates that the intention is to make an irrevocable divorce it is not necessary that the triple form should be used. [P 551 C 1]

(c) *Mah. Law — Divorce — Untrue acknowledgment of divorce is ineffective.*

An acknowledgment of a divorce, as distinct from the pronouncement of the divorce itself, obtained under compulsion is wholly ineffective if it is proved that it was in fact untrue. [P 551 C 2]

Majid Ali—for Appellant.

Mushtaq Ahmad—for Respondent.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for restitution of conjugal rights. The plaintiff's case was that the defendant No. 1 was his legally wedded wife, that he had come to the house of her father when on the 6th of June, 1922, her father and brothers forcibly under a threat of injury to his person and life made him sign a document purporting to be a deed of divorce, that accordingly no valid divorce was pronounced by him and that even if there was a divorce it was a revocable one and he revoked it by registered notices on the 17th of June, 1922.

The contesting defendant No. 1 in her written statement denied that there had been any coercion or compulsion and pleaded that a valid divorce had been pronounced and that it was an irrevocable one.

The Court of first instance although finding that some moral force might have been used in obtaining the document came to the conclusion that even if it was obtained under compulsion it was valid. It thought that a valid and irrevocable divorce had been pronounced, and accordingly dismissed that suit. On appeal the lower appellate Court has come to a contrary conclusion. It has found that the defendants Nos. 2 to 5 had prepared a plot to secure a deed of divorce and everything was ready from before, that they took the plaintiff to the house of one Abdul Rahim who appears to be a *Badmash* of Benares, that there were some 5 or 10 men sitting with *lathis*, and that there the plaintiff was forced to execute the deed of divorce. It found that the plaintiff had been forced to sign the document. As to whether there had been an oral pronouncement by the plaintiff it came to the conclusion that the story of the defendants was quite false. It believed that the plaintiff did not utter the word of divorce orally. It accordingly decreed the claim.

The defendants have come up in appeal and on their behalf it is urged that even if the document had been obtained under compulsion it effected a valid divorce. On the other hand the replies on behalf of the respondent are (1) that a divorce obtained by coercion is revocable, (2) that the deed not having been executed in the presence of the wife was inoperative, (3) that the document contains only one pronouncement and not three, and the divorce

on this ground also was revocable and (4) that it did not amount to a pronouncement of divorce at all but a mere acknowledgment that a divorce had been effected and as a mere acknowledgment it is invalid.

It is true that the majority of the Hanafi jurists have taken an extremely narrow view that a divorce pronounced under compulsion also is effective, though the opinion is by no means absolutely unanimous. The Shafai lawyers on the other hand hold such a divorce to be altogether invalid. In view of the opinion which I have formed on the terms of the document itself it is unnecessary for me to consider whether by the opinion that the divorce under compulsion is effective, it is meant that it is wholly valid and irrevocable, or whether that though it is not null and void yet it is revocable. Nor is it necessary to consider whether the view of the Hanifi lawyers is against the public policy as has been suggested by some commentators. The question of revocation also therefore does not arise.

The deed, however, is not defective merely because it was not signed in the presence of the wife, *vide* the case of *Mt. Waj Bibi* v. *Azmut Ali* (1).

The objection that the deed does not contain three pronouncements of divorce is also of no avail to the plaintiff. It is true that the lower appellate Court has found that the word 'three' in it is a subsequent interpolation. But when the language of the document clearly indicates that the intention was to make an irrevocable divorce it is not necessary that the triple form should be used.

The plea of divorce however falls to the ground because of the finding that the plaintiff did not pronounce the divorce orally but merely signed the deed Ex. A. The operative portion of it may be translated as follows :—

" While in full possession of my senses and having divorced my wife Mt. Nur Bibi in the presence of several persons, I declare and put it down in writing, etc., etc." The language of the document makes it clear that the divorce had taken place before the document was signed and the document itself contains a declaration that such divorce has been effected. The finding of the lower appellate Court is that the signature on this deed was obtained under compulsion. All that is proved then is that under compulsion the husband acknowledged that he already divorced his wife. This is quite a different thing from actually pronouncing the divorce itself.

On the question as to whether an acknowledgment of a divorce, as distinct from the pronouncement of the divorce itself, obtained under compulsion is binding on the husband, there is a perfect unanimity of opinion even among the Hanafi lawyers. Such an acknowledgment is wholly ineffective if it is proved that it it was in fact untrue.

It follows that the view of the lower appellate Court that no valid divorce has in the eye of the law taken place was correct.

In view however of the strained relations between the parties I would direct under Order 21, rule 33 (1) Civil Procedure Code that the decree against the wife shall not be executed by her detention in prison. It will be open to the plaintiff to take any other step that may be allowed to him by law. The injunction against the other defendants will of course hold good. With the above remarks the appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 8 W.R. 23.

1925 ALLAHABAD 551

SULAIMAN AND DANIELS, JJ.

Ganga Devi and another—Auction-Purchasers—Appellants.

v.

Ram Prasad and others—Decree-holders—Respondents.

First Appeal No. 103 of 1924, Decided on 11th May 1925, from an order of the Sub. J. of Farrukhabad.

(*a*) *Civil P. C., S. 47—Property sold being in excess of that ordered by decree to be sold—Application by judgment-debtor to set aside sale—S. 47 applies.*

An application by the judgment-debtor to set aside an execution sale on the ground that the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold is one under S. 47 and an appeal lies from the order on the application. [P 552 C 1]

(*b*) *Execution—Sale beyond decree is illegal.*

Where property in excess of that ordered to be sold by a decree was auctioned.

Held : that the sale of the excess portion was absolutely illegal. [P 552 C 1]

Gulzari Lal—for Appellants.

M. L. Agarwala—for Respondents.

Sulaiman, J.—This is an appeal from an order directing a sale to be set aside. Under the mortgage decree, which was in execution, the property mortgaged consisted of a one third share in 12 biswas and odd in the village in dispute. This share was situated in a certain patti, but in the sale proclamation the share advertised for sale was stated to be 7 biswas 13 biswansis share in that patti, and then the area and the revenue of the entire patti were given. The sale was accordingly completed of the 7 biswas, 13 biswansis share in that patti. The judgment-debtor applied to the Court for setting aside the sale on the ground that the decree did not direct the sale of so large a share. This application has been allowed and the entire sale set aside.

A preliminary objection is taken to the appeal that this was not an application under Order 21, rule 90 but was under S. 151 of the Code and, therefore, no appeal lies. We, however, think that the application must be treated to be one under S 47 of the Code of Civil Procedure because the sale had taken place in contravention of the decree and the property sold was in excess of that ordered to be sold. Under such circumstances an appeal would lie.

It cannot be disputed that the sale of 4 biswas and odd share alone could have been ordered, and not of the 7 biswas 13 biswansis. That being so, the sale of the share in excess of 4 biswas and odd was absolutely illegal.

Mr. Gulzari Lal, the learned counsel for the appellants, has properly offered to pay the whole of the sale price for one-third of 12 biswas odd which could have been properly sold and which he says his clients are willing to retain. Under these circumstances we allow the appeal in part and modifying the order of the Court below direct that the sale be confirmed with regard to one third of 12 biswas and odd only on payment of the amount fetched at the auction-sale and that the sale with regard to the remainder be set aside. We direct the parties to bear their own costs of this appeal.

Appeal allowed in part.

1925 ALLAHABAD 552

SULAIMAN AND DANIELS, JJ.

Madhori Saran—Appellant.

v.

Parbati—Respondent.

First Appeal No. 105 of 1924, Decided on 5th May 1925, from an order of the Sub. J., Farrukhabad.

(*a*) *Civil P. C., O. 43, R. 1 (w)—Right of appeal is subject to O. 47, R. 7.*

The right of appeal conferred by Order 43, rule 1 (w) is not an unlimited right, but is subject to the conditions of Order 47, rule 7. 40 *All.* 68 and 45 *Cal.* 60 *Foll.* [P 552 C 2]

(*b*) *Civil P. C., O. 47, R. 4 (2) (b)—Discovery of old sale deed—Appellate Court not deciding if it related to land in dispute but granting review and remanding case for decision of issue on merits after allowing opposite side to rebut the evidence—Order was held justified.*

An appellate Court granted an application for review on the ground of the discovery of a certain old sale deed relating to the land in dispute. But the Court did not decide whether the sale deed exactly referred to the land in dispute. It considered *prima facie* that it did appear to refer to the land, but sent back the case for decision of the issue on the merits after allowing the opposite side to produce rebutting evidence.

Held : that under the circumstances this was a proper order to pass. [P 553 C 1]

(*c*) *Civil P. C., O. 47, R. 1—Point not raised at trial cannot be raised in review.*

A party ought not to be allowed in review to raise a case which was never raised at the trial, and on which no evidence was adduced. [P 553 C 1]

Indu Bhushan Banerji—for Appellant.

Daniels, J.—This is an appeal from an order granting a review of judgment on the ground of the discovery of new and important evidence which the defendant could not by exercise of due diligence have discovered earlier. The new and important evidence consisted of a certified copy of a sale-deed of the year 1878 alleged to relate to the land in suit. The question arises whether the appeal comes within the terms of Order 47, rule 7 of the Civil Procedure Code. The right of appeal conferred by Order 43, rule 1 (w) is not an unlimited right, but is subject to the conditions of Order 47, rule 7 ; Vide *Khurshed Alam Khan* v. *Rahmat-ullah Khan* (1) and *Nandlal Mullick* v. *Panchanan Mukerjee* (2). In this case the appeal, if allowable at all, comes under clause (b) of rule 7 of Order 47 on the ground that the review was

(1) [1917] 40 All. 68=43 I. C. 490=15 A. L. J. 899.

(2) [1918] 45 Cal. 60=21 C. W. N. 1076=42 I. C. 484=26 C. L. J. 187.

admitted in contravention of rule 4. Now, the learned pleader for the appellants has not been able to dispute the finding of the learned Subordinate Judge that it was not within the power of the applicant, in spite of due diligence, to produce at the trial the evidence on which she now relies. His contention is that it is not clear on the face of the sale-deed that it relates to the land in suit. This is a point which the learned Subordinate Judge has not decided. He evidently considered *prima facie* that it did appear to refer to this land, for he says that the admission of the document changes the whole aspect of the case. At the same time he recog nized that it was not fair to decide the point as an appellate Court without giving the other side an opportunity to rebut the evidence. He accordingly sent back the case for decision of the issue on the merits after allowiug the respondent to produce rebutting evidence. This appears to us, under the circumstances, to have been a proper order to pass. The question can only be decided when the document is read along with the other evidence in the case. The evidence has not been laid before us, and we are not in a position at his stage to express any opinion on the questior.

In one respect the order of the Court below is open to objection. At the hearing of the appeal the defendant raised a point as to the effect of a certain partition on the plaintiff's claim. This was a new point raised in appeal, and the learned Subordinate Judge had held in deciding the case that it could not prevail in the absence of the evidence necessary to substantiate it. In his order admitting the review the learned Subordinate Judge has permitted the defendant to adduce evidence on this question also. For this there is no justification The point was never raised at the trial at all, and the defendant ought not to be allowed in review to raise a case which was never raised at the trial, and on which no evidence was adduced. We accordingly set aside that portion of the lower Court's order which allows the defendant an opportunity of establishing her contention regarding the partition. In other respects the apveal is dismissed. We make no order as to costs as the respondent is not represented.

Appeal dismissed.

1925 ALLAHABAD 553

LINDSAY AND KANHAIYA LAL, JJ.

Kishun Ahir and others—Plaintiffs—Appellants.

v.

Saran Ahir and another—Defendants—Respondents.

Second Appeal No. 363 of 1925, Decided on 1st May 1925, from a decree of the D. J., Azamgarh.

U. P. Pre-emption Act (11 *of* 1922), *S.* 5—Wajib-ul-arz *and* Rubkar *must be construed together.*

A *wajib-ul arz* cannot be read detached from a *rubkar* which professes to correct it. The two documents must be construed together. [P. 553, C. 2]

Haribans Sahai—for Appellants.

Kanhaiya Lal, J.—We think the decision of the lower Court in this case is correct. It is a case to which the Pre-emption Act XI of 1922 applies. It appears that in the 1874 Settlement the village in which the property is situated formed part of a taluqa comprising a number of villages. It is true that a *wajib ul arz* was prepared at that Settlement in which it was stated that there was a custom of pre-emption, but there was also produced before the Court below a certified copy of a *rubkar* dated the 30th September, 1874, declaring that the entry relating to custom in this *wajib-ul-arz* was to be deemed to be incorrect as far as this mauza Jalalpur was concerned. It was stated clearly in this *rubkar* that there was in that village no custom of pre-emption and that there would be no such custom in future.

We are of opinion that the Judge of the Court below construed S. 5 of the Pre-emption Act correctly. The *wajib-ul-arz* cannot be read detached from the *rubkar* which professes to correct it. The two documents must be construed together, and we are quite clear, this being done, there is no *wajib-ul-arz* of 1874 recording a custom of pre-emption.

It is further argued that even if this view be taken, there is nothing to exclude the idea that the parties who signed the *wajib-ul-arz* were entering into a contract for pre-emption. Here again we think the language of the *rubkar* is quite clear. It indicates to us that the parties concerned intended to have nothing whatever to do with the right of pre-emption whether by custom or by contract.

No other point arises for discussion.

We dismiss the appeal under order 41, rule 11.

Appeal dismissed.

1925 ALLAHABAD 554

LINDSAY AND SULAIMAN, JJ.

Abdul Wahid—Appellant.

v.

Hatim Ali and others—Repondents.

Second Appeal No. 706 of 1923, Decided on 30th January 1925, from a decree of the D. J. of Bulandshahr.

Pre-emption—Wajib-ul-arz giving right of pre-emption to co-sharers of village—Partition subsequent to preparation of wajib-ul-arz—Right of pre-emption can be claimed only by co-sharer of same mahal as that of vendor.

A wajib-ul-arz gave the right of pre-emption first to own brothers and on their refusal, to 'shurkayandeh.' Subsequent to the preparation of the wajib-ul-arz, there was a partition of the village.

Held: that after the partition though the right of pre-emption continued, the words 'shurkayandeh' should be interpreted as meaning 'shurkayan mahal' and that the right of pre-emption was confined only to those co-sharers who had a joint interest in the same mahal as the vendor. [P. 555, C. 1.]

Mustaq Ahmad and *Iqbal Ahmad*—for Appellant.

Kailas Nath Katju—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for pre-emption with respect to the sale of a share situated in mahal *munzabta* of Abdul Wahid the plaintiff, in which the plaintiff and the vendor had proprietary interests, and in which the defendant vendee has not proprietary interest. There were many pleas taken by the defendant. Among others there were the pleas, that there was no custom of pre-emption in this village: that the custom did not apply to resumed muafi lands which had been sold and lastly, that the defendant being a proprietor in the village out of which this mahal had been carved, he was on an equal footing with the plaintiff. The Court of first instance decreed the claim; but on appeal the lower appellate Court dismissed the suit *in toto*.

To prove the existence of this alleged custom the plaintiff produced a wajib-ul-arz of the year 1873 which contains a clause relating to the right of pre-emption. On behalf of the defendant three judgments, namely, of 1879, 1895 and 1899 were produced where a claim of pre-emption was asserted, but not allowed. The plaintiff produced a judgment of the year 1910 which we understand was affirmed by the High Court in second appeal and where a claim for pre emption on the basis of custom was upheld. We may note that the judgments in the earlier cases proceeded on a view of law which does not now prevail. The learned Judges did not proceed on a presumption in favour of the plaintiff but rather thought that the wajib-ul-arz not having been signed by the parties was not conclusive. In the second case the learned Judge held that the custom did not apply to *muafi dawami*. It is possible that the whole wajib-ul-arz was not before him because in the wajib-ul-arz in chapter III, paragraph 1, there is a special mention that transfers of *muafi dawami* take effect subject to the right of pre-emption.

The last judgment is in favour of the plaintiff.

In our opinion there is nothing to rebut the ordinary presumption arising from the wajib-ul-arz that a custom of pre-emption exists in this village. We therefore agree with the Courts below that it must be held that a custom exists.

The next question is whether such a custom applies to *muafi munzabta*. In paragraph 5 of the wajib-ul arz, after giving a long list of the transfers that were in existence at the time of its preparation, there is a recital that no other property is under a mortgage and that in future every co-sharer will have a right to sell his share, but he shall first sell to his own brothers and if they refuse then to *shurkayan deh* (co-sharers in the village), and if they also do not take then he may transfer it to any one he pleases.

Paragraph 14, which has the heading of the custom of pre-emption, states that pre-emption prevails. It is noteworthy that in this paragraph the list comprises both shares in khalsa and resumed muafi, and there is nothing in it to indicate that the entry was confined to sales of shares in khalsa land alone. Furthermore, since the preparation of the wajib-ul-arz the village has been partitioned into two distinct mahals. The plaintiff's mahal now consists of only one class of proprietors who originally were proprietors of resumed muafis and now are co-sharers in this new mahal. The plaintiff and the vendor are both co-sharers and they are on the same footing, whereas the defendant vendee is not a co-sharer in this mahal. The custom must be deemed to exist in this new mahal.

It is next contended before us that the defendant being a proprietor in the village is on the same footing as the plaintiff. This contention cannot prevail. Prior to the partition he certainly was a co-sharer with the vendor but since the partition he has gone off to an entirely different *mahal* and has no community of interest left with the vendor.

We are accordingly of opinion that the view taken by the learned Judge is not correct. We allow this appeal, and setting aside the decree of the lower appellate Court restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale. We extend the time for payment to six months from this date. In case of default of payment the suit shall stand dismissed with costs in all Courts including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 555

MEARS, C. J. AND PIGGOTT, J.

Kanji Mall—Plaintiff—Appellant.

v.

Durga Prasad and others—Defendants—Respondents.

Letters Patent Appeal No. 105 of 1924, Decided on 13th March 1925, against the judgment of Mukerji, J.

Civil P. C., O. 41, R. 33—Suit decreed against 1st defendant but dismissed against 2nd defendant—1st defendant appealing—Plaintiff not appealing from dismissal of claim against 2nd defendant—Appellate Court can pass decree in plaintiff's favour against 2nd defendant.

There were three defendants to the suit. The suit was decreed as against the first two defendants but dismissed as against the third defendant. The first two defendants appealed; but the plaintiff did not appeal against the dismissal of his claim against the third defendant.

Held; that the appellate Court could pass a decree against the 3rd defendant alone while exonerating the first two defendants. 43 *Mad.* 803 *Foll.* [P 555 C 2]

Peary Lal Banerji and *Surendro Nath Gupta*—for Appellant.

Piggott, J.—This was a suit for profits, and accounts had to be adjusted as between three distinct parties, namely, the plaintiff, Kanji Mal, the third defendant, Durga Prasad, and the other two defendants, Jugal Kishor and Ram Chandra, in respect of whom a joint account was required to be taken. The case underwent various vicissitudes; but in the end a learned Judge of this Court, on the basis of express findings of fact, returned upon issues remitted for the purpose, arrived at the conclusion that Kanji Mal, the plaintiff was, on a fair settlement of accounts, entitled to recover Rs. 242-7-6 in all from the other co-sharers. He also found that Durga Prasad was in debt to the other co-sharers by reason of realizations which he had made in excess of his rateable Share; to the amount of Rs. 202-14-11. On these facts the learned Judge rightly held that there ought to be a decree in favour of Kanji Mal against Durga Prasad alone for a sum of Rs. 202-14-11. It was found that there had been a settlement as between Kanji Mal and other two defendants, so that it was not necessary to go further into the question of their respective rights or liabilities. The learned Judge, however, held that, because no decree had been passed against Durga Prasad and the plaintiff had never appealed against the decree which dismissed his claim as against Durga Prasad, no decree could be given in favour of Kanji Mal on the second appeal which had been filed by Jugal Kishor and Ram Chandra. The matter has been brought before us in an appeal under the Letters Patent in which all the defendants to the suit as brought are impleaded. The plaintiff Kanji Mal relies on the provisions of Order 41, rule 33 of the Code of Civil Procedure, and contends that there ought to have been a decree in his favour against Durga Prasad for Rs. 202-14-11. Reliance is also placed on the case of *Neelumani Patnaik Mussadi* v. *Sukaduva Beharu* (1) as authority for the proposition that the provisions of Order 41, rule 33 of of the Civil Procedure Code can be applied so as to give appropriate relief to a plaintiff who appeared before the appellate Court as a respondent under circumstances closely analogous to those now before us. In our opinion this contention is well founded. We modify the decree of the learned Judge of this Court and instead of dismissing the plaintiff's claim altogether, we grant him a decree for

(1) [1921] 43 Mad. 803=60 I. C. 255=12 L. W. 269.

Rs. 202-14-11 against the defendant Durga Prasad alone.

The costs as between these two parties, which will include fees on the higher scale in respect of both hearings in this Court, will be adjusted on the basis of payment and receipt in proportion to failure and success calculated on the total amount originally claimed.

Decree modified.

1925 ALLAHABAD 556

SULAIMAN AND DANIELS, JJ.

Pitam Lal—Plaintiff—Applicant,

v.

Balwant Singh—Defendant—Opposite Party.

Civil Rev. No. 170 of 1924, Decided on 7th May 1925, from an order of the Sub-J., Budaun.

Civil P. C., Ss. 152 and 115—Court has jurisdiction to refuse amendment—Failure to exercise jurisdiction makes revision competent.

Under S. 152 of the Civil P. C. the Court has power, under the peculiar circumstances of any case, to refuse the application for amendment of decree if it feels inclined to do so. The Court is not bound to grant the application in every case. [P 556 C 2]

On the judgment-debtor satisfying a mortgage decree in full, the case was struck off. Three years afterwards, the defendant applied for amendment of the decree.

Held: that the Court could dismiss the application if it was inclined to do so. [P 556 C 2]

Held: further that the failure by the Court to exercise this jurisdiction on the ground of its non-existence, amounted to material irregularity in the exercise of its jurisdiction, so that revision of its order was permissible. [P 556 C 2]

Per Daniels, J.—When a decree for money has been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment under S. 152 of the Civi. P. C. [P 556 C 2; P 557 C 1]

Narain Prasad Asthana—for Applicant.

Peary Lal Banerji—for Opposite Party.

Sulaiman, J.—This is an application in revision from an order amending a decree. A mortgage decree for sale was passed by the Court below which was appealed against to this Court. The question of the liability to pay costs was raised in appeal but the appeal was dismissed for want of prosecution. The judgment-debtors satisfied the decree in full and the case was struck off. Three years afterwards, the respondent, Balwant Singh, applied to the Court below to have the decree amended on the ground that it was not in strict accordance with the judgment. The learned Subordinate Judge, who disposed of this application, felt himself compelled to grant the application because he imagined that he had no discretion to refuse it. He clearly says: "I think, however, that that course is not open to me." He would have dismissed the application had he thought that he had any discretion in the matter for he distinctly remarks; "I may, however, note in passing the circumstances which would have made it peculiarly desirable to exercise one's discretion against the applicant in this case if one had the power to do so." Having thought himself compelled to grant the application, he has ordered that the decree should be amended.

One of the points raised on behalf of the applicant is that the Court below had no jurisdiction to amend the decree because the matter had been brought up in appeal and was disposed of by the appellate Court. The contention is, in my opinion, not sound because there was no decree passed on appeal but merely an order dismissing the appeal for default. There is thus no decree of the appellate Court in which the first Court's decree has merged. It cannot, however, be doubted that under S. 152 of the Code of Civil Procedure the Court had power, under the peculiar circumstances of this case, to refuse the application if it felt inclined to do so. The Court was not bound to grant the application. I have already referred to the fact that the Court would have dismissed the application if it had felt that it had power to do so. Under these circumstances the Court below has not applied its mind to the case correctly and has acted with material irregularity in the exercise of its jurisdiction because it has not exercised its discretion at all. I would allow the revision and, setting aside the order of the Court below, dismiss Balwant Singh's application for amendment of the decree with costs.

Daniels, J.—I concur. I would be prepared to go a step further and hold that when a decree for money had been finally satisfied and discharged, the Court is *functus officio* and can no longer entertain an application for amendment

under S. 152 of the Code of Civil Procedure.

By the Court.—The application for revision is allowed and the order of the Court below is set aside and Balwant Singh's application is dismissed with costs in both Courts.

Application allowed.

1925 ALLAHABAD 557

MUKERJI, J.

Parbhu Lal—Appellant.

v.

Chattar and others—Respondents.

Second Appeal No. 1474 of 1923, Decided on the 6th March 1925, from a decree of the D. J., Agra.

(a) T. P. Act, S. 3—"Notice"—Registration is not notice in itself.

Where a mortgagee sub mortgages his interest the original mortgagor cannot be said to have notice of the sub-mortgage merely becuase the latter is registered, 48 *Cal.* 1 (*P. C.*) *foll.*

[P. 557, C. 2]

Narain Prasad Asthana—for Appellant.

M. L. Agarwala—for Respondents.

Mukerji, J—This appeal and appeal No. 1106 of 1923 arise out of similar facts. It appears that certain persons executed an usufructuary mortgage in favour of three persons Badam, Uday Ram and Chiranji Mal. Badam made a mortgage to plaintiff-appellant in the present appeal and Uday Ram and Chiranji Mal executed a simple mortgage in favour of the appellant in the other appeal. Among the properties mortgaged was the interest of the mortgagors as usufructuary mortgagees. The plaintiffs brought their respective suits to recover money and claimed the right to bring to sale the mortgagee's interest of Badam in one suit and Uday Ram and Chiranji Mal in the other. The mortgagors of these mainly contended that they had satisfied the usufructuary mortgage and redeemed the property and that therefore there was nothing to be sold.

Both the Courts found against the plaintiffs. They held, *inter alia*, that the original mortgagors had no notice of transfer of the mortgagee rights and were therefore not bound to pay the money to the present plaintiffs-appellants instead of to their original mortgagees.

Two points have been taken in the memorandum of appeal. The first is that registration is notice. This point has been fully and finally settled by the case of *Tilakdhari Lal* v. *Khedan Lal* (1), by their Lordships of the Privy Council, who held that a registration of subsequent transactions was no notice to persons who were parties to earlier transactions. In the case before their Lordships of the Privy Council it was urged that a prior mortgagee should be charged with the notice of a subsequent registered transfer. Their Lordships repelled the argument. On the same principle it cannot be said that the original mortgagors would have notice of the transfer in favour of their respective plaintiffs merely by reason of the fact that the transfers in their favour were registered. This argument therefore fails.

The second argument was that on the facts as found by the Court below a notice in law was established. The point is really a question of fact and the finding of the Judge below should be conclusive. The learned counsel however read out the judgment of the learned appellate Judge and I am satisfied that he has not misapplied any rule of law or has not drawn any improper conclusion from the facts before him. The direct evidence of transfor consisted of a letter sent by post which was received back with the word 'refused' marked on it. There is no evidence to show that the letter had ever been tendered to the original mortgagors or that they had written the word 'refused'. The next item of direct evidence was an application to the Sub-Registrar presented on the day the deed of redemption was registered asking him not to register the deed. The Judge finds that it was not proved that the application had been presented before the deed was actually registered. Evidently the learned Judge means that application may have been presented after the executant had appeared and acknowledged the execution of the document. The finding therefore was a legitimate finding from the facts proved.

The appeals fail and the present one is dismissed with costs which will include counsel's fees in this Coutt on the higher scale.

Appeal dismissed.

---

(1) [1920] 48 Cal. 1=47 I. A. 239=39 M. L. J. 243=18 A.L.J. 1071=(1920) M. W. N. 591=13 L. W. 161=25 C. W. N. 49=22 Bom. L. R. 1319=2 Pat. L. T. 101=28 M.L.T. 224=57 I. C. 465=32 C.L.J. 479 (P. C.)

★ 1925 ALLAHABAD 558

SULAIMAN AND DANIELS, JJ.

Sita Ram—Plaintiff—Appellant.

v.

Peare alias *Alloo and another*—Defendants—Respondents.

First appeal No. 175 of 1924, Decided on 8th May. 1925, from an order of the Sub., J., Bareilly.

★ *Civil P. C., O. 23 r. 3—Parties agreeing not to adduce any evidence and to abide by Court's decision after local inspection—Decision after local inspection is one based on compromise and is not appealable.*

The substantial dispute between the parties was as to whether a spout in question should or should not be closed. Instead of incurring the expense involved in producing a lot of oral evidence the parties decided that they should not produce any evidence whatsoever and should abide by the decision of the Munsif after he had made a local inspection. The document which recorded their agreement did not say that any inspection notes should be prepared by the Munsif and be left on the record ; nor did it say that he should necessarily refer to all the documentary evidence that was produced by the parties. The matter in dispute was left entirely to the decision of the Munsif.

Held : that the parties could not subsequently resile from their agreement and must be bound by the decision of the Munsif arrived at after local inspection whether the decision was, as a matter of fact, right or wrong. The Munsif's judgment was not vitiated by the fact that he kept no notes of his inspection or that he made no reference in his judgment to the documents filed by the parties. The decision must be treated to have been one based on a compromise between the parties and was no longer open to appeal. 1924 *All.* 570 and 1925 *All.* 271 *Foll.*

[P 558, C 2]

Girdharilal Agarwala—for Appellant.

Peary Lal Banerji—for Respondents.

Sulaiman, J.—This is an appeal from an order remanding the case so that it be tried *de novo* and the parties be allowed opportunities of producing additional oral and documentary evidence.

The plaintiff brought a suit praying that a certain spout opened by the defendant towards his Court-yard should be closed. The defence was that this spout was an old one and not a recent one, and that, in any case it threw water on the defendant's own land. On the 10th of December, 1923 both the parties made statements before the Court that they did not want to produce any evidence whatsoever, and that whatever the Court, after making a local inspection, decided, that would be acceptable to both the parties. This was duly signed by the parties. In pursuance of this no further evidence was recorded by the Munsif, and he made a local inspection of the place and came to the conclusion that the spout was a recent one and not an old one at all. He was further inclined to hold that the water from this spout did not fall on the defendant's land. He accordingly decreed the claim.

The defendant went up in appeal, and the lower appellate Court has set aside that decree. The lower appellate Court has remarked that the learned Munsif kept no notes of inspection, and has made no reference in his judgment to the documents that were filed by the parties. And then again, although the parties had clearly stated that they would not produce any more evidence, the lower appellate Court curiously enough, has directed that there should be a trial *de novo* and further evidence, both oral and documentary, should be produced by both parties. The order of remand cannot possibly be upheld

The substantial dispute between the parties was as to whether the spout in question should or should not be closed. Instead of incurring the expense involved in producing a lot of oral evidence the parties decided that they should not produce any evidence whatsoever and should abide by the decision of the learned Munsif after he had made a local inspection. The document which recorded their agreement did not at all say that any inspection notes should be prepared by the Munsif and be left on the record ; nor did it say that he should necessarily refer to all the documentary evidence that was produced by the parties. The matter in dispute was left entirely to the decision of the learned Munsif, and, in our opinion, the parties cannot now resile from their agreement and must be bound by the decision of the learned Munsif whether it was, as a matter of fact, right or wrong. The decision, therefore must be treated to have been one based on a compromise between the parties and was no longer open to appeal. For the sake of reference we may refer to the case of *Himmanchal Singh* v. *Jatwar Singh* (1) and that of *Ram Sunder Misra* v. *Jai Karan Singh* (2)

(1) 1924 All. 570=46 All. 710=5 L. R. A. Civ. 439.

(2) 1925 All. 271=23 A. L. J. 251=6 L. R. A. Civ. 270.

We accordingly allow this appeal, and, setting aside the order of the Court below, restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

★ 1925 ALLAHABAD 559

LINDSAY AND KANHAIYA LAL, JJ.

Husain Baksh—Defendant—Appellant.

v.

M. Mahfuzul Haq and another—Plaintiffs—Respondents.

Second Appeal No. 303 of 1924, Decided on 18th May 1925, from a decree of the Addl. Sub. J., Saharanpur.

★ *Mah. Law—Pre-emption—Shiah Law—Property not joint at time of sale or at any time previously — Right of way enjoyed in common by owners of several houses—No right of pre-emption arises on sale of one of the houses.*

Under the Shia Law there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off, while the roads and rivulets passing through them continue to be held in joint proprietary right. [P 559 C 2]

Where the properties are or were not held jointly at any time, but a right of way is enjoyed jointly by the owners of the properties, and this right of way is sold by one of them along with his property there can be no right of pre-emption, because there never was any original partnership in respect of the said properties to permit of the right of way being treated as a residuum of that joint right. The right of way enjoyed jointly by the owners of the properties, is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each. [P 560 C 1]

S. A. Haidar and *Surendro Nath Sen*—for Appellant.

Iqbal Ahmed—for Respondents.

Kanhaiya Lal, J—The plaintiff-respondent sued for pre-emption under the Muhammadan Law in respect of a house situated in Saharanpur city which was sold by *Mt.* Habib-un-nissa to Husain Bakhsh on the 9th January, 1920. The house of the plaintiff stands to the North of the house in dispute. The allegation of the plaintiff was that two parnalas of his house discharged water into the inner court-yard of the house sold; that there was a joint wall between the two houses, and that there was also a plot of land lying in front of the doors of the two houses, which was used as a common pathway, closed on one side, and belonging to the persons whose houses opened towards that lane. The vendor and the vendees are Shias. They denied that the plaintiff was a co-sharer in the property sold or in any pathway appertaining to it or that the plaintiff had any right to claim pre-emption. The Court of first instance found that the plaintiff was not entitled to pre-emption as he had no joint interest in any portion of the property sold and there was no joint wall standing between the two houses nor any joint pathway belonging only to these two tenements. The lower appellate Court, however, held that although there was no joint wall or other joint interest held by the parties in the house in question, there was a blind passage in front of the doors of the houses of the parties, which was common to all the houses existing there, and inasmuch as that passage was sold along with the house in question, the plaintiff as a sharer in the passage was entitled to claim pre-emption in respect of both.

The defendant vendee appeals and his contention is that the plaintiff is not entitled to pre-emption, firstly, because there was no joint passage belonging to the houses of the parties; and, secondly, because no right of pre-emption could be enforced as the property was not divided property and the common passage was owned by more than two persons having houses opening towards it.

The right of pre-emption under the Shia Law is of a much more restricted character than that allowed under the Hanafi law. According to the Shia law *shufa* is the legal title of one partner (*sharik*) in the joint property to the share of another partner (*sharik*) therein in the event of its transfer by sale, and, as stated by Baillie, a right of pre-emption can only be claimed under that law by a person who is a partner of a share in the joint and undivided property (Baillie's Muhammadan Law, p. 179).

According to the Sharaya-ul-Islam, quoted by Shyama Charan Sarkar, the right of pre-emption does not belong to a neighbour nor does it attach to the property that has been divided, unless a road or rivulet of water (if any running through it) be still in joint tenancy. It is a necessary condition that the person claiming a right of pre-emption should at that time be (actually) a co-sharer (of the

seller). Tagore Law Lectures, 1874, p. 447.

Again :—

"When there is more than one claimant by right of pre-emption, opinions are divided as to the establishment of the right. According to one of these it is established absolutely whatever be the number (of the claimants); according to another it is established with a plurality of partners when the claim is for land, but not when it is for more than a single slave ; and according to the third it is not established with respect to anything when there is more than one (co-sharer), and this last opinion is the most prevalent.

Similarly says Baillie :—

"It is otherwise in the case of lands which have been divided off, where the roads or rivulets passing through them continue to be held in joint property and one of the partners in the latter sells his share together with his portion of the divided land, for there the other partner's right of pre-emption attaches not only to the share in the road or rivulet which was held in joint property but also to the portion of the land divided off as being connected in sale with the other. If, however, the land should be sold separately, there could be no ground for a claim for pre-emption in respect of it; and even with respect to the road or rivulet which continued in joint property, it is only when it is sufficiently wide to admit of a division thatthe right can attach to either of them " (Baillie's Imamia law, p. 177).

Thus there can be no right of pre-emption except in relation to property which is held jointly or which was at one time held jointly and has been divided off, while the roads and rivulets passing through them continue to be held in joint proprietary right.

Where the properties are, or were, not held jointly at any time, as in the present instance, there can be no right of pre-emption, because there never was any original partnership in respect of the said properties to permit of the right of way being treated as a residuum of that joint right. If any right of way is enjoyed jointly by the owners of the properties, it is only a subsidiary or beneficial right appertaining to each property but not a right flowing out of the joint nature of the properties held by each. This will be further clear from another passage of the Sharaya-ul-Islam, translated by Baillie :—

" There is no privilege of pre-emption to a neighbour, nor in property that has been divided, unless the road or rivulet of water, running through it, is still held in partnership. The privilege is established by general assent when there are only two partners ; when there is more than one claimant, opinions are divided. According to one of these, it is established absolutely, whatever be the number. By another it is established with a plurality of partners in the case of lands but not of a slave. By the third it is not established in respect of anything when there is more than one partner. And this last opinion is the most prevalent and best supported by traditional authority (Baillie's Muhummadan Law. p. 179).

The Court below refers to a passage from the Sharaya-ul-Islam which states :

" The right of pre-emption is established in land where there is a partnership in the pathway or in the drinking water, if sold along with the land."

But this passage refers to a case where the property was originally joint and has been divided off, leaving the pathway or the drinking water or rivulet joint. It also refers to a passage in Jawahir-ul-Kalam, a commentary on the Sharaya-ul-Islam, where it is laid down :—

" There is another precept which has been held to be correct by more than one. There is a house belonging to a tribe of people who partitioned it and each of them took a piece separately and built on it and left between them an open space in the house in which they have their passage. A man came and purchased the shares of some of them. Can he do so (without the risk of being pre-empted) ? The reply was, he can do so ; but he should close the door and open it on another pathway."

The extract only goes to confirm what we have said above, namely, that the right of pre-emption can only be exercised where the property is or was held jointly at one time or another and has been divided off, leaving a residue of the proprietary rights in the way or water undivided, if the latter is included in the sale. An extract from the Riyayat-ulmisil was cited before the Court below on behalf of the defendant-appellant

which goes to show that no right of pre-emption can be exercised unless there is jointness in the substance of the rights.

The Court of first instance observed that the passage lying in front of the doors of the houses of the parties was used by the parties and the owners of two or three other houses and that it belonged to the owners of all these houses jointly. But the finding of the lower appellate Court on that point is not very specific or clear. All that it says is that the passage was common to all the houses and a right to that passage was sold along with the house in question. Assuming, however, for the sake of argument that that passage was the joint property of the owners of the houses, which have doors opening towards it, including the present plaintiff and the defendant-vendor, a joint proprietary right to that passage would not give the plaintiff a right of pre-emption, because the houses, to which that passage appertains, were never at any time joint property. They are separate houses, having a distinct and separate title. The passage in question does not appertain to any joint property, which had been divided or partitioned or to a house divided between the co-sharers thereof and in respect of which a right of pre-emption could be claimed.

In *Abbas Ali* v. *Maya Ram* (1) and *Saiyid Muhammad Razi-ud-din* v. *Raghubir Prasad* (2), it was held that upon a sale of property by a Shia Muhammadan no right of pre-emption arises, where there are more than two co-sharers in such property. Here the property was not held by the plaintiff and the defendant-vendor jointly at all. The houses owned by them were never joint. The passage in question may be either a public way or a private pathway belonging to more than two persons. In either case, the plaintiff is not entitled to claim pre-emption. This appeal is, therefore, allowed and the claim of the plaintiff dismised with costs here and hitherto.

Appeal allowed.

(1) [1898] 12 All. 229=(1898) A. W. N. 93.
(2) [1918] 16 A. L. J. 507=46 I. C. 82.

1925 ALLAHABAD 561

SULAIMAN AND DANIELS, JJ.

Sanwalia and another—Plaintiffs—Appellants.

v.

Nathi Lal—Defendant—Respondent.

First Appeal No. 179 of 1924, Decided on 13th May 1925, from an order of the Sub. J., Muttra.

Agra Tenancy Act, (2 of 1901) S. 4—Rent may include payment on produce of tanks—But where parties are not landlord and tenant, payment by one to other is not rent.

Rent may include what is paid on account of the produce of tanks, but rent is a payment by a tenant to his landlord. Where the plaintiffs are not the landlords of the defendants but the parties are proprietors in distinct mahals, the payment claimed is not rent. [P 561 C 2]

Narain Prasad Asthana—for Appellants.

Ajodhia Nath—for Respondent.

Daniels, J.—This is an appeal against an order of the learned Subordinate Judge of Muttra returning a plaint for presentation to the Revenue Court on the ground that the suit is one for arrears of rent under the Tenancy Act. The plaintiffs are co-sharers in mahal Sanwalia in M. Pingri in the Muttra district: the defendant is a co-sharer in another mahal known as mahal Ghair khwahindagan. According to the plaintiffs' case, a certain tank is joint between the two mahals, and the zamindars of the former mahal are entitled to a certain share in the produce of it. It appears that *singharas* are grown in the tank. The learned Munsif, in whose Court the suit was filed, decreed it in favour of the plaintiffs. The learned Judge, without considering the merits of the claim, held that the amount claimed was rent as defined in S. 4 of the Tenancy Act, and, therefore, he had no jurisdiction. The learned Subordinate Judge is quite right in saying that, according to the definition, rent may include what is paid on account of the produce of tanks. What he has overlooked is that rent is a payment by a tenant to his landlord. Here the plaintiffs are not the landlords of the defendant but the parties are proprietors in distinct mahals. The learned Subordinate Judge was, therefore, in error in holding that he had no jurisdiction. We set aside his order and direct him to restore the case to his file and dispose of it on the merits.

Costs will abide the result.

Order set aside.

1925 ALLAHABAD 562

STUART AND BOYS, JJ.

Firm Balram Das-Fakir Chand — Appellant.

v.

G. I. P. Railway Company — Respondent.

Second Appeal No. 607 of 1923, Decided on the 27th March 1925, from a decree of the Dt. J.. Ghazipur.

(a) Railways Act, S. 72--Risk Note B.—Sending waggons long distance sealed only with paper string and wax is wilful neglect by Railway.

A Railway will be guilty of wilful neglect in sending a waggon hundreds of miles during which the train would have to travel at night and stop at all sorts of sidings sealed only, with paper, string and wax. 1925 *All.* 172 and 7 *A.L.J.* 833 *foll.*

M. L. Agarwala—for Appellant.

Ladli Prasad Zutshi—for Respondent.

Boys, J.—In this case a firm called Balram Das-Fakir Chand carrying on business at Rasra in the District of Ballia sued the Great Indian Peninsula Railway Company for compensation to the amount of Rs. 1,271-8-0 on account of the price of two bales of yarn with interest thereon on the allegation that they delivered these goods to the Great Indian Peninsula Railway Company at Victoria Terminus at Bombay to be transported to and delivered at Rasra in the district of Ballia and that the Railway Company failed to deliver the goods in accordance with their contract.

It is admitted that the goods were sent under the owner's Risk Note B. That Risk Note is no longer in current use but with that fact we are not concerned : nor with the question of what may be the effect of our interpretation of the old rules on any new Risk Notes that may now be in force.

It is clear that *prima facie* the plaintiff was entitled to recover damages against the Railway Company and the Railway Company could only escape by proving that they are freed from responsibility to the Risk Note Form B. Next it is clear that it is for the Railway Company to establish "loss".

The first Court held that no loss was established. The lower Appellate Court held that the Railway had succeeded in proving loss. On this point we are inclined to agree with the lower Court though not for the reasons stated by it.

It appears established by the evidence of Mahadeo, a foreman at Victoria Terminus that he put these bales into a waggon No. 7552 and sealed it ; that the waggon was sealed for transit to Allahabad city which means that it was a complete waggon which would not except under very exceptional circumstances be opened in the ordinary course of railway business until it arrived at Allahabad city. The waggon was then sent to Wadi Junction and attached to a train which was there made up for Allahabad. Mahadeo, the foreman further states that in that waggon he placed 43 packages.

The next information we have is that at a station called Pachora on the Great Indian Peninsula Railway the guard noticed that the doors of the waggon were open and of course the seals broken. As to the nature of these seals we shall have something to say presently. He drew the attention of this to a Railway servant, Chintaman Gopal, who is described as a number taker. Apparently this was not the only waggon of which the seal had been broken because Chintaman received instructions from the guard to reseal a number of waggons including this particular waggon. Chintaman says in his evidence that the ticket on the waggon indicated that there were only 38 packages in the waggon, but we think that there is no doubt that the evidence of Mahadeo the loading foreman at Victora Terminus to the effect that he put in 43 packages, evidence which is supported by his registers, should be accepted.

Nothing further appears to have been done at Pachora at all, but later at Allahabad the packages were counted and it was found that there were only 38. They were recounted at Allahabad because of the transhipment that was necessary if they were to go by the Bengal North-Western Railway to Rasra. It is further established that at Allahabad amongst the 38 packages found in the waggon there were not to be found the two bales belonging to the plaintiff which Mahadeo had put in at Bombay.

The railway's case, therefore, is a case of "loss" ; that having established that they put the bales into a waggon that was sealed at Victoria Terminus for Allahabad and having established that those packages were not in the van at Allahadad and that the seals had been found to be broken at Pachora and the

door open they have proved that the packages have been lost.

It was suggested to us at one time that there was nothing to show how the waggon might have been handled or the packages handled at Wadi junction or anywhere else *en route*; that the packages might have been taken out inadvertently and possibly sold by the Railway Company as unclaimed property in which case the price would still be in their hands but we do not think that this would be a justifiable assumption against the Railway. They could not be expected to produce a witness from every station to say that the packages had not been handled at the station or the seals broken.

We hold, therefore, that the inference which the Railway asks us to draw that they have established "loss" is an inference which we ought to draw, though, as we have said, for reasons other than those stated by the lower appellate Court.

But we feel that we cannot and should not leave this part of the case without expressing the strongest disapproval of the way in which the Railway Company treated the claim of the plaintiff at the outset. The Company deliberately replied to the plaintiff that they had duly delivered his goods to the East Indian Railway and this statement they made not merely by inadvertence once but deliberately repeated a second and a third time. We have neither been shown nor have we found any evidence to justify these letters and even if the statement was not known by the Company's servant's to be false, it was at least made without any proper inquiry and with the most reckless disregard of the truth. If the intention of it was not deliberately to direct the plaintiff on to the wrong track, it was almost certain to have that result. Such conduct of the negotiations upon a claim calls for the strongest condemnation.

The next question is whether the plaintiff has established wilful neglect by the Railway administration or by its servants so as to justify him in claiming that the Railway Company are not free even under the terms of the Risk-Note from responsibility. This plea of wilful neglect has been taken all through and we may refer to clause 8 of the grounds of appeal to the lower appellate Court. The lower Court appears not to have dealt with this plea at all but it is open to us to deal with it as we have all the materials before us.

It is in the evidence of the guard that some two or three days before as is shown by an entry in his journal the seals of waggons on his train were found to be broken in very similar circumstances. It is also clear from cases to which we will refer that the finding of broken seals is, to put it at the lowest at least, not an uncommon incident.

The question therefore, arises whether the railway were not guilty of wilful neglect in sending a waggon hundreds of miles during which the train would have to travel at night and stop at all sorts of sidings, sealed only, as we have it established in the evidence of Mahadeo, the loading foreman, with paper string and wax.

Even if a finding in similar circumstances had not previously been arrived at by this Court we should have been inclined to hold that this was wilful neglect on the part of the Railway. In support of this view we need only refer to *Bengal North-Western Railway* v. *Manorath Bhagat Dhian Ram* (1) *Bengal and North Western Railway Company* v. *Haji Mutsaddi* (2). We hold, therefore, that there was "wilful neglect" by the company and that this appeal should be allowed and we accordingly allow it with costs on the higher scale.

Appeal allowed.

(1) 1925 All. 172=22 A. L. J. 1035=6 L. R. A. Civ. 24.
(2) [1910] 7 A. L. J. 833=7 I.C. 160.

1925 ALLAHABAD 563

LINDSAY, J.

Thakur Prasad and others—Appellants.

v.

Gulab Kunwar and others — Respondents.

Second Appeal No. 1015 of 1923, Decided on 20th February 1925, from a decree of the D. J., Azamgarh.

Lim. Act, S. 6—Alienation of property of Hindu joint family—Suit for setting aside—Person in existence at date of alienation having cause of action—Subsequent birth of other members does not extend time.

If at the date of the transfer of property belonging to a Hindu joint family there was in existence any person who had a cause of action for a suit to set aside the alienation, time begins to run and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation.

[P 564 C 1]

Time for a suit to set aside the alienation will expire either after 12 years from the alienation or 3 years after the attaining of majority of any person who had a cause of action on the date of the alienation. [P 564 C 1]

Peary Lal Banerji—for Appellants

S. N. Sen—for Respondents.

Lindsay, J.—The suit out of which this appeal has arisen was brought in order to avcid a certain transfer of what was alleged to be joint family property made by one Madhuban Das on the 27th November, 1903.

The suit was brought by two sons of Madhuban Das and one son of Sri Kishen who was brother of Madhuban Das. Sri Kishen himself was arrayed as a defendant in the case.

It is not necessary for me to enter into the grounds taken in the memorandum of appeal for a question of limitation has now arisen on the case put forward by Dr. Sen who appears for the respondents. According to this argument the suit was in reality time-barred, and so it appears to be having regard to the recent decision of their Lordships of the privy Council in *Ranodip Singh* v. *Parmeshwar Prasad* (1) decided by the Judicial Committee on the 17th of November, 1924.

The principle laid down by their Lordships in that case, is that if at the date of the transfer there was in existence any person who had a cause of action for a suit to set aside the alienation, time begins to run and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation. It is admitted here that on the date on which the alienation was made Sri Kishen was in existence and had a right to challenge the alienation which was made by his brother, and that being so, time expired either after twelve years from the 27th November, 1903 or after three years from the date on which Sri Kishen attained majority. It is admitted that, taking into account either period, the suit must be deemed to be barred. I therefore, dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

---

(1) 1925 P. C. 33=47 All. 165=52 I. A. 69=23 A. L. J. 176=27 Bom. L. R. 175=48 M. L. J. 29=21 M. L. W. 236=6 L. R. P. C. 47=(1925) M. W. N. 262=12 O. L. J. 74=2 O. W. N. 1=26 O. C. 343 P. C.).

1925 ALLAHABAD 564

SULAIMAN AND DANIELS, JJ.

Durga Ram—Appellant.

v.

Har Kishen Dass—Respondent.

First Appeal No. 130 of 1924, Decided on 5th May 1925, from an order of the Dt. J., Ghazipur.

Prov. Ins. Act, S 6—Mere inability to pay debts is not sufficient—Mere absence from the village for a few hours when creditor sent a man to him for collecting debt, not carrying on business vigorously, or not keeping accounts etc., is not sufficient.

A debtor was absent from his village for two or three hours when a *munim* of his creditor's shop went to him for collecting the debt. The debtor was purchasing cloth from the same creditor and using the proceeds to pay off his other credidors but did not pay this particular creditor from whom he purchased the cloth. For about one month he had not been keeping up his accounts and also had ceased to do his business with vigour.

Held: that none of these acts, constituted an act, of insolvency within the meaning of the act. [P 565 C 1]

Held: further that the fact that the debtor was unable to pay his debts was not in itself sufficient. [P 565 C 1]

Surendro Nath Verma—for Appellant.

Uma Shanker Bajpai—for Respondent.

Daniels, J.—This is an appeal from an order declaring the appellant, Durga Ram, an insolvent on the application of the respondent, Har Kishan Das, to whom he is indebted. It is difficult to know exactly on what grounds the learned Judge has granted the petition. The acts of insolvency alleged in the creditor's petition were, first, that the insolvent was removing his property in order to avoid paying his creditors, and, secondly, that he did not sit at his shop and was about to go to Calcutta. The learned Judge finds neither of these allegations to be proved. As regards the absence, he says that all that is proved is that the appellant was absent from his village for about two or three hours on one occasion when the *munim* of the shop went to collect the debt. This is not sufficient to constitute an act of insolvency within the meaning of clause (d) (ii) of S. 6. The grounds on which the learned Judge seems to have proceeded are that the defendant, who is a cloth dealer, has been purchasing cloth from the applicant, selling it retail and using the sale proceeds to pay up creditors other than the

applicant. He further finds that the defendant has not been keeping up his accounts for about a month past and has ceased to carry on his business with vigour during these days. Neither of these two acts constitutes an act of insolvency within the Provincial Insolvency Act. Nor does the fact that he is unable to pay his debts in itself suffice. We allow the appeal and set aside the order of adjudication. The appellant will get his costs.

Appeal allowed.

1925 ALLAHABAD 565

MUKERJI AND BOYS, JJ.

Lalla Babu and another—Plaintiffs—Appellants.

v

Lal Bahadur — Defendant -- Respondent.

Second Appeal No. 425 of 1923, Decided on 20th February 1925, from a decree of the Dt. J., Budaun.

Pensions Act (23 *of* 1871), *S.* 4—*Assignees of land revenue subsequently becoming proprietors of land—Assignees are not grantees of revenue free immovable property.*

A grant of immovable property is not to be treated as 'pension' within the Pensions Act. Where originally the Government assigned only the land revenue to certain persons and subsequently, when the proprietors of the soil died or became extinct, a settlement was made with the pensioners themselves,

Held : that the fact that the Government made the settlement with the pensioners did not convert the pensioners into grantees of revenue free immovable property. The nature of the grant must depend on what the Government gave and not on what may happen irrespective of the wishes of the Government. If the Government gave only the land revenue any acquisition of the lands by the pensioners themselves could not make them "a grantee of the immovable property." [P 566 C 1,2]

Held ; further that so long as the Government did not make a revenue free grant of the land, it could not be said that there was a merger of the two different rights, simply because the pensioners had been long in possession as zamindars. [P 566 C 2]

Narain Prasad Asthana, Harnandan Prasad and *Baleshwari Prasad*—for Appellants.

Kamalakanta Varma and *Sarkar Bahadur Johari*—for Respondent.

Mukerji, J.—This appeal concerns itself only with the question, *viz* : what is the property that is going to be sold ?

Certain persons being members of a joint Hindu family with the appellants mortgaged their property described in the plaint as mauza Muhammadpur Bayar, pargana Budaun, comprising a 15 biswas share entered in the *khewat* as holding No. 1, bearing a *jama* of Rs. 931-6-6. Certain issues arose between the parties and one of the questions raised was whether the mortgagors had any interest in the property which was not liable to be sold. The nature of that interest claimed as unsaleable, will be considered presently. A second appeal was heard by this Court and after an amendment of the decree appealed against, the appeal was remanded for disposal of the issue which is now to be finally disposed of by this Court.

It appears from the judgment of the lower appellate Court, that is to say, the judgment under appeal, that the ancestors of the mortgagors were originally assignees of the Government revenue in respect of the two villages, *viz* : Mahammadpur Bayar and Lakhanpur. The learned Judge found that whatever might be true history of the grant, "undoubtedly these two villages had been held by the ancestors of the appellants as assignees of the revenues during the Moghul times and originally the history of Lakhanpur and that of Muhammadpur Bayar was identical." The learned Judge found, in respect of Lakhanpur, that there were zamindars with whom the settlement was made by the Government, and that the appellants had been realising the land revenue from the zamindars of Lakhanpur as assignees of the same. With respect to Muhammadpur, the learned Judge finds that there were certain persons with whom the Moghuls and the early British officers made settlements, but later on when regular Settlements came to be made these persons disappeared and the settlement was made with the assignees of Government revenue themselves. The result was, finds the Judge, that for the last half a century or more the appellants have been treated as the proprietors of the village paying the land revenue to themselves. On these facts, the lower appellate Court remarked as follows :— "Thus the corpus of village of Muhammadpur Bayar passed into the possession

of the *muafidar*. Act 23 of 1871, on which the present appellants place reliance, does not refer to immovable property but only to grants of revenue and money." The learned Judge, accordingly, held that the property mortgaged was saleable.

To start with, we may point out that if the property, as described in the plaint, be sold, the purchaser will, on the face of it, be liable to pay a revenue of Rs. 951-6-6. The property is not described in the plaint as being revenue free. It is not said that whoever purchased the property will be exempt from payment of land revenue. In this view, if we simply affirm the decree appealed from, the purchaser would be liable to pay the land revenue, whether the same be payable to the appellants, the mortgagors, or to the Government.

However, the controversy having arisen as to what is the property that is to be sold, we proceed to discuss the question.

Under the Pensions Act "no Civil Court shall entertain any suit relating to any pension or grant of pension or land revenue conferred or made by the British or any former Government whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted" (S. 4 of Act 23 of 1871). It is clear that a grant of immovable property is not to be treated as 'pension' within the Pensions Act. This is not controverted. It is for this reason that the mortgagees are anxious to induce the Court to hold that the mortgagors are not mere assignees of the land revenue, enjoying a certain sum of money annually, but are the proprietors of the entire village although they do not pay any land revenue. It is conceded on behalf of the plaintiffs, *vide* document No. 83 A dated the 1st of June 1920, that originally the mortgagors were nothing but assignees of land revenue. When the proprietors of the soil died or became extinct, a settlement was made with the pensioners themselves. That being so, it appears to us there are two separate capacities held by the mortgagors. The fact that the Government made the settlement with the pensioners did not convert the pensioners into grantees of revenue free immovable property. The nature of the grant must depend on what the Government gives and on what may happen irrespective of the wishes of the Government. If the Government gave only the land revenue, any acquisition of the lands by the pensioners themselves cannot make them 'a grantee of the immovable property.' This, in our opinion, is the criterion for the decision.

It has been urged that the mortgagors have been long in possession as zamindars and that, therefore, the two rights which they possessed have merged into one another. We do not think that there is a merger. The two rights are entirely different. The owner of soil can enjoy it but subject to payment of the land revenue. That land revenue must be paid to the Government. The Government may choose that the land revenue would be paid, instead of to themselves, to somebody else. So long as the Government does not make a revenue free grant of the land, it cannot be said that there is a merger of the two different rights. The two rights may very well lie in the same person without merger. We consider that in this case there has been no merger at all.

The result is that we declare that the property to be sold is the pure zamindari rights which the mortgagors have in the property and their right to the realisation of the Government revenue as assignees thereof is not liable to be sold.

We allow the appeal, modify the decree of the Court below and order that the property as described above be sold. Having regard to all the circumstances of the case, we order that the parties bear their own costs in this Court.

Appeal allowed.

1925 ALLAHABAD 566

SULAIMAN AND DANIELS, JJ.

Rudra Prasad Pande and others—Defendants—Applicants.

v.

Mathura Prasad Pande and others—Plaintiffs—Opposite Party.

Civil Revision No. 130 of 1924, Decided on 12th May 1925, from an order of Addl. Sub. J., Basti.

(a) *Civil P. C., S. 115, and Sch. 2 P. 15—Order superseding award in pending case and directing suit to proceed—No revision lies.*

No revision lies against an order superseding an award made in a pending case and directing the suit to proceed on the merits. 43 *All.* 564 and 1925 *All.* 458 *Foll.* [P 567 C 1]

(b) *Civil P. C., S. 105—Order in pending suit superseding award can be questioned in appeal from decree.*

An order made in a pending case, superseding an award and directing the suit to proceed on the merits can be questioned in an appeal from the decree passed in the suit. 1925 *All.* 458 *Foll.* [P 567 C 1]

Narain Prasad Asthana—for Applicants.

Surendro Nath Sen—for Opposite Party.

Daniels, J.—This is an application in revision against an order of the learned Subordinate Judge of Basti superseding an award made in a pending case and directing the suit to proceed on the merits. The parties referred the case to arbitration during the pendency of the suit. The arbitrator made an award. Objections were filed to this award. The learned Subordinate Judge held that those objections were valid objections, and passed an order superseding the award under rule 15, schedule II of the Code of Civil Procedure. The result is that the suit will proceed as if no reference to arbitration had been made; and it is in fact proceeding. A preliminary objection is taken that no revision lies under these circumstances as the case has not yet been decided. The Full Bench ruling in *Buddhu Lal* v. *Mewa Ram* (1) is relied on in support of this argument. We find that the exact point raised in this preliminary objection was recently decided by a Bench of this Court in a reported case—*Muhammad Fakhruddin* v. *Rahimullah Shah* (2). That also was an order superseding an award in a pending case. The learned Judges held that it was governed by the Full Bench ruling already referred to, and that at this stage no revision lay. They further pointed out that if the suit ultimately went against the applicant, it would be open to him to attack the order superseding the arbitration under the provisions of S. 105 of the Code of Civil Procedure. Following this ruling, with which we agree, we dismiss the present application with costs.

Application dismissed.

---

(1) [1921] 43 All. 564=63 I. C. 15=19 A. L. J. 558 (F. B.)

(2) 1925 All. 458=47 All. 121=6 L. R. A. Civ. 22.

★ 1925 ALLAHABAD 567

KANHAIYA LAL, J.

Ishwar Prasad and another—Defendants—Appellants.

v.

Babu Bishunath Prasad Singh—Plaintiff—Respondent.

Second Appeal No. 426 of 1923, Decided on 10th July 1924, from a decree of the Dt. J., Allahabad, D/- 11th December, 1922.

★ (a) *Limitation—Starting point—Decree omiting names of appealing defendants—Names added in decree after enquiry by Superior Court—Appellants' right to appeal arose only on addition of names and not on the date of original decree.*

Where a decree as passed omitted the same of appealing defendants but they did file an appeal and the appellate Court having made an enquiry, the trial Court added their names in the decree,

Held: That the right of the defendants to appeal from those decrees—if they had any right to appeal—arose when the decrees were amended by the addition of their names. [P 568 C 1]

★ (b) *Limitation Act, S. 5—Honest mistake is a good excuse.*

When the appellants did not appeal in time owing to an omission on the part of the trial Court in not mentioning their names in decree.

Held: that the delay, if at all, should be excused on the ground of honest mistake. [P 568 C 2; P 569 C 1]

Haribans Sahay—for Appellants.

P. L. Banerjee—for Respondent.

Judgment.—These appeals arise out of three suits brought by the present plaintiffs respondents for the ejectment of certain tenants from their holdings on the allegation that they were non-occupancy tenants. The defendants pleaded that they were not the tenants of the plaintiffs and that they cultivated the land on behalf of Ishwar Prasad and Kuber Prasad the *Muqarridars* or inferior proprietors of the village and paid rent to them. An application was made by Ishwar Prasad and Kuber Prasad to be made parties to the suit, on which they were asked to file their written statements. Their defence was that they had an underproprietary right to the whole village, in which the disputed land was situated and that they had been realising rents from the tenants from the settlement of 1289 F. as *Muqarridars* or inferior proprietors. The trial Court framed an issue on the point and came to the conclusion

that the defendants intervenors had no rights in the village of a proprietary nature and that the plaintiffs were entitled to eject the tenants from their holdings.

As the trial Court had passed no express order, directing that the intervenors should be added as defendants, their names did not appear in the decrees, which were prepared in those cases The decrees passed were merely decrees for the ejectment of the tenants, an appeal from which would ordinarily lie to the Commissioner : and the affidavit filed by the defendants-appellants shows that with a view to file the appeal to the Commissioner of Benares, they took the papers to M. Bhairon Prasad but he returned the papers saying that as a question of proprietary title was in issue, the appeal would lie to the District Judge. The appeal was then filed in the Court of the District Judge of Benares from those decrees, but the office of the District Judge, Benares, reported that the defendants intervenors were not mentioned in the decree and no appeal by them could be entertained. The trial Court was therefore asked to explain the situation and the result of that inquiry was that by an order of the 1st February 1923 passed on the application of the defendants-appellants, the names of the defendants inetervenors were added to the plaint and the decrees in each of the three suits. The decrees were passed on the 26th September 1922. The only persons who were mentioned in the decrees as defendants were the tenants, who could have filed an appeal within 60 days to the Commissioner. The names of the defendants intervenors were not entered in the decrees and they could not have filed any appeal anywhere. They eventually filed the appeal on the 22nd December 1922 and on an objection being taken that they had no right to file the appeal, because they were not parties to the decrees, their names were subsequently added to the decrees on the 1st February 1923. The right of the defendants intervenors to appeal from those decrees if they had any right to appeal arose when the decrees were amended by the addition of their names ; and in that view of the matter, the appeals could not be regarded as having been filed beyond time.

It is, however, possible to look at the matter from another stand-point. The decrees as they stood were passed against the defendants tenants, who could have appealed to the Commissioner within 60 days. The defendants intervenors may have honestly believed that they could have instituted the appeal in the Court of the Commissioner within the same period. As held in *Brij Mohan Das* v. *Mannu Bibi* (1) an honest mistake could be made in good faith and a *bona fide* mistake might be taken into consideration in suitable cases.

In *Brij Indar Singh* v. *Kanshi Ram* (2) their Lordships of the Privy Council held that the judicial discretion given by S. 5 of the Indian Limitation Act to admit an appeal after the prescribed period of limitation should be exercised, if the appeal has been prosecuted with due diligence, and when in the exercise of a judicial discretion a judge fails to apply the rule, the appellate Court should either remit the case or itself exercise the discretion.

In *Maqbul Ahmad* v. *Murla* (3) it was held that where under a *bona fide* mistake an appeal was filed in time in a wrong Court an appellant who might otherwise suffer loss of rights and injustice, ought to be allowed to put the mistake right, and to appeal unless there was some conduct disentitling him to do so, and that if an application made to admit an appeal beyond time was rejected on the ground which was not really material then it must be taken that no real judicial discretion had been exercised and the lower appellate Court could deal with the order with a free hand. In *Shib Dayal* v. *Jagannath Prasad* (4) an honest mistake made by a litigant upon incorrect advice was treated as sufficient cause for extending the period of limitation within the meaning of S. 5 of the Indian Limitation Act.

An honest mistake appears to have been made in the present case by the defendants appellants in thinking that the appeals from the decree for ejectment passed against the tenants alone would

(1) [1897] 19 All. 348=(1897) A. W. N. 86 (F. B.)
(2) [1917] 45 Cal. 94=44 I. A. 218=33 M. L. J. 486=22 M. L. T. 362=6 L. W. 592=126 P. W. R. (1917)=15 A. L. J. 777=19 Bom. L. R. 866=3 Pat. L. W. 313=26 C. L. J. 572=104 P. R. 1917=(1917) M. W. N. 811=22 C. W. N. 169=42 I. C. 43=127 P. L. R. 1917. (P. C.)
(3) [1916] 14 A. L. J. 212=33 I. C. 546.
(4) 1922 All. 490=44 All. 626=20 A. L. J. 674.

lie to the Commissioner, and as soon as they were dispossessed of that idea by Mr. Bhairon Prasad Vakil, they filed the appeal before the District Judge. The learned District Judge observes that the defendants-appellants had not shown *bona fides* by taking their appeals to the Court of the Commissioner, as was usual in such cases ; but they stated that they were disabused by Mr. Bhairon Prasad, who advised them to file the appeals before the District Judge and that they filed their appeals before the District Judge accordingly. There is sufficient reason therefore on either of the above grounds for admitting the appeals under S. 5 of the Indian Limitation Act. A question has also been raised as to whether any appeal could have lain to the District Judge at the instance of the defendants intervenors ; but that point does not really arise for consideration here.

The appeals are therefore allowed and the cases remanded to the District Judge with a direction to re-admit the appeals under their original numbers and to dispose of them in the manner required by law. The parties will bear their own costs of these appeals.

Cases remanded.

1925 ALLAHABAD 569

SULAIMAN AND DANIELS, JJ.

Faqir Ullah—Plaintiff—Appellant.

v.

Hikmat Ullah—Defendant—Respondent.

Civil. Rev. No. 19 of 1925, Decided on 14th May 1925, from an order of the 3rd Sub. J., Moradabad.

(a) *Prov. Sm. Cause Courts Act, S. 35—Case instituted before officer with S. C. Court powers—Officer losing jurisdiction—Case taken up by successor not having S. C. Court powers in ordinary course—Omission by latter to rehear evidence does not vitiate proceedings where merits are not affected.*

The suit was originally instituted before a Munsif having Small Cause Court powers. This Munsif ceased to have jurisdiction, and the case was taken up in the ordinary way by his successor who had no Small Cause Court powers. The evidence had been recorded by the first Munsif. His successor proceeded to decide the suit without rehearing the evidence. *Held*: that even if it be held that the Munsif who decided the case should have re-heard the evidence and recorded it in full as in a regular suit, his omission to do so was merely an irregularity in procedure to which S. 99 of the Civil P. C. applied and which could not be made a ground for seting aside the decree unless it had affected the decision on the merits. [P. 569, C. 2; P. 570, C1]

(b) *Prov. Sm. Cause Courts Act (9 of 1887) S. 35—Case decided by officer without Small Cause Court powers—Appeal lies.*

A case which is decided under S. 35 by an officer not having Small Cause Court powers must be treated as a regular suit in which an appeal lies. 37 *All.* 450; 39 *All.* 357; *and* 1922 *All.* 161 *Foll.*

[P. 569, C. 2.].

Girdharilal Agarwala—for Appellant.

S. A. Haider—for Respondent.

Daniel, J.—This is a revision against an order of the learned Subordinate Judge of Moradabad dismissing the plaintiff's suit on appeal. The grounds of revision are these. The suit was originally instituted before a Munsif having Small Cause Court powers. This Munsif ceased to have jurisdiction, and the case was taken up in the ordinary way by his successor who had no Small Cause Court powers. The evidence had been recorded by the first Munsif. The case was decided in favour of the plaintiff by the second Munsif. On appeal the learned Subordinate Judge, to whom the appeal was made over, took a different view and dismissed the suit. The plaintiff's first contention is that the suit continued to be a Small Cause Court suit, and therefore, no appeal lay to the District Judge. This contention is contrary to Section 35 of the Provincial Small Cause Courts Act, and the fact that a case which is decided under that section by an officer not having Small Cause Court powers must be treated as a regular suit in which an appeal lies, is supported by a long string of authorities, *e.g.*, *Sarju Prasad* v. *Mahadeo Pande* (1), *Lachman Das* v. *Ahmad Hasan* (2) and *Zamir-ul-Hasan Khan* v. *Imdad Ali Khan* (3).

The applicant's second contention is that the Munsif who decided the case should have re-heard the evidence and recorded it in full as in a regular suit. Even if the Munsif should have done

(1) [1915] 37 All. 450=29 I. C. 996=13 A.L.J. 639.
(2) [1917] 29 All. 357=38 I. C. 105=15 A. L.J. 305.
(3) 1922 All, 161=44 All. 59.

this, his omission to do so is merely an irregularity in procedure to which section 99 of the Civil Procedure Code applies, and which cannot be made a ground for setting aside the decree unless it has affected the decision on the merits. In this case we find on examining the record that the learned Munsif who heard the evidence recorded unusually short notes. That the shortness of the notes did not prejudice his successor against the plaintiff is evident from the fact that the case was actually decided in his favour. In appeal before the learned Subordinate Judge the applicant took no objection to the form in which the evidence had been recorded. He had of course taken none before the trial Court. We further find that the decision turned on a question of limitation, which depended on whether the true date of the pro-note was 1920 or 1921. It is quite obvious that the date originally written was 1920 and has been altered into 1921. The point on which the Courts differed was whether that alteration was made immediately, at the time when it was first written, or was made subsequently in order to bring the case within limitation. We find, therefore, that the error in procedure, if there was any, has not in any way affected the result of the case.

The revision accordingly fails, and we dismiss it with costs.

Application dismissed.

1925 ALLAHABAD 570

SULAIMAN AND DANIELS, JJ.

Gulab Dei and another — Plaintiffs—Appellants.

v.

Vaish Motor Company, Etawah and another—Defendants—Respondents.

First Appeal No. 45 of 1924, Decided on 22nd April 1925, from an order of the D. J., Agra.

Civil P. C., O. 32, R. 7—Decree being passed on compromise does not necessarily imply Court has sanctioned the compromise—Where guardian changes mind before grant of leave, and does not want compromise, compromise cannot be forced on minor.

The mere fact that the decree has been passed in terms of the compromise does not necessarily justify an inference that the Court granted leave, or that it was satisfied that the compromise was for the benefit of the minor. Any compromise without the leave of the Court is a nullity. Where before any leave has been granted, the guardian himself changes his mind and does not want the compromise, it is impossible to force the compromise on the minor. (22 *Mad.* 378 *Foll.*) This is much more the case where the compromise has been entered into not by the guardian but by some one else on his behalf and before leave is granted, the guardian opposes the compromise. [P 570 C 2; P 571 C 1]

Gopi Nath Kunzru—for Appellants.

J. M. Banerji—for Respondents.

Sulaiman, J.—This is an appeal from an order of remand in a suit brought by Mt. Gulab Dei, on behalf of herself and as guardian of her minor son, against a motor company for accounts. The case was apparently being looked after by her father as her *pairokar*, and on the 2nd of August 1923, when she was not herself present in the Court, the case was compromised on her behalf and on behalf of her minor son on instructions given by her father, Shankar Lal. The Court recorded this compromise and passed a decree in terms of it. Mt. Gulab Dei, for herself and on behalf of her minor son, appealed to the District Judge from this order recording the compromise and urged that she had never given any authority to the compromise being made, that the compromise was not for the benefit of the minor, and that no leave of the Court having been obtained, it was a nullity. The learned Judge came to the conclusion that it was not clear whether Shankar Lal had authority to enter into the compromise, or that the compromise was for the benefit of the minor. He has accordingly remanded the case to the Court of first instance, but has given directions as to how the Court is to proceed in case it came to certain conclusions after further enquiry.

It seems to us that so far as the minor is concerned, the compromise cannot be forced on him. The minor's guardian herself did not enter into the compromise, but someone on her behalf did enter into it. It is, however, not disputed that no leave of Court has up till now been granted and that there is no finding that the compromise was for the benefit of the minor. The mere fact that the decree has been passed in terms of the compromise does not necessarily justify an inference that the Court granted leave, or that it was satisfied that the compromise was for the benefit of the minor. Any compromise

without the leave of the Court is a nullity. As, before any leave has been granted, the guardian herself does not want the compromise, it is impossible to force the compromise on the minor. In the case of *Ranga Rao* v. *Rajgopala Raju* (1) it was clearly held that even if a guardian of a minor enters into a compromise without the leave of the Court but changes her mind before the leave of the Court is granted, the compromise cannot be forced on the minor. This follows clearly from the wording of O. 32, R. 7 under which no next friend or guardian is permitted without the leave of the Court to enter into any agreement or compromise on behalf of a minor. If, therefore, before any such leave is granted she changes her mind, it cannot be forced on the minor.

The case, therefore, so far as the minor is concerned, must be disposed of on the merits unless the guardian chooses to compromise it afresh after having obtained the leave of the Court.

As regards Mt. Gulab Dei herself, the question remains whether Shanker Lal or her vakil had authority to compromise the case on her behalf. The case has been rightly remanded in order that this matter may be enquired into. Of course if it is found that neither Shankar Lal nor the vakil had any authority to compromise on behalf of Mt. Gulab Dei, then the case, so far as she is concerned, will also be tried on the merits.

We allow the appeal in part, and, modifying the order of the learned District Judge, direct that the case be remanded to the Court of first instance for the enquiry as to whether Shankar Lal or the vakil had authority to compromise the case on behalf of Mt. Gulab Dei. The compromise, so far as the minor is concerned, will, however, be totally ineffective.

We direct that the minor-appellant will have his costs from the respondent. The other parties will bear their own costs.

Appeal allowed in part.

(1) [1899] 22 Mad. 378.

1925 ALLAHABAD 571

NEAVE, J.

Lachmi Narain — Defendant — Appellant.

v.

Mooli—Plaintiff—Respondent.

Second Appeal No. 1760 of 1924, Decided on 13th May, 1924, against the decree of the Sub. J., Muttra, D/- 11th October, 1922.

(a) *Agra Tenancy Act (II of 1901,) S. 65 (2)—Well in a holding—Tenant using water for irrigating other plots of land—Suit for injunction and damages lies in Civil Court and not Revenue Court.*

The defendant was the ex-proprietary tenant of a certain plot of land. There was a well on the plot. The defendant was using the water from this well to irrigate adjacent fields which he held as sub-tenant from another landlord. The plaintiff brought a suit for an injunction prohibiting the defendant from using the water to irrigate any land other than the plot of which the defendant was ex-proprietary tenant and for damages.

Held : that the suit was not cognizable by the Revenue Court but should be brought in the Civil Court. [P. 572, C. 1.]

(b) *Landlord and Tenant—Well in holding—Tenant can use water for irrigating other fields held from other landlord.*

The defendant transferred to the plaintiff a certain plot which was his *sir* land and of which he accordingly became the ex-proprietary tenant. There was a well in the plot. The defendant used the water of the well for irrigating other plots of land which he held as sub-tenant under another landlord. The plaintiff sued for an injunction to restrain the defendant from using the water of the well and for damages. It was not pleaded that the tenant's use of the water had in any way resulted in injury or loss of any kind to the zemindar nor was any custom been alleged by which the zamindar was entitled to limit the use of well in the plots occupied by the tenant.

Held : that the suit should fail [P. 572, C. 2.]

S. C. Das—for Appellant.

N. P. Asthana—for Respondent.

Judgment.—The defendant appellant transferred to the respondent plot No. 922 in December 1906. This plot was his *sir* land, and he accordingly became an ex-proprietary tenant of it. There is a *pakka* well in the plot, and the defendant has been using the water from this well to irrigate adjacent fields which he holds as sub-tenant from another landlord. The plaintiff brought this suit for an injunction prohibiting the defendant from using the water to irrigate any land other than plot No. 922 and for damages.

The defence was, first, that the suit was not maintainable in a Civil Court, but should have been brought in the Revenue Court under S. 65 (2) of the Tenancy Act, and secondly, that the defendant was entitled to use the water of the well for any purpose he might desire. Both the Courts below have found against the defendant on both points.

With regard to the question of jurisdiction, there can be no doubt that the suit is triable by a Civil Court. S. 65 of the Tenancy Act prescribes in its first paragraph the procedure to be followed in ejectment for forfeiture and in the second paragraph now referred to allows a landlord to sue for compensation in addition to, or in lieu of suing for ejectment, or to sue for an injunction with or without compensation. This paragraph admittedly refers back to S. 57 (*b*) of the same Act, which permits the ejectment of a tenant on the ground of any act or omission detrimental to the land in the holding, or inconsistent with the purpose for which it was let. Now it cannot by any straining of language be held that the use of the water of a well situated in the holding of a tenant for the irrigation of other plots of land is detrimental to that holding or inconsistent with the purpose for which it was let. It is clear, therefore, that the suit was cognizable by the Revenue Court but was properly brought in the Civil Court.

Turning to the second plea I have not been shown any provision of any Statute or any ruling of any Court in which it has been laid down that a tenant is not permitted to use the water of a well situated in one plot of his holding for the irrigation of other plots in that holding merely because the latter plots belong to a different *zamindar* from the owner of the plot in which the well is situated. The learned Advocate for the respondent contends that as his client purchased the well along with the plot from the appellant he is entitled to prescribe the use to which the water shall be put. Such a doctrine seems to me to be inconsistent with the whole of the spirit of the tenancy legislation. S. 89 of the Tenancy Act allows even a non-occupancy tenant to make a Will for the purpose of the irrigation of his holding without the consent or even against the wishes of his zamindar, *a fortiori* an ex-proprietary tenant who had himself constructed the well on his ex-proprietary holding must be entitled to use the water from it for the purposes of irrigation. It has not been pleaded here that the tenant's use of the water has in any way resulted in injury or loss of any kind to the zamindar nor has any custom been alleged by which the zamindar is entitled to limit the use of well in the plots occupied by tenants.

The appeal is allowed with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

★ 1925 ALLAHABAD 572

WALSH, J.

Ganga Jee—Appellant.

v.

Sat Narain Lal and others—Respondents.

Ex. Second Appeal No. 1132 of 1924, Decided on 2nd February, 1925, from a decree of the Sub. J., Jaunpur,

★ *Limitation Act, S. 15—Execution suspended by orders of Court—Decree-holder can have it revived even after three years.*

Where the execution of a decree has been suspended through no act or fault of the decree-holder, the execution proceeding will not be time-barred even if the subsequent application is presented more than three years after the order of suspension was passed. 27 *All.* 334 (*P. C.*); 43 *All.* 383 *and* 37 *Cal.* 796 *Foll.* [P. 574, C. 1, 2.]

Mushtaq Ahmed—for Appellant.

Gadadhar Prasad—for Respondents.

Judgment.—This to my mind is a very clear case, and I find myself unable to agree with the decision of the Court below. Nobody can doubt that to affirm the decision of the Court below would result in grave injustice and injury to the decree holder, which would be entirely due, as it seems to me, to the acts of the Court itself. Except so far as they afford a guide for the principles which ought to govern cases of this kind, the authorities referred to in the Courts below and in the arguments do not really assist one, because these cases must depend in the main upon the facts peculiar to them. In this case there are two appeals and there are two decrees, both of which were obtained by the appellant decree-holder in Bombay in 1917, one on the 12th of May 1917, and one on the 11th of June 1917. They were transferred

to the Court of the Munsif of Jaunpur for execution, presumably upon the application of the decree-holder. On the 20th of February 1918 an order was made by the Munsif of Jaunpur. The reason for that was this. The judgment-debtor had begun a suit or suits in Jaunpur seeking to set aside the decrees which had been obtained against him in Bombay, on the ground of fraud. Nobody, I imagine, would expect that the decree would be executed while the suit to set it aside was being litigated, and the Munsif made an order: "execution proceedings shall be stayed until decision of the regular suit." Unfortunately this form of order is what may be described as slipshod or *katcha*. A Judge ought to make it clear when he means the order to come to an end. In one sense a suit is not decided until it is no longer appealable. Where a right of appeal is given, a suit is often finally decided in the appellate Court, and Courts ought to make their own orders clear by saying whether the stay is to operate until the decision of the suit in the trial Court, or the decision of the appeal, if any. The decree-holder was required to communicate to the Court the result of the suit, but the Court seems to have been in a great hurry, and apparently to have yielded to the temptation to get rid of a pending application, and on the 29th of June 1918 the Court passed the following order:—"As the regular suit is not decided, the case be struck off." Two things are perfectly clear upon that order. First the execution application has never been disposed of at all either on the merits or by a judicial proceeding. The Judge did say "strike it off," which is not a good way of removing from the list, or indefinitely postponing. The reason given however shows clearly that it was only intended to be suspended. Secondly the act was the act of the Court, and in no sense the act of the decree-holder. The suits were decided in the trial Court on the 9th of December 1919 against the judgment-debtor, but the judgment-debtor of course appealed—everybody seems to appeal—and the presumption is that if a suit is decided against anybody, he will appeal, and that a suspension of execution in a case like this means suspension until the final disposal of the suit, Technically the decree-holder might, when the trial Court had disposed of the suit on the 9th of December 1919, have applied to the Court which had suspended his execution proceedings, to have it revived, at any rate without committing any act of disobedience of the previous order. But everybody in his senses must have appreciated that if an appeal were pending, the same reason would have operated on the mind of the Court pending the appeal, as operated on its mind pending the trial of the original hearing, so that it would have been a perfectly idle application. Meanwhile some rule operating behind the back of the decree-holder in the record room must have come into operation, and the record was sent back to Bombay on the 29th of May 1920. That did not prevent its being sent for again, but it was the act of the Court, and it further indefinitely postponed the decision of the execution application. That is made perfectly clear by the endorsement of the Munsarim on the back of the application, which the decree-holder eventually filed in this case on the 23rd of April 1923, saying: "this is a decree of the Court of Small Causes of Bombay. The decree-holder should first produce a certificate of transfer." The appeals were decided on the 30th of March 1922 after a successful delay of four years, which the judgment-debtor and his advisers no doubt hoped to achieve by alleging fraud, and delaying the decree-holder so that he could not get execution by making a further application within three years of his application of 1918. It is not improbable that the whole scheme of the suit and appeals was a scheme to prevent execution and to put the decree holder in this difficulty. The decree-holder himself was guilty of his usual contribution towards the general delay and did not apply until the 23rd of April 1923. Owing to the Munsarim's note, to which I have already referred, it was necessary to get the record from Bombay, and a further substantial contribution to the general fund of delay was made by all the Courts concerned. Between them it took the Munsif's Court at Jaunpur, the District Court at Bombay, and the High Court at Bombay, 8 months to get the record back from Bombay where it had gone in 1920, and it eventually returned to Jaunpur on the 8th of December 1923. The only question in this appeal—indeed in this application—throughout has been whether this application for execution is a new application,

in which case it is undoubtedly barred by time, or whether it is only a revival of the application which was suspended and eventually struck off the list in February and June 1918 respectively. The decree-holder's representative in the Court below did his best to ruin any chance which the decree-holder had. In dealing with the previous application, he foolishly alleged that it was "struck off for want of prosecution." But that is not the case, and a misdescription of the order five years afterwards cannot affect the legal result of the order. But in the column reserved for stating the mode in which he requires the assistance of the Court, he does say that his prayer "to issue notice to the judgment-debtor" is in aid of the previous execution clearly intimating that it is—as I have no doubt it is—in fact an attempt to revive a previous application which had been indefinitely postponed. The view which I am taking may perhaps be said to involve holding that the order of June 1918, and the sending of the record to Bombay in 1920, was an indefinite postponement, so that the decree-holder would be entitled to come back even after 20, 30 or 40 years and ask for it to be revived on the same ground that I am deciding he is entitled to have it revived now. I think that is the logical result, but it is due to the orders of the Court and not the fault of the decree-holder. The principles governing this matter seem to me to be quite simple and clearly established by the ruling of the Privy Council in 1905 in the case of *Qamar-ud-din* v. *Jawahir Lal* (1). The effect of that decision is accurately set out by Mr. Justice Piggott on page 176 in the case of *Madho Prasad* v. *Draupadi Bibi* (2) where he says that that case is a good authority for the proposition that where the execution of a decree has been suspended through no act or fault of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have thus been suspended. In the case of *Madhabmani Dasi* v. *Lambert* (3) it was held, "that, an application for execution may be treated as one in continuation or revival of a previous application similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless," and quite recently Mr. Justice Lindsay in Execution Second Appeal No. 264 of 1922 took the same view, and held that an application to revive and carry through a pending execution proceeding will not be time-barred even if presented more than three years after the order of suspension was passed. I am prepared to go even further than Mr. Justice Lindsay and to hold that such an application would be within time even if presented more than 103 years after the order of suspension was passed. This seems to me the just and business result, and clearly does justice in this case, and I think is in accordance with well settled principles. The authorities mainly discussed by the Judge in the Court below seem to me to deal with cases where an injunction with a definite date for determination has been granted. I am inclined, further to think that this case could be treated within section 15 of the Limitation Act, to which I was quite properly referred by Mr. Mushtaq Ahmad in the arguments, by reason of the fact that the execution of the decree has been in effect stayed by the orders of February and June 1918, and that it was stayed indefinitely. I do not think it necessary to determine that question as I am satisfied that the appeal ought to succeed on the ground which I have already stated.

The appeal must be allowed with costs here and below including in this Court fees on the higher scale, and the case must be remitted to the lower Court for execution according to law.

Appeal allowed.

(1) [1905] 27 All. 334=32 I. A. 102=2 A. L. J. 397=1 C. L. J. 381=9 C. W. N. 601=15 M. L. J. 258=7 Bom. L. R. 433=8 Sar. 810 (P. C.).

(2) [1921] 43 All. 383=61 I. C. 417=19 A. L. J. 174.

(3) [1910] 37 Cal. 796=15 C. W. N. 337=6 I. C. 537=12 C. L. J. 328.

★ 1925 ALLAHABAD 574

KANHAIYA LAL, J.

Salamat Ali—Plaintiff—Appellant.

v.

Guj Kumar Chand and another—Defendants—Respondents.

Second Appeal No. 488 of 1923, Decided on 24th July 1924, against the decree of the D. J. Allahabad, D/· 22nd December 1922.

★ *Civil P. C., S. 11—Rent suit—Tenant asserting landlordship of another and payment of rent to him—Latter can be impleaded as party—But question of title decided between him and plaintiff is not* res judicata *between them Agra Tenancy Act, S. 198 (2).*

In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to the Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. [P. 575, C. 2.]

M. L. Agarwala—for Appellant.

Waliullah and *Gulzari Lal*—for Respondents.

Kanhaiya Lal, J.—The dispute in this appeal relates to plot No. 281A *khasra* situated in *mahal khas patti* Wahid Ali of the village Rajapur. The plaintiff is a co-sharer in *patti* 'Ghairkhwahindgan" of *mahal khas* of the said village. His allegation was that the defendant Gaj Kumar Chand had purchased a part of the share of Mubarak Ali but had no right to the plot in dispute.

It appears that a previous suit had been filed by Gaj Kumar Chand against Pitai for arrears of rent in respect, of the plot in question to which Salamat Ali was also impleaded as a co-defendant. That suit was resisted both by Pitai and Salamat Ali. Pitai pleaded that he had held the land at one time as a non-occupancy tenant on behalf of Salamat Ali and that he had surrendered the holding afterwards and was not therefore liable for rent to any party. Salamat Ali set up his own title to the land. That suit was dismissed by the Court of first instance but decreed by the Collector on appeal against Pitai alone. His finding was that Pitai was really in possession on behalf of Gaj Kumar Chand. There was a further appeal by Salamat Ali to the District Judge, who came to the conclusion that Salamat Ali was the owner of the plot in question, and that Pitai was not in possession and could not be made liable for the payment of rent.

The above decision was held by the trial Court in the present suit to operate as *res judicata*. The lower appellate Court has however, found otherwise and dismissed the claim of the plaintiff in regard to that plot. In a suit filed by a person against another who denies that the relation of landlord and tenant existed between him and the plaintiff, it is open to Court to implead the person to whom the payment of rent is alleged to have been made by the defendant. But if any question of title is decided between the plaintiff and a third party so added, that decision does not operate as conclusive, and a suit by the defeated party to establish his title can lie in the Civil Court. S. 198 cl. (2) of the Agra Tenancy Act provides for the determination of the same question in a separate suit. No relief was claimed in the previous suit against Salamat Ali. The plaintiff had claimed arrears of rent from Pitai. Pitai had denied that the relation of landlord and tenant existed between him and the plaintiff. He had further denied that he had been in possession. The Revenue Court proceeded to enquire whether he was in possession and on whose behalf and to whom he was liable to pay the rent of the plot in question. The trial Court found against Gaj Kumar Chand. The Collector on appeal gave him a decree for arrears of rent against Pitai alone. On a further appeal to the District Judge that decree was reversed. The decision of the question of title in those circumstances between Gaj Kumar Chand and Salamat Ali cannot be treated as final or *res judicata* in view of S. 198 cl. (2) of the Tenancy Act. S. 199 has no application because Pitai did not claim proprietary title in himself and for the same reason the decision in *Shahzade Singh* v. *Muhammad Ahmad Ali Khan* (1) is also inapplicable. The lower appellate Court finds that the plaintiff has failed to prove that he was the owner of the disputed plot. It further finds that the plot in dispute was in *patti* Wahid Ali in which the plaintiff Salamat Ali was not a co-sharer. The decision in the previous suit can therefore be disregarded. The appeal fails and is dismissed with costs.

Appeal dismissed.

---

(1) [1909] 32 All. 8=6 A. L. J. 917=3 I. C. 954.

★ 1925 ALLAHABAD 576

MUKERJI J.,

Dip Narain Singh—Appellant.

v.

Jagmohan Ahir—Respondent.

Second Appeal No. 767 of 1923, Decided on 26th November, 1924 against the decree of the Sub. J., Jaunpur.

★ (*a*) *Acquiescence—Mortgagor and mortgagee—Mortgagee in possession of building on mortgagor's land — Mortgagor can sue for demolition of structure.*

The principle of acquiescence does not apply to the case of a mortgagee building on the mortgaged premises and the mortgagor can ask for demolition of such building even after 12 years. Under the Transfer of Property Act S. 76 it is the duty of the mortgagee when he takes possession of the mortgaged property to manage it as a person of ordinary prudence would manage if it were his own. This implies that a duty is cast on him to see that the property is not lost by any encroachment. Further the same rule lays down that the mortgagee in possession is not to commit an act which is destructive or permanently injurious to the property. The mortgagee is therefore bound to protect the plaintiffs' rights. Moreover so long as the mortgagee is in possession it cannot be expected that the mortgagors would be going about inspecting the land mortgaged in order to see that it has been well taken care of. 21 *All* 496 (*P. C.*) *Foll.*

(*b*) *Tort—Trespass—Damages — Trepass on immovable property—Money is not sufficient compensation.*

Where immovable property is trespassed upon a money compensation is not the proper remedy to the plaintiff. 28 *Bom.* 298 and 12 *A. L. J.* 1026 *Foll.*

Mukhtar Ahmad—for Appellant.

Damodar Das—for Respondent.

Mukerji, J.—The facts of the suit out of which this appeal has arisen are practically all admitted and are as follows :—

The plaintiffs and defendants Nos. 9 to 12 are the appellants in this Court. Defendants No. 9 to 12 being away from the district were made *pro forma* defendants. They and the plaintiffs possessed the same right in the property in suit. The predecessors in-title of the plaintiffs and defendants Nos. 9 to 12 mortgaged plot No. 1763 which was their tenancy (presumably tenancy at fixed rate) for a period of 20 years in favour of the predecessors-in title of defendants Nos. 1-8. This mortgage was executed on the 27th of June 1901 and was redeemed on 22nd of June 1921. The plaintiffs came to Court with the allegation that some six months before the institution of the suit the defendants encroached upon a portion of plot No. 1763 and built a house upon the same. They asked for the demolition of the construction and for the restoration of the site to its original position. Of course, the suit involved a claim for the recovery of possession.

The defence was that the building was an ancient one, that no portion of the land had been encroached upon and that the suit was due to the fact that the defendants refused to allow a redemption of the mortgage before the expiry of the term.

The Court of first instance found that 1½ dhurs of land has been encroached upon by the defendants' building and that the defendants constructed the building some 12 years before the institution of the suit. On these findings the learned Munsif gave a decree for Rs. 10 by way of compensation and dismissed the rest of the claim. On appeal this decision was affirmed.

The learned Subordinate Judge found the following :—

" The truth is only so much that when the house was built, plaintiffs never thought that defendants were encroaching and defendants never thought that they were doing anything wrong. Now after 12 years when the time for redemption arrived plaintiffs want to take their pound of flesh. You will find in the map that the house is a large one and a very small portion of it lies in plaintiffs' area."

The learned Subordinate Judge applying the principle of acquiescence affirmed the decree of the first Court.

In this Court it is contended on the authority of the Privy Council case *Beni Ram* v. *Kundan Lal* (1) which has also been cited by the learned Subordinate Judge that the rule of acquiescence does not apply to the facts of the case and that the plaintiffs were entitled to have their land restord to them.

The counsel for the respondents cited two case namely *Shama Charan* v. *Babu Lal Misr* (2) and *Hajj Syed Muhammad* v. *Gulab Rai* (3).

The principle of acquiescence has been discussed by their Lordships of the Privy Council at page 502 in the case of *Beni*

(1) [1899] 21 All. 496=26 I. A. 58=3 C. W. N. 502=1 Bom. L. R. 400=7 Sar. 523 (P.C.)
(2) [1904] A. W. N. 70.
(3) [1898] 20 All. 345=(1898) A. W. N. 68

Ram v. *Kundan Lal* (1) already quoted. Although this Court in the case of *Beni Ram* v. *Kundan Lal* (1) came to the conclusion that the plaintiffs were bound by the principle of acquiescence, their Lordships of the Privy Council found themselves unable to agree with the view. In that case it appears that the predecessors-in-title of the defendants had taken a lease for a definite term of a certain piece of land. They did not use the land for which they had taken it. After a few years they went on erecting buildings on the site. The buildings were of a permanent nature. On the lessees suing for recovery of possession after the expiry of the term of the lease it was urged on behalf of the lessees that the lessors never having objected to the erection of permanent buildings they were barred by the principle of acquiescence from maintaining the suit. Their Lordships of the Privy Council pointed out that the defendants knew that they were holding for a definite term, and that they knew that they were entitled to erect any building they liked on the site provided they restored the land to its original condition after the expiry of the term of the lease. In the circumstances it was held that the principle of acquiescence would not apply.

It appears to me that the principle of the decision of *Beni Ram's* case applies with full force to the facts of the case before me. In this case, the parties who were in possession were the mortgagees. Under the law in force, namely under T. P. Act, (S. 76) it is the duty of the mortgagee when he takes possession of the mortgaged property to manage it as a person of ordinary prudence would manage it if it were his own. This implies that a duty is cast on the manager to see that the property is not lost by any encroachment. Further the same rule lays down that the mortgagee in possession is not to commit an act which is destructive or permanently injurious to the property. It cannot, therefore, be denied that the defendants so long as they were in possession as mortgagees, so to say, were trustees for the plaintiffs and were bound to protect the plaintiffs' rights. So long as the mortgagees were in possession it cannot be expected that the mortgagors would be going about inspecting the land mortgaged in order to see that it was well taken care of. The mortgage was for a definite period and during that period the mortgagees were entitled to use the land in any way they pleased provided they restored it to the same condition in which it was when the mortgage was made. No question of acquiescence in the circumstances can arise to bar the plaintiffs' suit.

The cases cited by the learned counsel for the respondents can easily be distinguished from the case before this Court. The decisions were given on the peculiar facts involved in them. In the case of *Haji Syed Muhammad* v. *Gulab Rai* (3) it was found that the plaintiff was not entitled to proprietary possession claimed by him but he had only a right of user over it. The defendant had raised the construction some 2 years before the institution of the suit. In the circumstances this Court refused to grant a mandatory injunction. In this case the plaintiffs are tenants of the land and they are entitled to be put in physical possession of the same. In the case of *Shama Charan* v. *Babu Lal Misr* (2) the owners of land lived within a few yards of the building and raised no opposition to the construction that was going on before their very face. In that case it might very well be said that the plaintiffs were bound to guard their own property and where it was encroached upon they were bound to tell the trespassers that they were under a mistaken idea that the land was theirs. In the case before this Court the defendants were bound to look after the interest of the plaintiffs and plaintiffs were under no obligation to look after their own property so long as the defendants were to do the same for them.

As regards compensation it has been held and I agree with the view that where immovable property is trespassed upon, a money compensation is not the proper remedy to the plaintiff. This view was taken in the case of *Jetha Lal Hira Chand* v. *Lalabhai Dalpatbhai* (4) and in the case of *Ganga Din* v. *Jagat Tiwari* (5).

The result is that plaintiffs' claim must succeed. I allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit with costs throughout. I allow the defendants sixty days from this date to remove the materials. The plan prepared by the Commissioner B. Bahadur Lal will be made a part of the decree and will be taken as indicating the extent of the land encroached upon.

Appeal allowed.

(4) [1904] 28 Bom. 298=6 Bom L. R. 86
(5) [1914] 12 A. L. J. 1026=25 I. C. 198.

1925 ALLAHABAD 578

MUKERJI AND DANIELS, JJ.

Khem Singh and others— Appellants.

v.

Raghubir Singh and others—Respondents.

First Appeal No. 32 of 1923, Decided on 17th December 1924, from a decree of the 1st Addl. Sub. J., Aligarh, D/- 3rd July 1922.

Civil P. C., S. 47 (3)—Applicants claiming to be brought on record as legal representatives of deceased judgment-debtor—Claim rejected—Second appeal lies from the decision.

Where the Court in execution adjudicates on the question of right of the applicant to be brought on record as the legal representative of the deceased judgment-debtor the decision is a decree and a second appeal lies. [P. 579, C. 1]

Igbal Ahmad and *H. S. M. Husain*— for Appellants.

Shiam Krishna Dar—for Respondents.

Judgment.—This appeal arises out of execution proceedings under the following circumstances. One Khushal Singh obtained a mortgage from one Chattar Singh and on foot of it sued his widow *Mt.* Jai Debi. Khushal Singh obtained a decree and put it in execution. Just before the property was sold *Mt.* Jai Debi died. Before the sale, Khushal Singh atso died and the names of his four sons Raghubir Singh, Sher Singh, Rajindar Singh and Karan Singh were substituted in his place as the decree-holders. These decree-holders made an application to the Court stating that on the death of *Mt.* Jai Debi they themselves had succeeded to the property of the judgment-debtor, *viz.*, the property that had been sold, and that it was not necessary to proceed with the execution any further. The execution proceedings were being carried on before the Collector, the property being ancestral. Before the Collector there appeared two other sets of claimants. One Yograj Jang Bahadur claimed that he was the next reversioner to the estate of Chattar Singh. The appellants before this Court appeared before the Collector and stated that they were the reversioners of Chattar Singh and they ought to be brought on the record. The Collector decided that he could not go on with the proceedings without the Civil Court adjudicating as to the title of the several persons to represent the judgment-debtor's estate. Accordingly by order, dated the 26th of March, 1919, he returned the papers to the Civil Court for determination of the question.

While the several cases were pending Yograj Jang Bahadur instituted a suit of his own to obtain a declaration of his title. That suit failed and Yograj Jang Bahadur's appeal to this Court also failed. Thereupon the contest remained between the remaining two parties, *viz.*, the present appellants and the respondents. The respondents admitted that there were five other persons similarly descended as they themselves and that these five persons would be equally entitled to Chattar Singh's property with the decree-holders. Thus there was a contest between the appellants on one side and the respondents and five others on the other. The learned Subordinate Judge decided against the appellants and hence the present appeal.

A preliminary objection was taken by the learned counsel for the respondents to the effect that no appeal lay. We are of opinion that an appeal lies under S. 47 of the Code of Civil Procedure. The argument of the learned counsel for the respondents was substantially this. If the question of title has been decided under Order 22, rule 5 of the Code of Civil Procedure there is no appeal. Again if the question was decided under S. 50 of the Code of Civil Procedure there is again no appeal. As regards the application of S. 47 of the Code of Civil Procedure the learned counsel argued that it was really the business of the decree-holder to bring such people as he thinks fit on the record, and if the decree-holder is not inclined to bring anybody on the record or if he is going to stop the execution altogether it was no business of anybody to jump into the case.

There can be no doubt that Order 22, rule 5, of the Code of Civil Procedure has no application to the present case. The controversy has arisen during the execution of a decree. Ordinarily, therefore, Section 47 would be the only section which would apply to the case. As for the argument that it was only for the decree-holder himself to say who would be brought on the record as the legal representative of the deceased judgment-debtor, it has to be pointed out that the legal representative of the judgment-debtor

is not entitled to bring a suit of his own to have any question that arises in the execution, decided. We asked the learned counsel for the respondents if he was prepared to say that he was not going to proceed with the execution at all. That undertaking the learned counsel could not give to us. It is common ground that Mt. Jai Debi died before the sale was held. The question whether the sale was a right one or not may have to be tried and the question would be who would be the party who should contest the sale. The appellants say that if they are not allowed to be brought on the record they cannot impeach the validity of the sale.

Further it appears to us that it is not the respondents' case that they are the only reversioners to the estate of Chattar Singh. As already stated, they and five others called themselves the reversioners to the estate of Chattar Singh. In the circumstances there is really no merger of the two rights, *viz.*, : the right of the decree-holder to bring the property to sale and the rights and liabilities of the judgment-debtor *Mt.* Jai Debi.

We are decidedly of opinion that the case comes under clause (3) of S. 47 of the Code of Civil Procedure and that an appeal does lie.

Coming to the merits of the case, the question is whether the appellants or the respondents and the five others who are said to be similarly descended are the next reversioners to the estate of *Mt.* Jai Debi. The lower Court having decided against the appellants it would be for them to show that the judgment of the Court below is erroneous.

We have been taken through the evidence in great detail by the learned counsel for the appellants and we are not satisfied that the appellants have been successful in establishing their case.

[The judgment then discussed the evidence and proceeded.]

There is some other documentary evidence which was relied upon by the learned Counsel for the appellants, but we do not see that it is in any way relevant or if relevant has any real probative value. It appears that one Bijoy Singh filed a pedigree along with his grounds of appeal in a certain suit. It was argued that Bijoy Singh was really a man descended from the same stock as the respondents, that the pedigree put forward by Bijoy Singh was really a correct one and that, therefore, the pedigree propounded on behalf of the respondents was an incorrect one. At the outset it is to be noted that the pedigree propounded by Bijoy Singh was never considered by the Court and Bijoy Singh's appeal succeeded on a purely technical point. Two documents. *viz.*, *wajib-ul-arz* of an unknown date but probably prepared some time after 1863 and a written statement dated the 10th of February 1854 were also relied upon to prove portions of the pedigree of the respondents. We confess we really do not see any particular relevancy of these documents in the case. They do not establish that the pedigree propounded by the respondents is in any way incorrect or false.

Coming to the oral evidence, we have heard every bit of it, the statements having been read out to us *in extenso*. The learned Subordinate Judge has dealt with the oral evidence and it will be sufficient for us to say that we are not prepared to disagree with the estimate of the evidence made by him. We do not propose to take the witnesses one by one.

The respondents' case is supported not only by the oral evidence adduced by them but also by the statement of the deceased *Mt.* Jai Debi as recorded in her application for succession certificate. On the very first occasion that arose for her to state who were her relations she mentioned the late decree-holder Khushal Singh, Tej Singh and Ratan Singh. *Mt.* Jai Debi was later on examined in the course of the trial of the suit she had brought for the setting aside of the deed of gift in favour of the appellant Madho Singh. There too she swore that the appellants did not belong to her family.

The Court below was satisfied that the oral evidence adduced on behalf of the respondents was much more reliable than in the case of the appellants. As in the case of the appellants we do not propose to discuss the oral evidence adduced by the respondents in detail. Suffice it to say that we have heard every portion of it and we are not prepared to disagree with the Court below.

The result is that the appeal fails and it is hereby dismissed with costs.

There is a cross-objection on behalf of the respondents. It appears that the learned Subordinate Judge omitted to say anything about costs of

the proceedings before him. There is no reason why the successful respondents should not have their costs in the Court below.. We accordingly allow the cross-objection with costs. The costs of appeal will include printing and translation charges.

Appeal dismissed.

★ 1925 ALLAHABAD 580

SULAIMAN AND BOYS, JJ.

Bahadur—Plaintiff—Appellant.

v.

Raja Moti Chand and others—Defendants—Respondents.

Second Appeal No. 547 of 1923, Decided on 6th March 1925, from a decree of the D. J. of Benares.

(*a*) *Agra Tenancy Act* (2 *of* 1901), *S.* 20 (3)—*Express condition in lease makes lease transferable.*

S. 20, Sub-clause (3) of the Tenancy Act implies that if under the express condition of the lease the right is made transferable, the lease would be transferable. [P 582 C 1]

★ (*b*) *T. P. Act. S.* 108 (*j*)—*Mortgage by tenant who is expressly authorised by lease to mortgage—Extinction of lease does not extinguish mortgage unless mortgagee has had opportunity to prevent that extinction—Rule applies to agricultural leases.*

Although the provisions of the T. P. Act relating to leases do not apply to agricultural leases, yet, as a general rule both in the cases of agricultural as well as non-agricultural leases, if a tenant is expressly authorised by the terms of the lease to make a mortgage of his land and thus to transfer his interest in the tenancy to a third party, the interest so transferred should not be allowed to be extinguished *e. g.*, by the ejectment of the tenant unless the person who has acquired that interest has had an opportunity to prevent that extinction. But the operation of this principle may be excluded by any statutory provision to the contrary. 15 *All.* 219 *Dist.* [P 583 C 2]

(*c*) *Agra Tenancy Act* (2 *of* 1901), *S.* 18 (*b*)—*Ejectment of tenant does not necessarily extinguish mortgage created by him under express terms of lease.*

There is nothing in S. 18 of the Agra Tenancy Act to displace the general principle of law that where a tenant being expressly authorised by the terms of the lease to mortgage his land, does so, the extinction of the lease does not extinguish the mortgage unless the mortgagee has had an opportunity to prevent that extinction. Hence in such a case, when the tenant is ejected by order of a Revenue Court, it does not necessarily follow that the mortgage created by him also comes to an end. [P 583 C 1]

(*d*) *Agra Tenancy Act* (2 *of* 1901), *S.* 79—*S.* 79 *does not apply to auction-purchaser purchasing a tenant's interest after latter's ejectment.*

S. 79 can have no application to the case of an auction-purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. 13 *A. L. J.* 329 *Foll.* [P 584 C 1]

Ram Nama Prasad—for Appellant.

Damodar Das—for Respondents.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit for a declaration that certain ejectment proceedings carried through in the Revenue Court were null and void and ineffectual as against the right of the plaintiff and that the defendant No. 1, the zamindar, had not acquired any right in the said lands as against him. There was a further prayer for a declaration that the proceedings relating to delivery of possession in favour of defendants Nos. 3 to 9 were also not binding on him. There were many pleas taken in the written statement filed by the contesting defendants to which we shall refer later. The Court of first instance dismissed the suit and on appeal that decree has been affirmed by the District Judge.

In order to understand the points in dispute it is necessary to recite briefly the history of this litigation.

It appears that the defendant No. 1, who is a zamindar of the village, granted two leases in November, 1909 in respect of different sets of plots in favour of the defendant No. 2, the terms of which are worthy of note. The lessee was to remain in possession of the plots leased generation after generation on payment of a fixed rent without any right of enhancement. There was a further provision that he would be entitled to transfer the lands by way of sale or mortgage like a fixed-rate tenant. It was further provided that if rents were not paid, the zamindar would have the right to recover them in the way provided by law, and it was recited that the lessee could apply to the Revenue Court for the mutation of his name as a perpetual lessee (*pattadar dawami*).

Under the power given to him in 1914 the defendant No. 2, the lessee or tenant made three mortgages of his rights, but all these three mortgages were simple and not usufructuary. On the 17th of June, 1919 a suit was instituted by defendants Nos. 10 and 11, two of the mortgagees, against the tenant-defendant No. 2 and other subsequent transferees, for sale of the property. A preliminary decree was obtained on the 31st of October, 1919

which was followed by a final decree dated the 17th of June, 1920. In execution of this decree the interest of the tenant was put up for sale and sold on the 20th of July 1921 and a formal delivery of possession followed on the 31st of August, 1921 in favour of the auction-purchaser, the present plaintiff.

Almost simultaneously with these proceedings, it appears that the zamindar, after the institution of the suit by the mortgagees, filed a suit for arrears of rent on the 27th of August, 1919 in the Revenue Court against the tenant-defendant No. 2. On the 15th of September, 1919 he obtained a decree for arrears. In December of that year the zamindar applied for ejectment of the defendant-tenant under S. 59 of the Tenancy Act. Before the tenant was finally ejected, the mortgagees, who had by that time already obtained their final decree for sale, applied to the Revenue Court for stay of proceedings for ejectment and offered to pay up the arrears. Nevertheless while the application was still pending and was undisposed of, the Court actually ejected the tenant and put the zamindar in possession of the lands on the 15th of February, 1921. On the 6th of May, 1921 the application of the mortgagees was ultimately rejected. Much trouble has arisen because the Revenue Court did not accept the payment by the mortgagees of the arrears of rent and did not grant relief to the tenant after the payment had been made.

Having failed in their attempt to get the ejectment proceedings stayed in the Revenue Court, the mortgagees applied to the Civil Court for a personal decree against defendant No. 2 fearing that his rights somehow became extinguished. This application was also rejected. They then proceeded to execute the decree and to put the interest of their mortgagor, the tenant, to sale. This interest has been sold and purchased by the plaintiff.

The Courts below have taken the view that the mortgage made by the tenant was subject to the right of ejectment by the zamindar and that, therefore, as soon as the tenant was duly ejected by the order of the Revenue Court, the mortgage was extinguished, and that, therefore, after that date no interest whatever remained in the mortgagor-tenant which could have been put up for sale and purchased by the plaintiff. The view of the Courts below, therefore, is that by the auction-purchase the plaintiff has acquired no interest whatsoever and his suit is bound to fail. This is the substantial point which arises in this case. There were questions of the six months' rule of limitation, the plea of a bar under S. 42 of the Specific Relief Act and a few other matters.

As the suit has been dismissed by the lower appellate Court on the substantial question as to whether the plaintiff acquired any rights by his auction-purchase, it is necessary for us to examine that point first.

Unfortunately no direct authority has been cited before us which would cover this case exactly, that is to say, no case has been cited before us which would show whether the result of the ejectment proceedings against the mortgagor-tenant is to extinguish the rights of the mortgagee automatically. The learned Vakil for the respondents however, has relied on certain re narks found towards the close of the judgment in the Full Bench case of *Khiali Ram* v. *Nathu Lal* (1). That, however, was not a case of mortgage of any tenancy but was really a case of sub-letting. Any remarks, therefore, bearing on the rights of a mortgagee are at most *obiter dicta*, but of course they are entitled to weight. The learned Judges, in order to prevent any misunderstanding or misapplication of their decision, thought it necessary to remark that it was obvious that the interest in an occupancy holding of any person to whom an occupancy tenat sub-lets or to whom he grants a usufructuary mortgage of land comprised in his occupancy holding will determine on the termination of the right of occupancy and can subsist no longer than the right of occupancy subsists. They go on to add that "the rights of the zamindar to obtain an enhancement of the rent payable to him or to obtain an ejectment of his occupancy tenant and of those, holding under him, cannot be interferred with or lessened by the fact that his occupancy tenant has by a lease or other form of sub-letting or by usufructuary mortgage to the granting of which the zamindar was not an actively consenting party sub-let or mortgaged the occupancy holding or any part of it." Over and above the fact

(1) [1893] 15 All. 219=(1893) A.W.N. 125 (F.B.)

that the observations were not necessary for the purpose of that case, it is to be noted that they were dealing with the case of a mortgage of an occupancy holding. Furthermore the learned Judges expressly excluded from the operation of the rule laid down by them cases where to the granting of mortgages the zamindar was an actively consenting party.

In order to see whether the observations made in that case are applicable, we must, in the first instance, examine the true nature of the rights created by the lease. It was first contended before us that the rights created were those of a fixed-rate tenant. In this particular case, however, it was clearly a perpetual lease granted to the tenant, the condition of the lease being that there would be no enhancement of rent and that the rights would be inheritable and transferable. In our opinion this was clearly a lease for agricultural purposes granted in perpetuity by the zamindar with the express power given to the grantee to transfer his rights. Under S. 20, sub-clause (3) of the Tenancy Act the interest of a *thekedar* is, subject to the terms of his lease, heritable but not transferable. That clearly implies that if under the express condition of the lease the right is made transferable, it would be transferable. We have already mentioned that such an express power was given by the zamindar. The tenancy in the present case is, therefore, in the first place distinguishable from the tenancy which was the subject-matter in dispute in the Full Bench case. Under the old law the occupancy holding could be transferred by way of a usufructuary mortgage, but in that case there was no express agreement or consent by the zamindar. In the present case the rights of the tenant were not transferable under the law. They became transferable because of the express contract between the zamindar and the tenant. It is clear, therefore, that in this case the zamindar must be deemed to have been an actively consenting party to the mortgages because he gave an express authority to the tenant to make such a mortgage. The observations in the Full Bench case, therefore, cannot be held binding on us when we have to consider the facts of the present case.

We may mention that in the Full Bench case of *Tulshi Ram Sahu* v. *Gur Dayal* (2), a mortgage had been made by a fixed-rate tenant after which he was ejected ; the zamindars, however, instead of claiming absolute possession of the property on the ground that the mortgage had been extinguished, instituted a suit for redemption and were ready and willing to redeem the mortgage. The learned Chief Justice, at page 116, remarked that the plaintiffs-zamindars were clearly entitled to redeem the mortgage held by the repondents if they are not entitled to possession of the holding without redemption but the question whether the plaintiffs are bound to discharge the mortgage itself does not arise, because they are willing and have offered to do so. That case, therefore, left this point altogether open.

It must be conceded that these leases were leases for agricultural purposes and, therefore, under S. 117 of the Transfer of Property Act the provisions of Chapter V of that Act are not applicable. But ordinarily when power is given to a tenant to transfer his land, unless we are satisfied that there is some provision in the Tenancy Act which automatically puts an end to a mortgage after ejectment, it would be just and equitable to hold that the mortgage subsists even after such ejectment. The only section on which reliance is placed in order to show that the mortgage is extinguished is S. 18 of the Tenancy Act. Under that section it is provided that a right of occupancy shall be extinguished (*a*) when the tenant dies leaving no heir entitled to inherit it, (*b*) in land from which he has been ejected in execution of a decree or order of a Court, (*c*) in a holding which the tenant has abandoned or surrendered after service of a notice, and (*d*) in land which has been acquired for a public purpose or a work of public utility. It is contended that the provisions of this section are absolute and they necessitate the extinction of the right of occupancy when a tenant has been ejected in execution of a decree or order of a Revenue Court

It is clear that the section cannot be read in that wide and general sense. It has been held in a number of cases by this Court that where a tenant has abandoned or surrendered his holding after having made a mortgage which by

(2) [1911] 33 All. 111=7 I. C. 231=7 A. L. J. 1011.

law he is entitled to make, the mortgage is not extinguished with the extinction of the right of occupancy. *Vide* the cases of *Badri Prasad* v. *Sheo Dhian* (3), *Brij Kumar Lal* v. *Sheo Kumar Misra* (4) and *Chhiddu* v. *Sheo Mangal Singh* (5). Similarly it has been held at least by the Board of Revenue that when a tenant dies without leaving any heir entitled to inherit and the zamindar takes possession of the tenancy, he cannot avoid the mortgage and eject the mortgagee without redeeming him. *Vide* the cases of *Nand Kishore Pande* v. *Muhammad Hasan* (6) and *Lal Bahadur Rai* v. *Maharaja of Vizianagram* (7). It is, therefore, clear that at least in cases which fall under two sub clauses of this section, it has been held that a mortgage is not necessarily extinguished with the extinction of the occupancy right. Is there then any good ground for holding that the mortgage is extinguished when a case falls under sub-clause (*b*), that is to say, when the tenant is ejected? In our opinion there is a clear distinction between the extinction of the occupancy right and the extinction of the mortgage. When the zamindar has given an express power to the tenant to mortgage his land and a mortgagee takes a mortgage of the land under the assurance that the zamindar has authorised it, it seems unjust and inequitable that behind the back of the mortgagee the zamindar would be able not only to eject the tenant but also to put an end to the mortgage.

It has been contended that the case of an ejectment stands on a different footing from that of a mere surrender, for it is said that a voluntary surrender involves an idea that a tenant intends to commit a fraud on his mortgagee, whereas ejectment proceedings are the result of an order of a Revenue Court. But when closely examined, the position in the two cases very often may be exactly the same. The tenant voluntarily surrenders the land not only to defraud the mortgagee but sometimes to get rid of his liability to pay rent to the zamindar when he finds it to be onerous. On the other hand, a person may willingly submit to his ejectment by simply not paying arrears of rent which involves his ejectment. In either case there may or may not be a fraud but on principle it seems to us that there is really no valid distinction. If a tenant is entitled to make a mortgage of his land and thus to transfer his interest in the tenancy to a third party, the interest so transferred under the express authority of the zamindar should not be allowed to be extinguished, unless the person who has acquired that interest has had an opportunity to prevent that extinction. This seems to be a just and equitable view which we are bound to uphold unless there is a statutory provision to the contrary. We find nothing in S. 18 which would compel us to hold a contrary opinion.

We are, therefore, of opinion that the ejectment proceedings in the Revenue Court, although they put an end to the tenancy of the defendant No. 2, did not have the neccessary effect of destroying the rights and interests of the mortgagees, defendants Nos. 10 and 11. If the interests of the mortgagees, defendants Nos. 10 and 11, subsisted even after the ejectment proceedings, then it is clear that those rights were capable of being put up for sale and purchased by the present plaintiff. The result of the purchase made by the present plaintiff would then be that he would be entitled to occupy the land and hold it on till he is redeemed by the zamindar who must be deemed to have stepped into the shoes of the tenant-mortgagor whom he has ejected. The view of the Courts below then that nothing passed to the plaintiff by the auction-purchase is not sound and must be over-ruled.

There were, however, a number of other defences to the case. One of those was that the present plaintiff was at best a tenant and the defendant-zemindar having obtained possession more than six months before the suit the claim was barred by time and was not maintainable in the civil Court. Reliance has been placed on S. 79 of the Tenancy Act, under which a tenant ejected otherwise than in due course of law has a remedy against the zamindar. It has, however, been held by a Bench of this Court in the case of the *Collector of Benares* v. *Shiam Das* (8) that S. 79 can have no application to

(3) [1896] 18 All. 354=(1895) A. W. N. 109.
(4) [1915] 37 All. 444=29 I. C. 215=13 A. L. J. 649 (F. B.)
(5) [1917] 39 All. 185=39 I. C. 585=15 A. L. J. 44.
(6) [1915] 29 I. C. 555.
(7) [1916] 33 I. C. 556.
(8) [1915] 13 A. L. J. 329=28 I. C. 302.

the case of an auction-purchaser who never actually or constructively was in possession of the tenancy and who in fact acquired his interest at an auction-purchase subsequent to the ejectment. The present plaintiff is not a tenant who has been ejected by the zamindar. In fact the person who was ejected was a person whose interest he had purchased at the time when ejectment took place. Neither the plaintiff nor the mortgagee had any *locus standi* to obtain actual possession before the ejectment. They were neither in actual nor in constructive possession. The person in possession was the tenant. The present suit, therefore, is maintainable in the civil Court and would not be barred by the six months' rule of limitation. This was the view clearly expressed in the above-mentioned case with which we agree.

The next point raised in the Court below was that defendants Nos. 3 to 9 had already obtained a decree to the effect that two-thirds of the lands sold and purchased by the plaintiff were not liable to be sold because they never belonged to the mortgagor tenant but belonged to these contesting defendants. This point has not been clearly disposed of by the learned Judge. The determination of this question will depend on a number of circumstances which we have not considered. It is, therefore, proper that this matter should be left open for disposal after remand.

There is a third point raised that the present claim was barred by the provisions of S. 42 of the Specific Relief Act. The learned Judge has not dismissed the suit on that technical ground. It might have been possible to allow the plaintiff to recover possession on payment of necessary Court fees, but that of course would be a matter entirely in the discretion of the lower appellate Court. As we have said, the suit was not dismissed on that technical ground and, therefore, we do not propose to say anything on that matter.

We accordingly allow the appeal and setting aside the decree of the lower appellate Court and the finding that nothing passed to the plaintiff by the auction-purchase, remand the case to that Court for disposal according to law. The costs of this appeal will abide the event and will include fees in this Court on the higher scale. *Appeal allowed.*

1925 ALLAHABAD 584

SULAIMAN AND BOYS, JJ.

Dip Chand and others—Defendants—Appellants.

v.

Muhammad Khalil—Plaintiff—Respondent.

Second Appeal No. 582 of 1923, Decided on 24th March 1925, from a decree of D. J., Azamgarh.

Landlord and Tenant—Occupancy tenancy—Rights akin to those of occupancy tenant can be created by contract.

Though a landlard cannot create an occupancy tenancy by contract, yet a contract by which a landlord agrees to execute in favour of the promisee and register a perpetual lease giving the promisee a right of occupancy in the terms agreed upon between the parties, is legal. 28 *All.* 747 and 41 *All.* 223. *Foll.*[P. 585 C1,2]

Surendro Nath Sen and *M. A. Aziz*—for Appellants.

Iqbal Ahmad and *Mukhtar Ahmad*—for Respondent.

Boys, J.—The Plaintiff sought to enforce his right to possession of certain land by ejection of the defendants 1 to 3 and that the fourth defendant, the zamindar, be ordered to execute in favour of the plaintiff a perpetual lease in terms of the agreement entered into between the plaintiff and the fourth defendant who had received from the plaintiff a sum as *nazrana*.

The first Court gave him damages only.

The lower appellate Court gave him a decree ordering the zamindar to execute a registered lease in his favour conferring on him a right of occupancy in terms embodied in the receipt, Ex. No. 6, dated the 16th of March, 1919 and ordered that he be put in possession by ejectment of the defendants.

The defendants 1-3 set up their possession founding their title on a compromise arrived at in a suit for ejectment brought against them by defendant No. 4 but that compromise has been found to be collusive, and the defendants 1-3 now fall back on the plea that the plaintiffs cannot, in any event, succeed because their own title is defective.

It is urged (1) that the plaintiffs were not entitled in their suit to have conferred on them by the decree of the Court a right to have a perpetual lease executed in their favour conferring on

them occupancy rights; (2) that the plaintiffs asked for a declaration that they had "occupancy rights"; (3) that the lower appellate Court has declared them to have occupancy rights; and (4) that a zamindar cannot by a deed create an occupancy tenancy. We may say at once that there has been much verbal play in the argument for the appellant with the phrases 'right to occupy" and "occupancy rights" but there is a very real distinction.

Granting the fourth contention of the appellant to be correct, *i. e.*, that a zamindar cannot create an occupancy tenancy having all the characteristics of an "occupancy tenancy" as known to the Tenancy Act, neither of the first three will bear examination.

As to the second point, the claim in the first portion of relief (*a*) (*istahqaq haq kasht dakhilkari*) that the plaintiff had "occupancy rights" is not strictly accurate, but its real intent is made clear by the later words in the same relief "*wa niz hasb qarardad bahami mazkur-i-bala muddailehum No. 4 ko hukm ho ki patta dawami nisbat araziat zail muddaee ke haq men tahrir karke registeri karadewen*" by which words they pray that defendant No. 4 be ordered to execute a permanent lease in their favour.

As to the third point some slight ground for the defendant-appellant's contention is to be found in the remark of the District Judge that the decision in *Bachchi alias Bachchia* v. *Bachchi* (1) "is in favour of the contention that it is possible for a landholder to create an occupancy tenancy by grant".

But later he says "there is nothing in the Tenancy Act which prevents a land-holder from carving out a right akin to the rights of an occupancy tenant" and in his final order he did not declare the plaintiffs to have occupancy rights *i. e.*, to be occupancy tenants within the meaning of the Tenancy Act but merely declared them to have a right of occupancy. In that order he has held quite plainly that the plaintiffs are entitled to a registered lease conferring on them a right of occupancy "in terms embodied in the receipt, dated the 16th of March, 1919". That such a contract is not illegal is clear, See *Bhola Nath Tevari* v. *Suraj Bali rai* (2).

The wavering of the lower appellate Court between its description of a zamindar as having power "to create an occupancy tenancy by grant" and having power "to carve out a right akin to the rights of an occupancy tenant" is possibly due to the language used by the learned Judge in the case of *Bachchi alias Bachchia* v. *Bachchi* (1), to which the lower appellate Court refers, where the learned Judge says: "He might confer on him the right to occupy the land at a fixed rate of rent, but that would only make him an occupancy tenant and not a fixed rate tenant within the meaning of the Act". But we may note that the same learned Judge who used in *Bachchi alias Bachchia* v. *Bachchi* (1) the words I have quoted, made his meaning quite clear in *Bhola Nath Tiwari* v. *Suraj bali Rai* (2) where, in the course of the argument, he said: "There is a difference between making a person an occupancy tenant and conferring upon him the rights of an occupancy tenant."

These two cases also further meet the first contention of the defendants that we have noted above.

Here it is clear that the plaintiff is entitled to a decree as prayed in relief (*a*).

The order of the Court is that the claim of the plaintiff in the relief (*a*) is decreed and the defendant No. 4 do execute and register in plaintiff's favour a lease giving him a right of occupancy in terms of the receipt dated 16th March, 1919, and that he be put in possession by ejectment of the defendants.

With the exception of the above verbal alteration, the appeal is dismissed with costs.

Appeal dismissed.

(1) [1906] 28 All. 747=3 A. L. J. 513 =(1906) A. W. N. 219

(2)[1919] 41 All. 223=49 I. C. 357=17 A.L.J.120

★ 1925 ALLAHABAD 585

BOYS AND ASHWORTH, JJ.

Kali Charan Singh and others—Plaintiffs—Appellants.

v.

Bageshra Kunwari and others—Defendants—Respondents.

Second Appeal No. 740 of 1923, Decided on the 15th May 1925, from a decree of the D. J. Benares.

★ (a) *Civil P. C., S. 11—Hindu Law—Reversioners—Suit by reversioner against tranferees from widow — Subsequent similar suit against transferees of other portions of estate—Defendants' failure in previous suit to plead that plaintiff was not next reversioner does not bar that plea in subsequent suit.*

In a previous suit brought by the plaintiff as next reversioner against a Hindu widow and against transferees from her, the widow and those transferees had failed to adopt the plea that the plaintiff was not the next reversioner. Subsequently the sons of the plaintiff in the previous suit brought another suit against the widow and transferees of some other portions of the estate from her.

Held : that the defendants in the subsequent suit were not debarred from raising the plea that the plaintiffs in that suit were not the next reversioners. 19 *A. L. J.* 749 Dist. [P. 586, C. 2]

(b) *Civil P.C., O. 41 R. 31—Appellate Court need not examine Trial Court's finding on fact not objected to.*

Where a party to an appeal does not ask to be heard on a question of fact decided by the Trial Court and the legal question only is argued in appeal, the Court is justified in disregarding the question of fact. [P. 586, C. 2.]

(c) *Hindu Law — Reversioner—Nearest reversioner, a minor—A more distant reversioner cannot sue except as minor's next friend.*

A more distant heir may not sue in his own right where the nearest reversionary heir is a minor, although the minor can sue through the more distant heir as next friend. [P. 587, C. 1]

Iqbal Ahmad and *Haribans Sahai*—for Appellants.

Kailas Nath Katju—for Respondents.

Ashworth, J.—This second appeal arises out of a suit brought by certain persons alleging themselves to be the presumptive reversionary heirs of one Makundi Singh against the widow in possession and against certain transferees from the widow.

Amongst other points taken up in defence, it was urged that the plaintiffs-appellants were not the next reversioners. The Subordinate Judge of Jaunpur framed an issue on this pleading and decided it in favour of the defendants, namely, he held that there was a nearer reversioner, one Jangbahadur, grandson of Makundi Singh The plaintiffs, however, pleaded that the defendants were debarred from taking advantage of this plea because in a previous suit brought by their father as next reversioner against the widow and against transferees of other portions of the estate of Makundi Singh, the widow and those transferees had failed to adopt the plea now put forward that the plaintiffs' father was not the next reversioner. The Subordinate Judge accepted this plea and held that the matter was *res judicata*. He consequently decreed the plaintiffs' suit.

In appeal the District Judge held that the doctrine of *res judicata* did not apply and accordingly on the finding of fact that the plaintiffs were not the next reversioners, dismissed the suit.

In this appeal the first ground taken up is that the Subordinate Judge was right and the District Judge was wrong as to the question of *res judicata*. Reliance is placed on the Full Bench ruling of this Court in *Kesho Prasad* v. *Sheo Pargash* (1), where it was held that a question decided between the widow in possession and the next reversioner for the time being of the suit would bind the reversioners suing at a later date the widow on a similar cause of action. We distinguish this ruling on the following ground. The ruling applied to a party who was, in fact, the reversioner. The present appellants wish us to apply the same reasoning to a party who is not the next reversioner, in fact, but only a claimant to be such. We, therefore, find no authority for holding that the failure of the widow or the transferees in the first case to raise the plea against the father of the present plaintiffs that he was not the next reversioner would in any way be *res judicata* as regards the present suit.

The next ground of appeal taken is that the lower appellate Court was bound to consider whether the finding of the Subordinate Judge on the question of fact, whether Jangbahadur Singh was the next reversioner, was correct or not. From the lower appellate Court's judgment we find it stated that the legal question of *res judicata* was the only one argued. From this we infer that the respondents did not in that appeal before the District Judge ask to be heard on the question of fact and we must hold that the matter did not come up before the District Judge. He was entitled, therefore, to disregard it.

The only other ground taken up in this appeal was that Jangbahadur Singh being a minor at the time of both suits could be legally represented in each by the father of the plaintiffs and the plaintiffs themselves respectively. Reliance is placed on the Privy Council ruling in *Rani*

(1) [1921] 19 A. L. J. 749=64 I. C. 248.

Anand Kunwar v. *The Court of Wards* (2) where it was held that a person who was not the presumptive reversionary heir but a more distant heir might bring a suit on behalf of the reversioners where the presumptive reversionary heir had colluded with the widow. An attempt is made to infer from the principles underlying this proposition that a more distant heir may sue where the nearest reversionary heir is a minor. Neither the ruling nor any principles invoked in that ruling appear to support such a proposition and for an obvious reason; the more distant reversioners are in a position to appear and sue as the next friends of the minor and that is the method of law prescribed for enabling a minor to assert his rights. Indeed, so far as we are aware, there is nothing to prevent the minor suing through a next friend at this stage.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

(2) [1881] 6 Cal. 764=8 I. A. 14=8 C. L. R. 381=R. & Js. No. 153 (Oudh)=1 Sar. 195 (P. C.)

1925 ALLAHABAD 587

MUKERJI, J.

Panchaiti Akhara—Appellant.

v.

Beni Bahadur Singh—Respondent.

Ex. Second Appeal No. 929 of 1924, Decided on 3rd February, 1925, from a decree of the Sub. J., Allahabad.

(*a*) *Bundelkhand land Alienation Act* (*II of* 1903), *S.* 2.—*Trees.*

Trees apart from land are not 'land' within S. 2.46 *A.* 631 *Ref.* [P 588 C 1]

(*b*) *Bundelkhand Land Alienation Act*, (*II of* 1903) *S.* 16—*Trees apart from land can be sold.*

S. 16 of the Bundelkhand Land Alineation Act is no bar to the selling by the decree-holder, of the trees appertaining or belonging to the groves held by the grove-holder judgment-debtor. [P 588 C 1]

Haribans Sahai—for Appellant.

Mushtaq Ahmad—for Respondent.

Judgment.—A preliminary objection is taken that no second appeal lies and that objection seems to be valid.

It appears that the decree holder, the appellant in this case, obtained a decree from the Court of Small Causes against the respondent. The decree was transferred to the Court of Munsif, Allahabad, in order to enable the decree-holder to attach immovable property. He sought the attachment of certain groves, held by the judgment-debtor, in an area to which the Bundelkhand Land Alienation Act applies. The judgment-debtor objected that under S. 16 of the above mentioned Act the groves were not saleable in execution of a decree. The decree holder then made a statement to the effect that he wanted to sell not the groves as they stood but only the trees. Evidently he meant that the purchaser would be required to cut the trees and take the timber or wood away. The question, therefore, that arose in the case was whether the trees were, apart from the land or as apart of the groves situated in an area to which the Bundelkhand Land Alienation Act applies, saleable, the judgment-debtor being a member of the agricultural tribe.

The learned Munsif allowed the objection of the judgment-debtor and held that the trees were not saleable. The learned District Judge affirmed this decision on appeal. The decree-holder has come in second appeal.

There can be no doubt that, on the authority of this Court, a second appeal is barred under S. 102 of the Civil Procedure Code.

The decree-holder has asked this Court to take up the matter under S. 25 of the Small Cause Court Act. It is contended by the learned counsel for the respondent that S. 25 has no application in a case like this. In my opinion this contention of the respondent has no force. The order has been passed "in a case decided by the Court of Small Causes" and therefore, it is an order which is subject to a revision by the High Court.

Coming to the merits of the case, the question stands thus:—"whether the trees, as apart from the land on which they stand, are 'land' within the definition of section 2 of U. P. Act II of 1903, Bundelkhand Land Alienation Act." The definition of 'land' is the following:—

The expression "land" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes, etc., etc.

Now, the question is, "whether the trees are 'land' and, if so, whether the trees are 'land let for agricultural purposes or for purposes subservient to agriculture'? It will be noticed that groves are a wellknown thing and abound in villages. It cannot for a moment be

believed that the legislature could possibly lose sight of the existence of such an article as a grove or even trees as apart from the land on which they stand. I am driven to the conclusion that they never meant that groves of trees should be included within the tern 'land held for agricultural purposes or for purposes subservient to agriculture.' In numerous cases decided under the U. P. Tenancy Act 1901, the words 'land for agricultural purposes' have been interpreted as not including groves or trees : *Kesho Prasad* v. *Sheo Pragash Ojha* (1), affirmed by the Privy Council in I. L. R., 46 All., 831.

I am of opinion that S. 16 of the Bundelkhand Land Alienation Act is no bar to the selling by the appellant of the trees appertaining or belonging to the groves held by the respondent.

I set aside the orders of the Courts below, disallowing the application for attachment made by the decree-holder, and direct that the decree-holder's application for execution, as amended by the Vakil's statement dated the 14th July, 1923, be restored to its original number and be disposed of according to law. The respondent must pay the costs of the appellant in this Court and in the Courts below.

Appeal dismissed.

(1) 1922 All. 301=44 All. 19=19 A. L. J. 749 (F. B.)

★ 1925 ALLAHABAD 588

LINDSAY AND KANHAIYA LAL, JJ.

Rudra Pratab Singh and others—Objectors—Appellants.

v.

Sarda Mahesh Prasad Singh—Decree-holder—Respondent.

Ex. First Appeal No. 153 of 1922, Decided on 6th February 1925, from a decree of the Sub. J , Mirzapur.

★ *Civil P. C., S. 47 and O. 20, R. 12—Order that defendants are liable to account as legal representatives of deceased judgment-debtor—Amount due not determined—Order is not appealable—Civil P. C., O. 20, R. 12.*

O. 20, R. 12 enables the Court to direct an enquiry to be made as to the rents and mesne profits to which the plaintiff may be entitled. Such an enquiry is made in the course of a proceeding which is virtually a proceeding in continuation of the original suit, and under rule 12, clause (2), a final decree has to be prepared in respect ot the mesne profits which may be awarded in accordance with the result of such an enquiry. From such a final decree an appeal is maintainable. But where the order of the C urt below merely directs that the defendants are liable to render accounts as the legal representatives of the deceased judgment-debtor and the amount for which they are liable has not been determined, the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the defendants in the place of the deceased, and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree. S. 47 therefore has no application. It is at best an interlocutory order and no appeal is maintainable but the defendants can raise the plea of their non-liability in the appeal from the final decree.

[P 589 C 1 & 2]

T. B. Sapru, H. K. Mukerji and *K. N. Katju*—for Appellants.

Gulzari Lal, Iqbal Ahmad, Harnandan Prasad and *Kashinarain Malaviya*—for Respondent.

Kanhaiya Lal, J.—This is an appeal from an order passed by the Subordinate Judge of Mirzapur directing the method in which an account of the mesne profits was to be taken as against the present appellants who were impleaded as the legal representatives of Baij Nath Prasad Singh deceased.

On the 3rd of March 1915, a decree was passed for possession of certain property which, among other things, directed that an account shall be taken of the dealings of Baij Nath Prasad Singh with the disputed property and of the rents and profits arisising therefrom, and that Baijnath Prasad Singh will pay to the plaintiff what may be found due to him on the taking of the said accounts. That decree was upheld by this Court, except as regards certain moveable property, on the 30th of May, 1916. There was a further appeal to His Majesty in Council which was dismissed on the 7th of February 1921. Before the decision of that appeal by the Privy Council, Baijnath Prasad Singh died. It is stated that he died after the hearing had taken place before their Lordships and his legal representatives could not, therefore, have been brought on the record before that appeal was decided. An application for the settlement of accounts in pursuance of that decree was made on the 28th February, 1921 which, among other things, asked that Rudra Pratap Singh, Jang Bahadur Singh and Upendra Bahadur Singh, sens of Baijnath Prasad Singh, might be substituted on the record in the place of the deceased. As a matter of fact, Jang Bahadur Singh and Upendra Bahadur Singh, two of the younger

sons of Baijnath Prasad Singh, were already on the record of the suit which went up in appeal to the Privy Council. The only new person who was proposed to be added or substituted in the place of Baijnath Prasad Singh was Rudra Pratap Singh, his eldest son All the same the object of the application was to make Rudra Pratap Singh, Jang Bahadur Singh and Upendra Bahadur Singh liable for the mesne profits claimed by the plaintiff, as the legal representatives of Baijnath Prasad Singh deceased.

Various objections were taken by the three sons of Baijnath Prasad Singh to the said application ; but the main objection with which the Court below first proceeded to deal was to the effect that the sons were not liable for the mesne profits, if any, appropriated by Baijnath Prasad Singh, because he was in possession as a trespasser and the liability for the accounts could not, therefore be enforced against his sons. The Court below held that the possession of Baijnath Prasad Singh, though illegal, could not be called wrongful and that the sons of Baijnath Prasad Singh could, therefore, be made liable to render the accounts of the mesne profits which their father had appropriated. The Court below then proceeded to direct the method in which the accounts were to be determined. From that order the present appeal has been filed and the preliminary question for consideration is whether such an appeal is maintainable.

The learned counsel who appears for the appellants contends that the effect of the order of the Court below was to determine the liability of the appellants and that the appeal was consequently maintainable under S. 47 of the Code of Civil Procedure. It is not contended that the appellants are not the legal representatives of the deceased, Baijnath Prasad Singh. The decree directed that an account of the mesne profits shall be taken as against Baijnath Prasad Singh. It was in fact a decree passed in terms of Order 20, rule 12 of the Code of Civil Procedure, clause (*c*) of which enables the Court to direct an enquiry to be made as to the rents and mesne profits to which the plaintiff may be entitled. Such an enquiry is made in the course of a proceeding which is virtually a proceeding in continuation of the original suit, and under rule 12, clause (2), a final decree has to be prepared in respect of the mesne profits which may be awarded in accordance with the result of such an enquiry. From such a final decree an appeal is maintainable. The order of the Court below merely directs that the appellants are liable to render accounts as the legal representatives of Baijnath Prasad Singh, deceased ; and the amount for which they are liable has not yet been determined. In fact, no final decree has yet been prepared. Really there is no execution proceeding going on. The preliminary decree which directed the taking of accounts is not capable of execution and the question which has been actually determined by the Court below is merely a question relating to the substitution of the names of the appellants in the place of Baijnath Prasad Singh, deceased, and their liability to render the accounts directed by the decree as his legal representatives. It is not a question relating to the execution, satisfaction or discharge of a decree ; S. 47, therefore, has no application. It is at best an interlocutory order and no appeal is maintainable. The preliminary objection must, therefore, prevail. It will be open to the appellants to raise the question of their liability in any appeal that may be filed from the final decree which may be passed in the proceeding.

Under S. 244 of the old Civil Procedure Code an enquiry into mesne profits could have been, it may be noted, made in an execution proceeding, but as pointed out in *Ishaq han* v. *Rustom Khan* (1), the effect of the change introduced by Order 20, rule 12 of the Code of Civil Procedure is that the Court which hears the suit is the Court which is eventually to ascertain the mesne profits and pass a final decree for such profits, and that till such final decree is passed there is no decree for mesne profits capable of execution. In *Dalgleish* v. *Nanda Misser* (2), it was held that an order by which a Court determines the principle whereupon mesne profits are to be assessed and directs their ascertainment by a Commissioner was an interlocutory order in a pending suit and not appealable as a decree. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

---

(1) [1918] 40 All. 292=44 I. C. 88=16 A. L. J. 182.
(2) [1912] 13 I. C. 186.

1925 ALLAHABAD 590

SULAIMAN AND DANIELS, JJ.

Zorawar Singh & others—Appellants.

v.

Bhagwan Singh & another—Respondents.

First Appeal No. 160 of 1924, Decided on 27th May 1925, from Sub. J.,of Muttra.

U. P. Land Revenue Act, S. 233 (k)—S. 233 (k) is not applicable only to cases under S. 111 determining question of title—Question of proprietary right being raised in partition Court, cannot be re-agitated.

S. 233 (k) is not limited to the case in which a question of proprietary right has been determined under S. 111. Where the question of proprietary right involved was definitely raised by the plaintiffs in their application to the partition court and where the relief which they asked for in respect of the land was not granted, it must be deemed to have been refused. The course of decisions of Allahabad Court has now definitely established the principle that S. 233 (k) debars civil courts from questioning the final allotment of land and title effected by means of a partition. [P 590 C 2 & P 591 C 1]

N. P. Asthana—for Appellnts.

K. N. Katju & G. Kunzru—for Respdts

Daniels, J.—The question for decision in this appeal is whether the present suit is barred by the provisions of section 233 (k) of the Land Revenue Act. The present suit is for a declaration that the plaintiffs are owners in possession of an area of 25.17 acres out of a khata of 104 acres in mahal Bhagwan Singh. mauza Sampat Jogi and that the defendants are wrongly entered in the revenue papers as owners of the equity of redemption. The area of which the property in dispute forms a part was originally mortgaged to Sahib Singh, a collateral relative of the parties. The plaintiffs are sons of Gulab Singh, the head of another branch, and the defendants are the heirs of Durg Singh who represented a third branch of the family. The equity of redemption in this property was purchased in equal shares in the names of Durg Singh and Sahib Singh at some time subsequent to the mortgage.

On 17th March, 1909 the plaintiffs applied for partition of this property impleading Durg Singh whose name they asserted to be fictitiously entered in the khewat and whom they asserted to have no proprietary interest in the property. There is on the record of the partition suit an application purporting to be made by Durg Singh admitting that his name was fictitiously entered. The petition was not verified and in the partition as finally made Durg Singh continued to be recorded as proprietor of the area now in dispute and the sons of Gulab Singh as mortgagees. The trial Court held that section 233 (k) applied and dismissed the suit. The lower appellate court has reversed this finding and remanded the suit for decision on the merits. The argument of the respondents, which found favour with the learned Subordinate Judge, is that as no question of proprietary right was raised by any co-sharer under section 111 or section 112, the question was never decided by the revenue courts, and further that section 233 (k) cannot apply as the share in dispute and the share allotted to the plaintiffs were both included in one mahal.

It appears to us, however, that the rulings of this Court do not permit us to accept this contention. Section 233 (k) is not limited to the case in which a question of proprietary right has been determined under section 111. In this case the question of proprietary right involved was definitely raised by the plaintiffs in their application to the partition court and as the relief which they asked for in respect of this land was not granted, it must be deemed to have been refused. A Bench of this Court held in *Ram Subhag Singh* v. *Dip Narain Singh* (1) that the final allotment of land at a partition is conclusive even though the question of proprietary title which it is sought to raise in the civil suit was not directly raised and decided in the partition. We may refer to *Gokaran Singh* v. *Ganga Singh* (2). *Nazir Ahmad* v. *Muhammad Sharif* (3) is a recent instance of the application of the same principle. The learned Judges say :—

"It seems to us that the legislature has given the revenue courts exclusive jurisdiction over the partition of a mahal among recorded co-sharers.....There is no doubt that if the plaintiffs had formed their suit so as to confine their claim merely to damages they might have succeeded. But they have chosen to join this claim to a claim to obtain exclusive possession of certain specified plots, which undoubtedly are the subject of the partition."

In Bhupal Singh v. *Ujagar Singh* (4) the plaintiff sued for a declaration of his title to a pre-empted share which had not been allotted to him at the partition, The Letters Patent Bench, affirming the deci-

(1) 1922 All. 158=44 All. 74.
(2) [1920] 42 All. 91=52 I.C. 779=17 A.L.J. 1072
(3) 1924 All 682=46 All. 453.
(4) [1920] 18 A. L. J. 928=58 I. C. 122.

sion of the Judge who heard the appeal, held that the case was governed by the Full Bench ruling in *Bijai miser* v. *Kali Parasad* (5), and that section 233 (k) was a bar to the suit. Whatever may be said against this rule, it has at least this great advantage that a revenue partition operates as a clearing up of disputed titles and that a title declared at a partition may be safely relied on against all persons who were parties to the proceedings.

The course of decisions of this Court has now definitely established the principle that section 233 (k) debars civil courts from questioning the final allotment of of land and title effected by means of a partition, and to depart from this rule would merely be to throw the law again into the state of uncertainty which formerly prevailed regarding it.

We think, therefore, that in the view of the scope of S. 233 (k) which has been accepted by this Court, the appeal must be allowed and the decree of the trial court restored. We direct accordingly. The appellants will get their costs of this appeal.

Sulaiman, J.—I concur in the proposed order. As the plaintiffs had definitely asked the partition court to allot to them exclusively the property entered in the name of Durg Singh on the allegation that his name was fictitiously recorded and as the court did not grant their prayer, it must be deemed to have been refused. The plaintiffs cannot now reagitate the same matter in the civil court.

Appeal allowed.

(5) [1917] 39 All. 469=41 I. C. 912=15 A. L. J. 496.

1925 ALLAHABAD 591

SULAIMAN, J.

Darbari Lal—Applicant.

v.

Emperor—Opposite party.

Cr. Ref. No. 322 of 1925, Decided on 30th May 1925, made by S. J., Farrukhabad.

(a) *Criminal P. C., S. 435—Sessions Judge can make reference to High Court against order of District Magistrate.*

Under the explanaiton to S. 435 the District Magistrate is inferior to the Sessions Judge. The latter has jurisdiction to call for the record of a case decided by the former and make a reference to the High Court. [P 592 C 1]

(b) *Whipping Act (4 of 1909), S. 3 (d)—Housebreaking to commit adultery—Sentence of whipping is not legal—Penal Code S. 445 (5)*

The offence of outraging a woman's modesty not being punishable with whipping, housebreaking in order to commit that offence cannot be so punished. [P 592 C 1]

Referring Order—This is an application in revision againt an order of the District Magistrate who, sitting as a Court of appeal, has altered the convic- of the applicant from S. 451 to S. 454 of the Penal Code, and has converted his sentence from three months' imprisonment and Rs. 50 fine to a sentence of whipping. It is contended on behalf of the applicant that this sentence is illegal, and the contention appears to me to be good. The Magistrate who tried the case charged the applicant with having committed an act of house-trespass with a view to outrage the modesty of Musammat Rampa. The district Magistrate has apparently concurred with the finding of the trial Court that the applicant's object was to outrage Musammat Rampa's modesty. There is, therefore, a common finding of both Courts that the applicant entered the house in order to commit an offence punishable under secion 354 of the Penal Code. This offence is not punishable with whipping and therefore section 3 (*d*) of the whipping Act does not apply. This being so, the sentence of whipping inflicted by the District Magistrate appears to be illegal, and I direct that the proceedings be referred to the High Court with a recommendation that the sentence of whipping be set aside and that either the original sentence be restored or such other sentence be inflicted as the Hon'ble Court may think proper.

Another point arises and has been argued before me and that is, that the District Magistrate's order amounts to an enhancement of sentence. In a Madras case in 1897 (reported at page 487 of Weir's Law of Offences and Criminal Procedure) it was held that where the lower Court reduced a sentence of imprisonment and inflicted a sentence of whipping, the effect was an enhancement. The present case is of course different inasmuch as the original sentences of imprisonment and fine have been set aside altogether and in their place a sentence of whipping has been substituted. In the circumstances, therefore, I do not think it can be said the sentence has been enhanced, but I should be glad to have a ruling on this point.

Before the record is submitted to the High Court an opportunity will be given to the learned District Magistrate to state his point of view in regard to the two questions raised in this revision,

The parties were not represented.

Sulaiman, J.—This reference must be accepted. The explanation added to S. 435 C. P. C. by Act 18 of 1923 makes a District Magistrate exercising original or appellate jurisdiction inferior to the Sessions Judge. The latter has therefore jurisdiction to call for the record and nake a refernce to the High Court.

Both the trying Magistrate and the District Magistrate found the accused guilty of entering a house in order to outrage the modesty of a woman. The first Court convicted him under section 451 of the Indian Penal Code and sentenced him to undergo a sentence of three months rigorous imprisonment and to pay a fine of Rs. 50, and in default one month more of rigorous imprisonment. The appellate Court took the view that as the accused had used violence in effecting his escape he was guilty of house breaking as defined in S. 445 (5) I. P. C. and therefore altered the conviction from one under section 451 to one under section 454 of the Indian P. C. and also altered the sentence to 15 stripes under the Whipping Act, S. 3 (*d*).

Leaving aside the question whether the alteration of a sentence of imprisonment and fine to one of whipping amounts to an enhancement of the sentence, I think the sentence of whipping was illegal.

S. 3 (*d*) of Act IV of 1909 does not make every house-trespass or house-breaking punishable with whipping, but only when the commission of the offence is "in order to the committing of any offence punishable with whipping under *this* section." It is obvious that the offence of outraging a woman's modesty (S. 354 I. P. C.) is not pouishable with whipping at all, and therefore house-breaking in order to commit that offence cannot be so punishable.

The facts of the case just fell short of an attempt to commit rape; otherwise the accused if convicted of the attempt could have been sentenced to whipping under section 4. But even if it be assumed that the house-breaking was with the object of attempting to commit rape. S. 3 would be inapplicable as such offence is not punishable under that section.

The sentence of whipping being illegal, I set it aside and restore the sentence passed by the trying Magistrate.

Reference accepted.

1925 ALLAHABAD 592

RYVES, J.

Kewal—Applicant.

v.

Tufail Ahmad—Opposite Party.

Criminal Revision No. 643 of 1924, Decided on 17th December 1924, against the order of the S. J., Meerut.

Penal Cade, S. 448—Dakhalnama *giving formal possession to complainant against accused—Accused entering or remaining on land is not guilty.*

Where a *dakhalnama* only gave formal possession of the house to the complainant against the accused,

Held; that the accused by entering or remaining on the land was not liable to be convicted 2 *All.* 465 *Foll.*

Hamid Hasan—for Applicant.

Assistant Government Advocate—for the Crown.

Ryves, J. — On the facts as they appear in the judgment of the learned Judge it seems to me that, havng regard to the decision of this Court *in the matter of the petition of Govind Prasad* (1), the offence of criminal trespass has not been made out.

It has been argued that, as a matter of fact, the decision arrived at by the Magistrate on the evidence of the case was to the effect that the applicant had been turned out of the house and that the possession of it had been made over to the complainant who had, afterwards, been forcibly ousted by the applicant. If those were the real facts then obviously the conviction would be right, but I do not think that the first Court really meant that. What it said was that "the *dakhalnama* is a decisive proof that the complainant was put in possession of the house and that the accused Kewal was ousted by an order of the Court." The *dakhalnama* apparently only gave formal possession of the house and actual physical possession was not given as would appear from the findings of the learned Sessions Judge. On those findings, having regard to the ruling of this Court, which is bindings on me, I must hold that the offence is not proved.

I accordingly allow the application and acquit the applicant of the offence charged and direct that the fine, if paid, be refunded.

Application allowed.

(1) [1878-80] 2 All. 465.

1925 ALLAHABAD 593

STUART, J.

Bhagwat Prasad Misra and others—Appellants.

v.

Baldeo Prasad Misra and others—Respondents.

Second Appeal No. 1120 of 1923, Decided on 26th February 1925, from a decree of 2nd A. D. J., Gorakhpur.

(a) *Civil P. C., O., 34, R. 1.—Merely an entry in village papers does not make a person a necessary party.*

Simply because a person has some title to the lands by reason of an entry in the village papers, he is not entitled to be made a party to a suit for redemption which is filed against the mortgagees.

(b) *Co-sharers—One co-sharer forcibly dispossessed from khudkasht—Physical possession can be decreed.*

When a co-sharer in a village has rightfully acquired land as his *khudkasht* and another co-sharer forcibly dispossesses him the Court can restore the man forcibly dispossessed to physical possession. [P 594 C 1]

Haribans Sahai—for Appellants.

Shimbhu Nath Chaube—for Rospondents.

Stuart, J.—The plaintiffs to this suit were purchasers of certain plots in a village in the Gorakhpur district. At the time of purchase they obtained the equity of redemption only over the plots now in dispute. The plots had been mortgaged with possession to two persons called Prabhakar defendant-appellant No. 2 and Rajbali deceased, the father of Ram Niwas Misir defendant-appellant No. 4. In 1912 the plaintiffs sued to redeem the plots over which they had purchased the equity of redemption. Rajbali having died and being represented only by Ram Niwas the mortgagees sued were Prabhkar and Ram Niwas. The matter was decided amicably under a compromise and a decree was drawn up on the 11th March, 1913, declaring the mortgage redeemed and assigning the plots in question to the plaintiffs. This decree was against Prabhakar and Ram Niwas. The plaintiffs obtained physical possession over these plots and cultivated them.

Subsequently Prabhakar and Ram Niwas with Bhagwati Prasad and Radhakant interfered with their possession by action taken over the standing crops. They undoubtedly based this interference upon an entry in the village papers which seemes to show that they had some title to the plots in question.

The preceding facts have been found by the lower appellate Court. The following findings must be emphasised. After the decree of 1913 the plaintiffs, were in possession of these plots. The plaintiffs were in separate and exclusive possessior of these plots by cultivating them. The defendants dispossessed them. The possession subsequently passed under an order of the Criminal Court to the police as a breach of peace was apprehended. The lower appellate Court has given the plaintiffs-respondents a decree for physical possession over these plots. This decree is attacked in appeal on two grounds. It is attacked on the ground that the decree of the 11th March, 1913, is not good as giving title to the plaintiffs.

The argument here is that the predecessors-in-interest of all the present defendants-appellants were interested in the matter and that the defendants-appellants 1 and 3 were no parties to the decree. There is no force in this plea. The mortgagees were Prabhakar defendant-appellant No. 2 and the father of Ram Niwas. The mortgagors were the plaintiffs vendors. The decree had only to be redeemed as against the mortgagees.

The next point taken was that the compromise was signed only by Prabhakar and not by Ram Niwas. I have searched the record and do not find that the compromise is on it or that the compromise was ever proved. The suggestion is apparently that if Ram Niwas did not sign the compromise it was signed by Prabhakar on his behalf. There cannot be the slightest doubt as to the fact that the decree was binding against both of them.

Another point argued here was to the effect that Ram Niwas was a minor. He clearly was not a minor at the time a decree was passed though he apparently was described as a minor in the plaint But he is described as a major in the decree. Apart from that, from the present pleadings it appears that Ram Niwas was 30 years old in 1921 which would make him a major in 1912. The redemption was a good redemption and the plaintiffs had title to the plots.

The next point taken is that they should not have been granted a decree for physical possession because they and the defendants are zamindars in the property.

The learned counsel has quoted in support of his argument the decision in *Bisheshar Singh* v. *Hanuman Singh* (1) and *Sarbjit Singh* v. *Rajkumar Rai* (2). The head-note in the first decision might be a little clearer. All that these decisions lay down is that when co-sharers or tenants-in-common are jointly in cultivation on a particular area the ouster of one by the other entitles the party ousted to a decree for joint possession. The decisions further lay down that when such a co-tenant intrudes upon joint land the remedy of the persons intruded against is to obtain a decree for joint possession, but nowhere do these decisions or any other lay down that when a co-sharer in a village has rightfully acquired land as his *khudkasht* and another co-sharer forcibly dispossesses him the Court should do otherwise than restore the man forcibly dispossessed to physical possession.

Here the plaintiffs were in separate physical possession of the plots in question and were dispossessed illegally by the defendants. The lower appellate Court was obviously right in giving the plaintiffs a decree for physical possession.

This decision disposes of all the points argued before me. There were other grounds of appeal but they were abandoned. I dismiss this appeal with costs on the higher scale.

Appeal dismissed.

---

(1) [1921] 19 A. L. J. 780=63 I. C. 802.
(2) [1921] 19 A. L. J. 783=63 I. C. 806.

1925 ALLAHABAD 594

WALSH AND SULAIMAN, JJ.

Jhunni Lal—Appellant.

v.

Natha—Respondent.

First Appeal No. 201 of 1923, Decided on 28th January 1925, from an order of the S. J., Aligarh.

Civil P. C., S. 47—Objection by Judgment-debtor's representative under O. 21, R. 58 — Case falls under S. 47, and decision thereon is a decree.

Where one N was brought upon the record as a representative of the deceased judgment-debtor and he set up his own right to the property and filed objection under O. 21, R. 58.

Held; that this objection must be taken to have come under S. 47 and that O. 9, R. 13 would in terms be applicable to an *ex parte* decision passed on the objections. 39 *All.* 47 *Foll.* 41 *Cal.* 1 *Dist.* [P. 595, C. 1]

Panna Lal—for Appellant.

Gulzari Lal and *P. L. Banerjee*—for Respondent.

Sulaiman, J.—This is a first appeal from order which has been by the decree-holder and arises out of the following circumstances :—

A mortgage decree for sale was obtained against Madan Lal who died subsequent to the decree. In his place Onkar Das, his brother and Natha Ram, his nephew, were brought upon the record as his legal representatives and heirs. There were first certain objections filed by Onkar Das with which we are not concerned in this appeal. On the 15th of November 1922, Natha Ram filed certain objections purporting to be made under S. 47 and also under O. 21, R. 58 of the Code of Civil Procedure. Notice was issued to the decree-holder, but the report of the process-server was that he refused to accept notice. The Court considered the service sufficient and ordered that *ex parte* proceedings should be taken. On the 24th February 1923, the objector got the objections amended as being exclusively under S. 47, and on that date the Court passed an *ex parte* order allowing the objections.

On the 28th February 1923 the decree-holder put in an application for setting aside the *ex parte* order, alleging that he had no notice of it, and also stating that the objection under O. 21, R. 58 was not maintainable. The learned Judge has dismissed this application summarily, holding that O. 9, R. 13 of the Code of Civil Procedure does not apply to execution proceedings, and that therefore the application is not maintainable.

A preliminary objection is taken that no appeal lies before us If the original objection had been one under O. 21, R. 58 and had been allowed then objection that no appeal lies could have been entertained. But we have already pointed out that Natha Ram was brought upon the record as a representative of the deceased judgment-debtor. In his objection he set up his own right to the property, and therefore his objection must be taken to have come under S. 47. This was clearly held in the case of *Dulla* v. *Shib Lal* (1) by a

(1) [1917] 9 All. 47=36 I.C. 281=14 A.L.J. 846.

Bench of which one of us was a member. The objection being under S. 47, the order which was passed on the 24th of February 1923, though an *ex parte* one, amounted to a decree. Under S. 2, sub-clause (2) of the Code of Civil Procedure a decree includes the determination of any question within S. 47. It follows, therefore, that O. 9, R. 13 would in terms be applicable. The learned Judge was quite wrong in holding that the application for setting aside the *ex parte* decree was not maintainable. Even if O. 9, R. 13, were not expressly applicable, the Court would have an inherent jurisdiction to review an order which had been passed *ex parte* provided of course sufficient cause is shown.

The learned advocate for the respondent contends that a contrary view has been expressed in the case of *Bharat Indu* v. *Asghar Ali Khan* (2) following the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (3).

We may point out that the case before Calcutta High Court arose out of proceedings under O. 21, Rr. 100 and 101, which were not execution proceedings. In the case decided by this Court the application for execution had been struck off on the ground that the decree-holder had failed to prosecute it with due diligence. The facts of that case, therefore, are quite different.

In the present case we have already held that the order of the 24th of February 1923, amounted to a decree, and that therefore, O. 9, R. 13 was clearly applicable.

Instead of sending the case back to the Court below we have thought it convenient to dispose of the question of fact ourselves. On the one hand we have the sworn affidavit of the decree-holder that he had no notice of the date fixed. As against it there is the report and affidavit of the process-server. We find it difficult to believe that if the decree-holder was aware of the date and was actually present in the Court compound as alleged by the opposite party, he would have deliberately allowed the objection to be heard *ex parte*.

We accordingly hold that it is established that the decree holder was ignorant of the date fixed and that he could not attend the Court on that day, and that sufficient cause has been shown for his non appearance within the meaning of O. 9, R. 13.

We accordingly allow the appeal and set aside the order of the lower appellate Court, with the result that the *ex parte* decree, dated the 24th of February 1923, is also set aside and the objections of Natha Ram are restored to the file, and we direct that they should be disposed of according to law. Costs in both Courts will abide the event, including in this Court fees on the higher scale.

Appeal allowed.

(2) 1923 All. 460=45 All. 148=21 A. L. J. 135.

(3) [1913] 41 Cal. 1=19 I.C. 683=18 C.W.N. 343.

★ 1925 ALLAHABAD 595

MEARS, C. J. AND MUKERJI, J.

Swarath Ram Ram Saran—Plaintiff—Appellant.

v.

Ram Ballabh and others—Defendants—Respondents.

First Appeal No. 82 of 1922, Decided on 22nd April 1925, from a decree of Sub. J., Agra.

(a) *Contract Act, S. 253 (10)—Joint family business continued after partition—Death of one partner dissolves partnership.*

Where subsequent to the partition of a Hindu joint family, the family business is carried on jointly by two of the members on the one side and another member on the other, the death of the latter dissolves the partnership. [P. 599, C. 1]

(b) *Hindu Law—Guardianship—Man leaving his separate property and minor sons—Mother is natural guardian.*

On the death of a Hindu leaving sons, all of whom are minors, and separate property, the minors' mother is their natural guardian in respect of the property. [P. 599, C. 1]

★ (c) *Minor—Minor is not liable to be sued for specific performance of contract for sale made on his behalf by guardian.*

The natural guardian of a minor cannot impose a personal liability on the minor by a contract entered into by the guardian on the minor's behalf. Hence a minor is not liable to be sued for specific performance of a contract for the sale of immovable property. [P. 600, C. 1]

★ (d) *Specific Rel. Act, S. 22—Plaintiff abandoning intention of going on with contract for purchase of property stimulated into activity subsequently by chance of property being sold to another—Specific performance should not be granted.*

Where a plaintiff in a suit for specific performance of contract of sale of immovable property had in fact abandoned all intention of

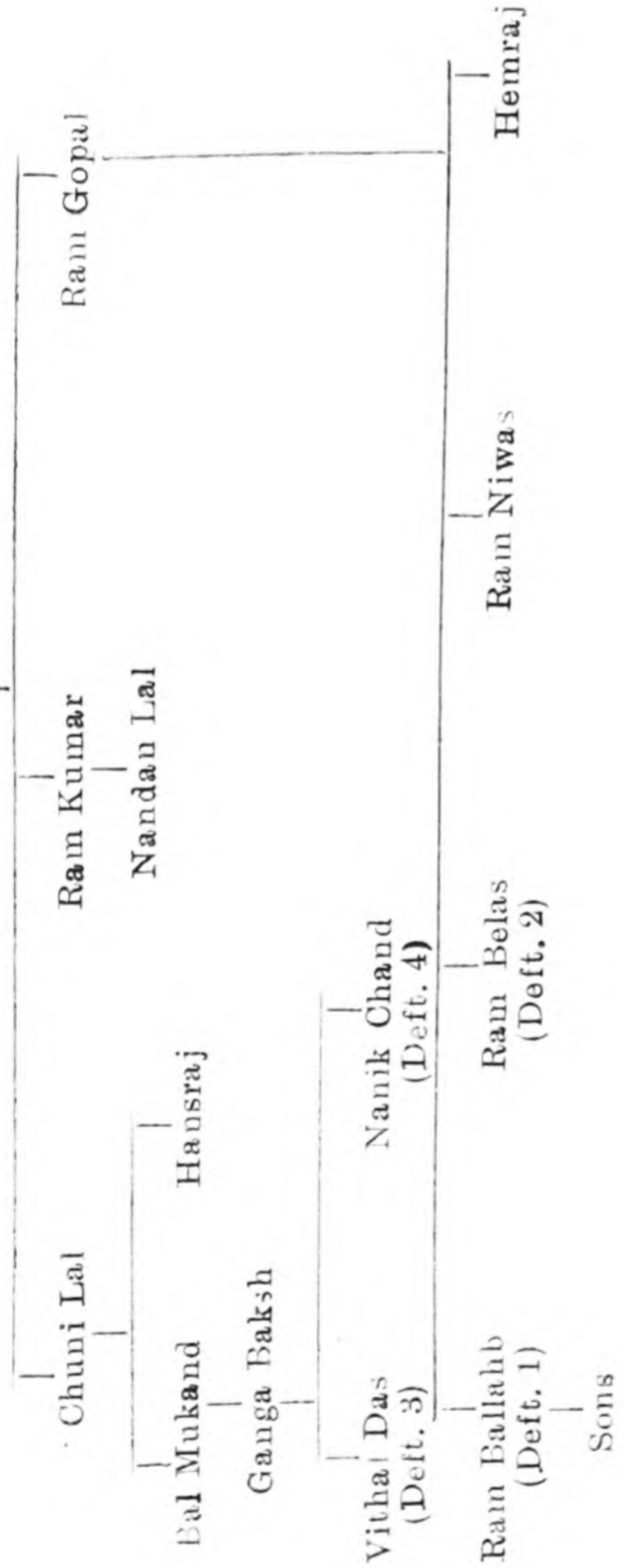
going on with this contract, but was stimulated into activity by learning that the property was likely to be sold over his head.

Held: that the case was one in which specific performance should not be granted. [P. 601, C. 1]

B. E. O' Conor and *Kailas Nath Katju* —for Appellant.

Tej Bahadur Sapru, *Gulzari Lal*, *Surendro Nalh Sen*, *Girdhari Lal Agarwala*, *B. Malik* and *Baleshwari Prasad*—for Respondents.

Mears, C. J.—The facts of this case will be better understood by a reference to the following pedigree:—



This is the appeal of the plaintiffs from a decision of the Subordinate Judge of Agra in a suit for specific performance. The learned Subordinate Judge decided, for reasons which we shall discuss, that the plaintiffs were not entitled to the relief claimed by them. The plaintiff-firm is known as Swarath Ram-Ram Saran and Sital Prasad is one of the owners of that firm. For many years they had occupied as tenants a godown at Agra. The landlords were the defendants. The defendants in the year 1913 mortgaged this godown together with other Properties to Nemi Chand for the sum of Rs. 90,000 carrying interest at the rate of 6% per annum. On the 11th of April, 1914 it appears that the defendant firm sent a notice to the plaintiffs enhancing their rent from Rs. 400 to Rs. 750 a year. On the 13th of January, 1917 there was a partition. The principal parties to that partition were the sons of Bal Mukand, Ram Kumar and Ram Gopal. The effect of the partition was that Nandan Lal, the son of Ram Kumar, was bought out and thereafter the son of Bal Mukand, Ganga Baksh, and the sons of Ram Gopal each had a half share in the business which, we have been told, was that of commission agents, that is to say, presumably at the end of each financial year the profits of the business would be equally divided between the sons of Ram Gopal and the son of Bal Mukand. In April 1917, and probably towards the end of that month, there was a conversation between Sital Prasad, Ram Ballabh and Nemi Chand as regards the purchase of the godown by the plaintiffs. There was some conversation as regards the price ranging round Rs. 11,300 but eventually on the suggestion of Nemi Chand, Sital Prasad expressed his willingness to give Rs. 12,000 for the property. Ram Ballabh seems to have aquiesced in this as being a reasonable offer and one which he himself would have accepted had the decision rested entirely with him and he stated that he would return to Sambhar and discuss it with the other people who were interested in the property. At this date there is reason to believe that Ganga Baksh was alive. He was undoubtedly dead on the 27th of May. According to the evidence no message came from Sambhar as to the offer and about the 18th of May, Ratan Lal munib of the plaintiff-firm, went to Sambhar and had an interview with Ram Ballabh The question whether he ever went there has been disputed and it has been pointed out that in this firm one would expect to find a record of his expenses, whereas it is admitted that no record exists. The answer is

according to the evidence, that Sital Prasad paid the sum of Rs. 10, 12 or 15 which was said to be the cost of the journey from Agra to Sambhar and back, out of his own pocket.

We think he must have gone and on his return he said that there had been an agreement by all the interested parties. The next matter is one of importance. It is said that on the 20th of May Ram Ballabh wrote a latter to Nemi Chand addressed to Ajmere. At that date apparently Nemi Chand was in Agra. He was at all events in Agra on the 22nd of May and on the 22nd of May he sent for Sital Prasad who, with Ratan Lal, went to see him. He is stated to have shown the original letter of Ram Ballabh to Sital Prasad and Ratan Lal and Ratan Lal is said to have taken a copy. Before reading the letter we might just mention here that in our opinion the copy of the letter which was preferred to the Court and which was received in evidence ought not to have been received for the reason that the preliminary steps were not taken which would have made that document evidence. Nemi Chand having died, the presumption would be that the letter was in the possession of Tikam Chand, his son and successor to the business, and a notice ought undoubtedly to have been sent to Tikam Chand to produce that document. If Tikam Chand had then said that it was not in his possession, then, if it was likely that it was in the possession of anyone else, another notice should have been sent to that person. Indeed it was suggested that the letter had passed into the possession of a man named Ram Kumar who was said to be such a long way away from the Court at a place called Hoshangabad. No matter whether he was there or not, the rules of the Court must be obeyed and before the Judge could have received this copy in evidence he ought to have been satisfied that the preliminary steps had been taken both as regards Tikam Chand and Ram Kumar to find out the whereabouts of that original document. However, the case proceeded and the Court accepted the letter and we also now accept it as a true copy of a document which did arrive at Agra on the 22nd of May, 1917 and did come from Ram Ballabh That letter shows that the writer expected that the munib of the plaintiffs was very likely to have come to Nemi Chand in respect of the sugar godown and the letter further says that the munib has also seen him. That does support Ratan Lal in his statement that he had in fact gone to Sambhar. "Please send for him and get earnest money in respect of Rs. 12,000 deposited. Please bring him round politely." Now that undoubtedly meant that Ram Ballabh did not want to lose a purchaser at Rs. 12,000 and he wanted Nemi Chand, who is a man of considerable social position at Agra, to deal carefully and prudently with the munib and arrange the contract. There is the sum of Rs. 12,000 mentioned and it had already been a matter of assent by Nemi Chand that if this money were paid he would reduce the principal sum under the mortgage to Rs. 78,000 with a corresponding reduction of interest, and inasmuch as the defendants were receiving Rs. 400 only as rent and were paying Rs. 720 per annum as interest, it was obviously to their interest to get this matter carried through without delay and it was good business to sell the godown. Sital Prasad says that he assented to the terms of this letter and that in fact he gave Nemi Chand a document in writing setting out all the particulars. Again, no step was taken by the plaintiffs to get that document and there is no evidence before this Court as to its contents. But we do know that on that day Nemi Chand mentioned Rs. 200 as the necessary earnest money and on that day the Rs. 200 was paid into the account of Nemi Chand. On the 27th of May, 1917 the firm of Seth Ram Ballabh executed a power of attorney to two people, one Tara Chand and the other Kewal Chand. On the 14th of July, 1917 a stamp vendor at Agra sold a Rs. 120 stamp to a man whose name he recorded as Kewal Chand, munib of Hira Lal Chunni Lal. It is said that Kewal Chand came down to Agra on this very business and was there round and about the 14th of July. It is further stated that a draft of the sale-deed was prepared by Ikram Husain, that it was submitted to Kewal Chand, that the parties went to a pleader named Basdeo Sahai. Basdeo Sahai thought it better to re-draft the whole agreement. Kewal Chand took that document away with him. At this interview with Basdeo Sahai, and possibly before, the name of Hansraj was mentioned. He, it will be seen ; is the son of Chunni Lal and Sital

Prasad was anxious that Hansraj should be one of the executants of the sale-deed. Kewal Chand opposed it and said that it was not necessary because Hansraj had become bankrupt in Bombay some time before and had ceased to have any interest in the business. Sital Prasad was clearly not satisfied with this and instituted enquiries and those enquiries, according to Ratan Lal, took 1½ to 2 months and according to Sital Prasad five to six months before it was ascertained that Hansraj had been adjudicated bankrupt. Later we shall show that there is a curious circumstance in connection with this because we have not been able to discover on the record Exhibit IV, mentioned in the evidence of Sital Prasad. The conclusive document which shows that Hansraj did become bankrupt is under the seal of the Bombay High Court. The date when the document was obtained from Bombay is the 30th of September 1918 and it evidences Hansraj's bankruptcy in 1914. On the 29th of July, 1917 the defendants wrote a letter to the plaintiffs. It is a document which has given us cause for a certain amount of doubt as to whether Kewal Chand was in fact in Agra at the time when the stamp of Rs. 120 was purchased because the whole tone of the letter is that of a man who has never seen the text of any draft, who is anxious to get the matter through and who is prepared to send Kewal Chand after the receipt of it. But at all events whatever may be the real truth about it whether Kewal Chand came to Agra or not, this letter of the 29th of July, 1917 asks the plaintiffs not to make a delay. From that date, *viz.*, the 29th of July, 1917 there is an unbroken silence for a year. It is said that during that period the plaintiffs were verbally urging the defendants to complete, but the evidence is very slender on that and in any circumstance a plaintiff seeking specific performance must show a great deal more than verbal request week after week and month after month to complete. The plaintiffs must force the defendants either to complete or to repudiate. There is no real explanation of how it happened that the delay occurred, but it may very well be that Basdeo Sahai, at the interview when the name of Hansraj came up, pointed out to Sital Prasad that the mere fact of a bankruptcy of a member of the firm did not make that member walk out of the firm, but merely substituted his trustee in bankruptcy for him and that if in fact Hansraj had any property in this business that was of value, the trustee in bankruptcy could come in and could claim it. That may have been one of the circumstances that disposed the plaintiffs to hesitate as to whether this contract was worth carrying through. On the 26th of August, 1918 the defendants worte a letter to the plaintiffs asking for an account relating to the godown which is rented by them. It is very curious that there is no referrence whatever to be found in this letter to the fact that they had through the agency of Nemi Chand entered into a firm contract of the sale of the godown for Rs. 12,000 and the letter is the ordinary letter which one would expect from people who had stood to each other in the relationship of landlord and tenant. For the moment we pass over a very material date to mention that on the 5th of September, 1918 an accout was sent by the plaintiffs in which they included the sum of Rs. 200 which had been paid as earnest money and the further sum of Rs. 12 / which had been spent in the purchase of the stamp paper. The explanation of that may possibly be that a munim was told to make out the account as it stood between the parties and he merely took a copy of the ledger exactly as it was and that there was in that ledger no separate rent account and no separate puachase account. An important date to which we have to refer is the 30th of August, 1918. At p. 93 of the record will be found a letter of the most definite repudiation. It shows that there had been a registered letter sent by the plaintiffs after the 12 months of unexplained silence. That registered letter, we are told, was a notice directed to the defendants to complete the contract. We think there is no doubt that by this time the plaintiff-firm had come to know that the defendants second party on the record-Sarju Prasad and others had begun the negotiation for the purchase of this godown. The letter of repudiation written on behalf of the firm by a pleader says. "I neither sold any any house to you, nor took any earnest money." It makes a reference to the fact that the rent should be Rs. 750 and again asks for an account. Notwithstanding that most plain assertion by the defendants that there was no contract

and never had been one, the plaintiffs wait ten more months before they commence the action and in fact sent the account of September 5th. In the interval they sent notices to various people who are connected with Sarju Prasad and others, the defendants second party, telling them that they (the plaintiffs) have entered into a contract for purchase of the godown and warning them not to buy over their head. On the 23rd of March, 1919 the defendants first party sold the godown to the defendants second party for the sum of Rs. 14,250. On the 14th of June, 1919 this suit was instituted.

The first question that one has to consider is what was the effect of the death of Ganga Bakhsh at a time when beyond question the proceedings were in the negotiation stage only. From the time of the partition, which had taken place some four months before, the business presumably had been carried on jointly by Ram Ballabh and Ram Bilas on the one side and Ganga Bakhsh on the other. When Ganga Bakhsh died it did not seem to occur to any of these contracting parties that by operation of law the partnership had come to an end and that there would have to be a reconstitution of the partnership before any sale of this character could be carried through, nor apparently did it occur to the parties that Mt. Godaveri, the mother of Vithal Das and Nanik Chand who were boys of tender age, was the legal guardian of those minors. At its highest the case is that Ram Ballabh has been spoken of in this Court as the *de facto* manager of the business and *de facto* guardian of the minors. The fact is that there was in law no partnership business and Ram Ballabh had not behind him any record of past management of the business as it stood at and after the death of Ganga Bakhsh. There is no evidence given to us to show that there was any reconstitution of the business and no evidence given to show that Mt. Godaveri requested Ram Ballabh to look after the interest of the minors or that they had been incorporated into the firm. We are of opinion that in law Ram Ballabh had no authority to act on behalf of these minors. If, however, he had, then it appears to us that the plaintiffs are met by the difficulty which has been pointed out in *Waghela Rajsanji* v *Sheikh Masludin* (1), *viz.*, that Ram Ballabh was purporting to bind the minors by a personal obligation. In this case the mother and guardian of a minor conveyed certain villages which were part of a taluqdari estate in liquidation of debts which were chargeable upon the estate and, stating that those villages were rent free, covenanted that if the villages should be assessed to Government revenue, she, the guardian, and her minor son, the ward, would be liable to pay to the purchaser the amount of such Government revenue. The liability was also charged upon other parts of the minor's estate. In fact later those villages were declared assessable to revenue and the question then arose as to whether the minor could be made liable to repay the amount which the purchaser of the village had been called upon to pay. The important passage is to be found at p. 561 and their Lordships of the Privy Council stated that it was conceded that there was not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. They continue that they are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They stated that it would be a very improper thing to allow the guardian to make a covenant in the name of his ward so as to impose a personal liability upon the ward and they held that in this case the guardian exceeded her powers so far as she purported to bind her ward and that so far as the suit was founded on the personal liability of the taluqdar, it must fail. The emphasis there is laid upon personal liability and it is to be noted that in this suit for specific performance the personal liability of the minors is sought to be enforced against them. We have also had called to our notice the case of *Mir Sarwarjan* v. *Fakhruddin Mohammad Chowdhari* (2) in which Lord Macnaughten in Privy Council laid it down that neither the manager of a minor's estate nor the guardian of a minor is competent to bind the minor or the minor's estate by a contract for the purchase of immovable property. The reason which their Lordships gave was that the minor not being bound

(1) [1887] 11 Bom. 551

(2) [1912] 39 Cal. 232=39 I. A. 1=16 C. W. N. 74=(1912) M. W. N. 22=9 A. L. J. 33=15 C. L. J. 69=14 Bom. L. R. 5=21 M. L. J. 1156=13 I. C. 331=11 M. L. T. 8 (P. C.)

by the contract there was no mutuality and even though the minor in that case had reached his majority he could not obtain specific performance of a contract. Sir Tej Bahadur Sapru has put it in argument that the principle in that case is equally applicable whether a minor be a purchaser or a vendor of an immovable property and that in either case the element of mutuality being wanting, no suit for specific performance can be brought by or against the minor. We need not decide this point as we are satisfied that the case must fail on other grounds. Another case which has been brought to our notice is *Patchu Ramajogayya* v. *Vajjula Jagannadhan* (3). In that case the learned Chief Justice gave a judgment which followed the case of *Waghela* v. *Masludin* (1) to the full and held that a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit. Two other learned Judges who arrived at the same conclusion of law gave some rather different reasons for their decision. The case is a strong one because the minor had through his mother borrowed money for the purposes of defraying the expenses of the marriage of his sister. It was held that his mother as guardian could not enter into a contract on his behalf so as to impose any personal liability on him and in the peculiar tenure of the property it was held that the mortgage which had been given was invalid. The question, however, for the decision of the Madras Bench was solely the question of personal liability. In this connection the case of *Imambandi* v. *Sheikh Haji Mutsaddi* (4) might also be considered

The result, therefore, is that first of all we hold that Ram Ballabh assumed an authority to deal with the minors' property which he did not possess it in law. Even if he did possess it in law we hold that he could not by any engagement entered into by him put the minors under a personal obligation. There are other matters which, in our opinion, are fatal to this case and we have already mentioned the matter of Hansraj. Undoubtedly the question did arise as to whether Hansraj was to be a party to the conveyance. or not. Sital Prasad never appears to have told Ram Ballabh that his objection to the omission of Hansraj's name from the document had been swept away. One had better see exactly what he did say. He said that "it was agreed" between him and Ram Ballabh that the name should not be inserted. That statement, "it was agreed," is a conclusion of fact. It was not for a witness to draw a conclusion of fact, but it was for the witness to give evidence of facts from which the Judge would draw his own conclusion as to whether or not it was agreed. Sital Prasad never informed the Court when or where or in what manner he had communicated to Ram Ballabh the fact that he assented to the omission of Hansraj's name from the document. He says: "I had a talk with Ram Ballabh about the name of Hansraj being mentioned on receiving the copy of adjudication from Bombay." We have been quite unable to fix what that date is. If it is a reference to some period about 5 to 6 months after May it would be understandable, but it is not understandable if it is a reference to the 30th of September, 1918 on which date he obtained a copy of the record of insolvency because it is inconceivable that Ram Ballabh then said "very well" as Sital Prasad represents him to have done, when one remembers that exactly a month before the defendants had written a letter of repudiation in the plainest terms. He says: "When the draft was prepared I did not tell Kewal Chand in how many days I would make enquiry about Hansraj. I said only so much that I would enquire about Hansraj from Bombay. Had not the enquiry satisfied me I would not have obtained the sale-deed. I did not also tell Kewal Chand that I would inform him after making an enquiry." The position, therefore, with regard to Hansraj is, as we have said before, that it was one important outstanding matter which was certainly outstanding for many months and one which Sital Prasad may never have subsequently discussed with Ram Ballabh or with Kewal Chand.

Then comes the final matter of delay. The first delay that is mentioned in the record is 5 to 6 months for obtaining information about Hansraj. Ratan Lal

---

(3) [1919] 42 Mad. 185=36 M. L. J. 29=25 M. L. T. 23=9 M. L. W. 220=49 I. C. 872=(1919) M. W. N. 148 (F. B.)

(4) [1918] 45 Cal. 878=45 I. A. 73=16 A. L.J. 800=35 M. L. J. 422=24 M. L. T. 330=28 C. L. J. 409=23 C. W. N. 50=5 Pat. L. W. 276 = 20 Bom. L. R. 1022=(1919) M. W. N. 91=47 I. C. 513=9 L. W. 518 (P. C.)

says 1½ to 2 months. If in fact Sital Prasad took all that time to enquire, Sital Prasad was grossly negligent because an enquiry of that kind, if made through a proper person, would have resulted in an answer being obtained certainly within 21 days. The only thing which was wanted was the answer to one question--has one Hansraj been adjudicated bankrupt by the Bombay High Court? There was no need to wait for formal documents yet in that way, according to Sital Prasad himself, six months pass by. We have already pointed out that from the 29th of July, 1917 to some time in August, 1918 there is no sign of activity on the part of Sital Prasad. Lastly, when on the 30th of August, 1918 the defendants tell him in terms which admit of no possible doubt that they do not regard him in any sense as a purchaser of the godown, again Sital Prasad waits some ten months. We think those are circumstances coupled with the substantial difficulty about Hansraj which entitle us to assume that Sital Prasad had in fact abandoned all intention of going on with this contract, but was stimulated into activity by learning that the property was likely to be sold over his head. Thereafter he wrote the series of letters of which we have spoken in the hopes that Sarju Prasad would not continue negotiations and that having failed, brought the suit for specific performance. We agree with the learned Subordinate Judge that this is a case in which specific performance should not be granted and inasmuch as we have decided that Ram Ballabh had no authority to act on behalf of the infants, it follows that the whole suit must fail and we, therefore, dismiss this appeal.

In view of the fact that Ram Ballabh said untruthfully that the contract had to be carried through within 3 months and in view of the fact that he had also stated that Kewal Chand had ceased to be his munim, whereas in truth and in fact Kewal Chand was carrying, though on their behalf, a sale of Rs. 45,000 in value, on the 23rd of November, 1918 and was acting obviously under the power of attorney of the 27th of May, 1917, we deprive Ram Ballabh and the other defendants first party of their costs in this Court. Sarju Prasad will get his costs of this appeal from the plaintiffs including fees on the higher scale. The defendants second party Nos. 5 to 13 will get their costs from the plaintiffs including fees on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 601

WALSH AND RYVES, JJ.

Thakur Anrudh Singh—Appellant.

v.

Mt. Rupa Kunwar and others--Respondents.

First Appeal No. 178 of 1923, Decided on 10th December, 1924, from an order of the Second Sub-J., Cawnpore.

★ *Civil P. C., O. 9, R. 8—Plaintiff missing train — Suit dismissed for default — Plaintiff reaching Court and applying for restoration same day—Restoration was ordered.*

It is the business of the Court to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline, but to use their discipline for the purpose of penalsing them for their neglect and removing the results of such neglect. [P. 601, C. 2.]

Where the plaintiff's claim was valued at Rs. 20,000 and on the date of the hearing the plaintiff started with his witnesses but missed the train and reaching the Court after the suit had been dismissed for default, applied for restoration on the same day.

Held: that the plaintiff's negligence in starting for the last train and missing it was human and not irreparable, that it could be repaired by paying the costs of the opposite party and that the suit should be restored. [P. 601, C. 2]

Kailas Nath Katju—for Appellant.

Shiva Prasad Sinha—for Respondents.

Walsh, J.—In this case we are satisfied that the appellant is entitled to another chance. It is the business of the Courts to decide the rights of the parties and not to deprive them of their rights by the mere exercise of discipline but to use their discipline for the purpose of visiting neglect upon them and removing the results of such neglect. The learned Judge rightly says that at times parties will stay away when they are not ready and then come back with a cock and bull story to apply for restoration, in other words that they are acting *mala fides*. He has not been able to find that was so. In this case he only finds that the plaintiff was negligent in starting for the last train and missing it. Negligence of that kind is human and not irreparable. It can be repaired by paying the costs of the other side and restoring the parties

to their original position. We are satisfied in this case by really overwhelming evidence, namely, that the claim was Rs. 20,000, that the plaintiff did start with his witnesses, and that he did in fact take the train and apply that day to have his case restored, on the ground, that he had been prevented by having missed the earlier train. We, therefore, reverse the order and direct the lower Court to restore the case to its pending file for rehearing on the condition that the plaintiff pays into Court within a month a sum of Rs 100 as security for all costs borne by the defendant in the lower Court with fees in this Court on the higher scale. The money must be paid before the case is heard.

Order reversed.

★ 1925 ALLAHABAD 602

PIGGOTT, J.

Manni Lal—Defendant—Appellant.

v.

Radhey Gopalji and another—Plaintiffs—Respondents.

Stamp Ref. in First Appeal No. 310 of 1922, Decided on 11th February 1925.

★ (*a*) *Court Fees Act, S. 7 (iv) (c) and (d)—Suit for declaring plaintiff to be rightful manager of trust properties and for injunction against defendants—S. 7 (iv) (c) applies though plaintiff is in possession of properties.*

The suit was brought by the plaintiff No. 3 with and on behalf of plaintiffs Nos. 1 and 2 who were idols *inter alia* for the following reliefs:—

(*a*) It may be held that defendant has no power to supervise and manage the properties of plaintiffs Nos. 1 and 2 and it may be declared that the plaintiff No. 3 is the lawful manager of plaintiffs Nos. 1 and 2.

(*b*) The defendant may be restrained by means of a perpetual injunction from supervising and managing the property of the plaintiffs Nos. 1 and 2 and from entering the property of the plaintiffs.

The possession of the property by the plaintiff was not in dispute.

Held: that the relief claimed was consequential and not merely an injunction and that S. 7 (iv) (c) and not S. 7 (iv) (d) applied to the case. [P 604, C 1]

★ (*b*) *Court Fees Act, S. 7 (iv) (c)—Court fee must be levied on value of declaration of right plus that of the consequential relief.*

The "relief sought" on which the court fee must be levied, is the sum total of the two reliefs, *viz*, declaration of right and consequential relief and not the consequential relief alone' 36 *All.* 500 *Foll.* [P 604 C 1]

Lalit Mohan Banerji and *Narain Prasad Asthana*—for Appellant.

S. C. Das and *Surendro Nath Sen*—for Respondents.

Reference. — The Taxing Officer's report:—

The suit, from which this appeal has arisen, was brought by the plaintiff No. 3 with and on behalf of plaintiffs Nos. 1 and 2 who are idols for the following reliefs:—

(*a*) It may be held that defendant has no power to supervise and manage the properties of plaintiffs Nos. 1 and 2 and it may be declared that the plaintiff No. 3 is the lawful manager of plaintiffs Nos. 1 and 2,

(*b*) The defendant may be restrained by means of a perpetual injunction from supervising and managing the property of the plaintiffs Nos. 1 and 2 and from entering the property of the plaintiffs.

(*c*) The moveables of the plaintiff No. 1 that may be proved, may be recovered.

(*d*) The costs may be awarded.

(*e*) Any relief other than relief (*a*), which it may be deemed just to grant with any addition or alteration, may be granted. The plaintiffs will pay on it any court fee that is deemed necessary to be paid.

The suit was valued for the purposes of jurisdiction at Rs. 26,500, as a value of the property, and the court-fee was paid as follows:—

	Rs. a. p.
Declaration of right, valued at Rs. 25,000.	10-0-0
Issue of perpetual injunction, valued at Rs. 1,000.	75-0-0
Recovery of moveable and cash at Rs. 500.	37-8-0

The lower Court passed a decree declaring that the plaintiff No. 3 was the manager and trustee of the estate of the plaintiff No. 2 and perpetually restrained the defendant from managing the property of the plaintiff No. 2 or entering it. It further passed a decree for possession over moveable property of the value of Rs. 3-10. Against this decree the defendant preferred this appeal, valuing it at Rs. 4,000 and paying only Rs. 10 as court-fee, praying that the appeal be allowed and the suit be dismissed with costs.

The respondent has filed a cross-objection with respect to the property of plain-

tiff No. 1, valuing it at Rs. 630 and paying Rs. 10 for a declaration and Rs. 37-8 for an injunction.

As against the parties to the suit and the appeal and cross-objection, it is maintained that in the plaint relief (*b*) prayed for is consequential to the declaration prayed for in relief (*a*), that, therefore, for the purpose of estimating court-fees, S. 7 clause 4 para. (*c*) of the Court-Fees Act is applicable and an *ad valorem* duty should be paid in both Courts. On this contention there is deficiency of Rs. 792-8 payable by the plaintiffs respondents in the Court below. With regard to their cross-objection, it is maintained that it should have been valued at Rs. 21,000 and that there is this a deficiency of Rs. 747-8 due from them in this Court. From the defendant-appellant there is a deficiency of Rs. 215 due in this Court.

It is understood that the counsel for the appellant has seen the deficiency report submitted by the office and has raised no objection to payment. The counsel for the plaintiffs-respondents, however, has objected that the suit does not fall under S. 7, clause 4 para. (*c*) but para. (*d*) of the Court-Fees Act. He points out that, as is stated in the judgment of the lower Court, the possession of the property by the plaintiffs Nos. 1 and 2 is not in dispute, and that plaintiff No. 3 is not suing on his personal right and is not claiming any beneficial right in the property, and he relies on the case quoted in 19 C. L. J., 15. There the plaintiff asked for a declaration that he was in possession as the sole *sebait* of certain endowed properties and that the defendants had not been validly appointed as such, and for an injunction to restrain the defendants from interfering with the management of the property. The Court held that the substantial relief claimed was this injunction and proceeded to decide whether the valuation placed on this relief was arbitrary or not. Counsel contends with some force that the case quoted exactly covers the points raised in the present suit, namely whether in the first place the relief claimed is consequential or merely an injunction and, secondly, whether if it is held to be an injunction, the valuation put upon it is arbitrary or not.

Now whatever may be the relief claimed "in substance," the words actually used in the prayer (page 4 of the paper book) appear to be capable of only one interpretation. I am of opinion that this is clearly a claim for a declaration with consequential relief. The right to obtain an injunction against the defendant flows from the declaration which the plaintiff seeks of his right to the management. "If the plaintiff has that right, he is entitled to an injunction in consequence. If he has not that right, he is not entitled to an injunction;" (22 A. L. J. R., 1038, Daniels, J.). The fact that in this case it is a question not of possession but of management, does not seem to me to be strictly relevant. If it is pleaded that the plaint might have been worded differently, I would draw attention to the remarks of Piggott, J., in a similar case in 20 A. L. J. R., 589.

But assuming that the relief claimed is consequential, counsel refers to the remarks of Stanley, C. J. in I. L. R., 28 All., 117: "As regards the court-fee, in many cases the costs of such a suit as this fall on the trust estate, and it seems to me that as the decree in such a suit works no change in the beneficial ownership of the property, it would be a hardship to impose on the trust estate the payment of the ordinary court-fee payable in respect of a hostile suit for recovery of land on title." As a matter of fact this was not an issue in the case. The above words are merely the expression of an opinion and the learned Judge did not come to any finding on the point.

In view, however, of the judgment of Mukerji, J., in 19 C. L. J., 15 and of the remarks of Piggott, J., and Stanley, C. J., in the judgments referred to, I direct that this order be laid before the Hon'ble Taxing Judge for a decision of the issue whether this suit falls under para. (*c*) or para. (*d*) of clause 4 of S. 7 of the Court-Fees Act, and for orders as to whether, if it falls under para. (*c*), the full *ad valorem* court-fee is to be paid.

Should the learned Judge decide that the suit falls under para. (*c*), the second issue framed above need not be considered. On the other hand, if the suit is held to fall under para. (*d*), it is contended that the valuation placed on the relief claimed by means of an injunction both in the lower Court and (in the cross-objection) in this Court is purely arbitrary, and that in the lower Court the valuation should have been that declared for purposes of jurisdiction, namely Rs. 25,000 and under

the cross-objection, Rs. 25,000 less Rs. 4,000 the valuation of the appellant, *i. e.*, Rs. 21,000.

On this question the remarks of Mukerji, J. in the judgment above quoted appear to be applicable since the benefit that is to accrue to the plaintiffs, if plaintiff No. 1 is made sole manager of the property and the defendant is excluded, has not been shown to be above the valuation put upon the relief claimed. But since this issue depends upon the decision of the first issue framed, I am of opinion that it too should be left for the orders of the Hon'ble Taxing Judge.

Piggott, J.—I cannot read the plaint in this suit as anything but a claim for a declaratory decree, with consequential relief, under S. 7 (IV) (*c*) of the Court-Fees Act, No. VII of 1870. This being so, the case is covered by the ruling in *Mt. Jageshra* v. *Durga Prasad Singh* (1). I am not prepared to recommend a reconsideration of that decision. I can see the point hat, on the wording of the Section it is arguable that the expression "the relief sought" means the "consequential relief" spoken of in sub-clause (*c*). At the same time I do not think we ought now to unsettle the law laid down by a Bench of two Judges more than ten years ago. Moreover, I am impressed with the argument based upon S. 8 of the Suits Valuation Act, No. VII of 1887. I accept the contention that the valuation for purpose of Court-fees is to be determined first and that for purposes of jurisdiction must follow on the same; but the plaintiff in a suit in which consequential relief is prayed cannot at one and the same time obtain the services of the highest possible tribunal for the determination of his claim and evade the payment of *ad valorem* court-fees. If for purposes of jurisdiction he sets a high value on the relief by way of declaration and a merely nominal value on the relief by way of injunction, it is doing him no injustice to hold that the "relief sought," on which the court-fee must be levied, is the sum total of the two reliefs. It is beside the point to suggest that different consequences would have followed if the plaintiff in the present case had asked for a declaration only, or for an injunction only: the question under the Court-Fees Act must be determined upon the plaint as framed.

I affirm the report of the stamping officer, and allow the parties concerned one month in which to make good the deficiency.

Stamping Officer's report affirmed.

★ 1925 ALLAHABAD 604

SULAIMAN AND DANIELS, JJ.

Tulshi Ram—Plaintiff—Appellant.

v.

Daya Ram—Defendant—Respondent.

First Appeal No. 88 of 1924, Decided on 30th April 1925, from an order of D. J of Meerut.

★ (*a*) *Civil P. C., O.* 17 *R.* 3—*Parties agreeing to abide by oath affecting a third person to be taken in particular manner—Oath illegal under Oaths Act—Court fixing date for oath to be taken—Oath not taken on that day—O.* 17, *R.* 3 *does not apply.*

In the course of the plaintiff's evidence, the plaintiff agreed that if the defendant would take an oath holding one of his sons in his lap with his hand placed on the son's head, he would accept it. The defendant agreed to do this, and a date was fixed for the required oath to be taken and for no other purpose. On the date so fixed, the defendant failed to produce his son. The Court applied the provisions of Order 17, rule 3, and, without giving the parties an opportunity of producing any further evidence proceeded to decide the case on the materials on the record.

Held: that the Court acted wrongly in fixing a date for the oath in question to be taken, as under S. 8 of the Oaths Act of 1873 it was not permissible for the Court to allow an oath to be taken affecting a third person. [P. 605, C. 1]

Held further that O. 17, R. 3 had no application to the circumstances of the case and opportunity should have been given to the parties produce all available evidence. [P. 605, C. 1]

★ (*b*) *Oaths Act*, (1873) *S.* 8—*Oath by man with his hand on his son's head is not permissible.*

It is not permissible for a Court to allow to an oath to be taken by a man by holding his son in his lap with his hand placed on the son's head as it is an oath affecting a third person. [P. 605, C. 1]

N. C. Vaish—for Appellant.

K. C. Mital—for Respondent.

Daniels, J.—This is an appeal against an order of remand under the following circumstances. In the course of the plaintiff's evidence, the plaintiff agreed that if the defendant would take an oath holding one of his sons in his lap with his hand placed on the son's head, he would accept it. The defendant agreed to do this, and a date was fixed for the

(1) [1914] 36 All.500=24 I.C. 679=12 A.L.J.844.

required oath to be taken and for no other purpose. We may point out that the oath in question was one which it was not permissible to the Court to allow to be administered in view of S. 8 of the Oaths Act of 1873 as it was an oath affecting a third person. The Court, therefore, acted wrongly in fixing a date for the oath to be taken. On the date so fixed, the defendant asserted that he was unable to produce his son as the plaintiff had persuaded his wife not to allow her son to come. This allegation, so far as it concerned the plaintiff, may have been, and very likely was, false. However that may be, it was impossible for the oath to be taken on that date. The learned Munsif applied the provisions of O. 17, R. 3, Civil Procedure Code and, without giving the parties an opportunity of producing any further evidence proceeded to decide the case on the materials on the record. The learned Judge holds, and we agree with him, that this is not the correct course to take, and that O. 17, R. 3 has no application to these circumstances. The proper course was to direct the suit to proceed and to be decided on the merits after allowing the parties an opportunity to produce all the evidence they wished to produce. We accordingly dismiss the appeal with costs.

Appeal dismissed.

★ 1925 ALLAHABAD 605

NEAVE, J.

Ram Saran and others—Plaintiffs—Appellants.

v.

Thakur Seo Pratab Singh—Defendant—Respondent.

Second Appeal No. 1749 of 1922, Decided on 25th April 1924, against the decree of Sm. C. C. J., Allahabad, D/- 7th September 1922.

★ (a) *Registration Act, S. 17—Undertaking before Criminal Court to abstain from disturbing certain immovable property requires no registration.*

An undertaking given by the appellants to the Criminal Court with the object of saving themselves from any further action under S. 145, Criminal P. C. and agreeing to abstain from interfering with certain immovable property is not a compromise and needs no registration.

[P. 606, C. 1]

★ (b) *Evidence Act, S. 115—Undertaking given to Criminal Court cannot be avoided by a civil suit.*

A person is not entitled to give an undertaking to a Criminal Court to abstain from certain action and to go and file a civil suit for declaration that the undertaking given by him was of no effect.

[P. 606, C. 1]

Hamid—for Appellants.

P. L. Banerji—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-appellants for a declaration that what they describe as a compromise filed by them in a Criminal Court is null and void and not binding upon them. Briefly put, the facts are that the appellants are grove holders. The respondents who are their *Zamindars*, made a report to the police that they had planted some new trees and dug holes in their groves and that, as these groves were used as the site of the weekly market, there was a risk that these actions might give rise to disputes and breaches of the peace. The Sub-Inspector of Police made a report to the Magistrate on which proceedings were started against the appellants under S. 145 of the Code of Criminal Procedure. The appellants filed a petition containing the alleged compromise. As a matter of fact, this was not a compromise at all but an undertaking given by them to plant no more tress, to remove any new tress that had been planted and to abstain in future from digging holes. This application was filed and the case was later on dismissed apparently without reference to it.

The first Court appears to have treated this as a compromise dealing with immoveable property to the value of more than Rs. 100 which required registration, and granted the appellants a decree on the ground that the document was unregistered. The lower appellate Court held that the application was no more than an undertaking in the form of a petition, which required neither to be stamped nor registered. The various allegations to the effect that the execution of the application had been obtained through fraud, coercion and undue influence were found by the Court below to be untrue.

Clearly the document in question was not a compromise. It was only an undertaking given by the appellants to the Criminal Court with the object of

saving themselves from any further action under S. 145. It may be true that the Court took no action on it and decided the case on other grounds, but even so the appellants cannot be allowed to bring a suit, like the present one, to have the undertaking declared of no effect. It is unnecessary to decide whether it is effectual or not. That point can be raised if any other litigation takes place on the subject between the parties. A person is not entitled to give an undertaking to a Criminal Court to abstain from certain action, and then to go and file a Civil suit for a declaration that the undertaking given by him was of no effect.

The order passed by the Court below was a proper one and the appeal is dismissed with costs

Appeal dismissed.

1925 ALLAHABAD 606

WALSH AND SULAIMAN, JJ.

Fateh Chand and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 891 of 1924, Decided on 12th December 1924 from an order of the Addl. S. J., Bareilly.

(a) *Evidence Act, S. 24—Person in authority telling accused that if he gives true account he will be pardoned—Accused's confession is irrelevant, unless the inducement has ceased to operate.*

If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates, and that the person confessing has no longer any hope of gaining anything from the authorities by making confession. [P. 607, C. 2; P. 608, C. 1]

(b) *Evidence Act, S. 24—Admissibility of confession must be decided before contents of confession are looked at.*

When the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under S. 24 the trial Judge must make up his mind upon this issue, and decide the question of admissibility before relying upon the contents of the confession. [P 608, C. 2]

C. Ross Alston and *J. M. Banerje*—for Appellants.

The Government Advocate—for the Crown.

Judgment.—In. this case we have come to the conclusion that to some extent, in fact to a large extent, the appeal must be allowed, although it is impossible not to feel that this result leads to an apparent miscarriage of justice, due partly to misbandling by the police, and partly to a fundamental error made by a very experienced and able Judge, who in his ruling on one point has made our task exceptionally difficult. The case, as it came before Sessions, was a difficult and complicated one, and it has been dealt with in a painstaking judgment, which as an analysis of the facts, is an admirable piece of work, although perhaps somewhat too elaborate, and would have been open to little or no exception, if the Judge had not made a fundamental error by admitting in evidence and acting upon a confession in breach of an elementary rule of law with which everybody ought to be familiar. S. 24 provides that a confession by an accused person is irrelevant in a Criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement having reference to the charge against the accused person proceeding from a person in authority.

Four out of five persons, originally accused, have been convicted, and now appeal against their conviction for having stealthily and cruelly murdered one Hori, a Kurmi, whose wife was living apart from him, and who was an attractive young woman but unchaste. There can be no doubt that Hori was murdered shortly after the Saturday, 26th January, when he left the village where his wife was living and was seen no more The motive for the murder obviously. was—there is no conceivable alternative —to get rid of the husband who was persistently endeavouring to get his wife back to his own house One of the accused was acquitted altogether. Three, Munna Lal Brahaman, Fateh Chand and Narain have been sentenced to death mainly on the confession of one of them, namely Munna Lal Brahaman, which is said to be corroborated in various ways, while the 5th another Munna Lal Mahajan, wealthy zamindar with much influence in the village, has been sentenced to transportation for life for having abetted and encouraged the murder, being also proved by clear evidence to

have taken a great interest in trying to hush the matter up. The murder, as we have pointed out, was committed about the end of January. Narain one of the convicted appellants was originally suspected owing to what we think was a false scent deliberately started by the mother of the deceased's wife, and in consequence of this information given by her being discredited, Kishan Lal, a near relative of the deceased man who had accompanied him to where his wife was living made a report on the 8th of February. There can be no doubt that the investigation of the crime, which had undoubtedly been committed, by that time, was neglected and hampered by the conduct of the police, and that the appellant Munna Lal zamindar had a hand in these transactions. It was not until the father of the deceased man an old man nearly blind and doubtless in a state of great grief and indignation as to the fate which had overtaken his son, petitioned the Superintendent of police and the Circle Inspector was appointed to take charge of the investigation, that anything substantial was done. This new phase began on the 16th of April. But on the 25th of April Munna Lal Brahaman made a full and voluntary confession under S. 164 before a Magistrate implicating himself and the other four accused, and the case for the prosecution was built up round this confession and accepted by the Judge and the majority of the assessors.

We come to the serious mistake which has been made. Sohan Lal the Circle Inspector was called at the trial at Sessions on the 3rd of October, and was allowed to say that Munna Lal Brahaman confessed to him on the 24th. Muqaddar Ali the original Investigating Officer, whose failure had necessitated the Circle Inspector being called in, was allowed on the same day to give the same evidence. This piece of evidence must have been known to Sohan Lal, a man of high position in the police force, and to the Government Pleader, to be a breach of S. 25 of the Evidence Act, and the learned Judge ought instantly to have stopped the witness and the Pleader, and to have excluded the statement from the evidence in the case. He has in fact relied upon it in his judgment. As a result of this inadmissible communication, Munna Lal pointed out to the Circle Inspector in the presence of several people a place in a stream, 22 miles from the village where Hori had last slept, and 4 or 5 miles from the *thana*, where he himself found in the water some delapidated clothes, which have been indentified as belonging to the deceased, and which, as far as they can be said to correspond to any description at all, correspond in some particulars to the description which has been given by Kishan Lal of the garments which Hori was wearing. There was also found a light and old *gandasa*. With this piece of corroboration which they doubtless thought convincing, the police put Munna Lal Brahaman to make the voluntary confession which he made before the Magistrate on the 25th April. Sewa Ram, a Kurmi of the village-most of the people concerned are Kurmis of the village--was called for the prosecution at the trial to corroborate the first inadmissible confession and the finding of the clothes. He said at the trial that Munna Lal had said to the Inspector that he would point out the place where he, Munna Lal, had killed the deceased, which was another inadmissible confession. But he went on to say in cross-examination that before Munna Lal went to the spot where the clothes were found, he was told by the Inspector that he would be let off which is a promise of pardon, if he would give true particulars. This piece of evidence by itself is sufficient to make the confession irrelevant under S. 24. It must be recognized by everybody and Judges must never allow themselves to lose sight of the fact, that, whatever other incidents may follow an incident of this kind, an astute Inspector conscious of the circumstance which by law vitiated the confession is not unlikely to endeavour to cover it up by other incidents, and a promise of this kind is a continuing offer. It does not differ from any other bargain which may be made by men in the ordinary course of life. If a man is told by a person in authority that if he gives a true account of the matter he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance which breaks it so as to show that the inducement no longer operates, and that the person con-

fessing has no longer any hope of gaining anything from the authorities by making a confession. The fact that the Circle Inspector made this offer or promise was denied on oath by the Circle Inspector in answer to the Court. But one is bound to receive with some caution the evidence of an astute witness like the Circle Inspector, who has already given evidence as to a confession which he knows was inadmissible. There was therefore direct conflict of testimony on this point. Unfortunately the learned Judge came to no decision on this conflict. In several places in the course of his judgment he referred to the confession as being clearly voluntary. No doubt what was passing in his mind was the fact that Munna Lal had also alleged that the Inspector had beaten him and insulted him, and used threats, and the Judge did not believe him. It is not surprising that it should be discredited because if the promise of pardon had been made, the threats would be superfluous. But unfortunately it is necessary to refer again to the case of *Khetal* v. *Emperor* (1) in which a member of this Bench endeavoured to point out to Judges trying Sessions cases the necessity of trying this matter with care, and the fact that where there is any evidence of any inducement, it is no answer to say that a confession is voluntary, because it must be voluntary if the person confessing is acting under the inducement. The section requires the Judge to decide whether it appears to him that there was any inducement. He might have refused to believe Sewa Ram. The accused Munna Lal had been confronted with two formidable witnesses, Mt. Pirani and Jograj, who were prepared to make compromising statements against him, and this may have induced him to throw up the sponge, and to entertain the hope that if he did so quickly, he might be made an approver. On the other hand he has also always stoutly alleged that he was promised a pardon, and if this course had been followed by the police and the man made an approver so that his statement could have been closely examined and cross-examined at the trial, a complete elucidation of the case might have been reached. But the learned Judge has unfortunately held that the evidence of this inducement, even if true, does not establish that the inducement led to the confession made before the Magistrate and relied upon by the prosecution, because the accused had already made the first confession, thus using one piece of inadmissible evidence to destroy the inadmissibility of the other. It is necessary to repeat once more, as emphatically as this Court can do, that Sessions Judges must try and master the simple rules for dealing with this question. When the admissibility of a confession depends upon a conclusion as to the truth about conflicting evidence antecedent to the making of the confession and tending to show that it is liable to rejection under S. 24, the trial Judge must make up his mind upon this issue, and decide the question of admissibility before relying upon the contents of the confession. All this seems obvious enough, but the importance of it in this case is emphasised by the fact that two of the assessors expressly based their opinion on their belief in the truth of the confession, which never ought to have formed part of the evidence in the case at all. We have, therefore, been compelled to undertake the difficult task of sifting the evidence afresh, and discarding completely from our minds, directly or indirectly, any influence created by the fact that this confession has formed the basis of the whole decision which we have to review.

As against Narain, the only evidence is a statement that Hori left with him to go to some market for the sale of *gur*. We are of opinion that this statement was not only untrue, but was deliberately made with a view to create a false scent in the interests of other persons. Narain is therefore entitled to an acquittal, there being really no evidence against him.

With regard to Munna Lal Brahaman, on the other hand his guilt is clear. It is conclusively shown against him in consequence of information given by him clothes were found in the stream 22 miles away. This is quite legitimate under S. 27 of the Act. The question at once arises how came he to know this fact. It is an admission of knowledge showing intimate acquaintance by him with some of the circumstances relating to the disposal of the relics of the deceased. A significant and apparently quite innocent

(1) 1923 All. 352=45 All. 300=21 A. L. J. 143=4 L. R. A. Cr. 13=24 Cr. L. J. 526.

remark made by the witness Sewa Ram about an incident which occurred on their way to the stream shows further intimate acquaintance. Sewa Ram says that when they had got to a certain spot between the police station and the stream, Munna Lal asked that the bullock waggon might be stopped as there was no way to reach the spot by which a bullock cart could go. When at the trial Munna Lal knew that the promise of pardon had been broken, that he had been tricked by the police, and when he had retracted his confession, he failed in any way to explain, or to attempt to contradict this piece of evidence, showing his acquaintance with the spot and with the things which were found there. This is a damning piece of evidence against him. Going back to the inception of the case against him, there is evidence which we see no reason to distrust by Mt. Pirani that Munna Lal came with Fateh Chand and took Hari away on the last occasion when he was seen alive. Jograj saw these two men in company with Hari shortly afterwards on the same evening. Sewa Ram, who appears to be a perfectly honest witness, says that in his presence Munna Lal Brahman admitted that he had taken Hari away. But what is even more significant is the overwhelming evidence not only that he had obtained the affection of Hari's wife, but that he was determined to prevent her returning to her husband, and had used lauguage suggesting that he was determined to carry this resolve into effect. Hari had been for a long time trying to get his wife back. There is very strong evidence, not merely of Mt. Pirani but of other witnesses in the village, that Munna Lal was carrying on an intrigue with her. She has admitted that he was the father of the child of whom she expected to be delivered, and although she went back from it at the trial, she stated before the Magistrate that when Hari came for the last time to fetch her Munna Lal told her mother in her presence that there would be no return, that he would put an end to the *rukhsat*, and that subsequently he told her that he had fixed Hari, which she understood to mean 'killed,' and that when she complained, he said that if she told anybody she would be killed. These circumstances are sufficient to justify the conviction, and his appeal must be dismissed.

With regard to Fateh Chand the case is far from being so strong, although it is impossible to say that there is no evidence against him which leads to suspicion. It is in his favour that there is no real ground for supposing that he wished to murder Hari. Mt. Pirani, whom we are inclined to believe swears that he also was having an intrigue with this woman of easy virtue, which is quite possible as he was visiting her from time to time, and she was the sister of his wife. Other witnesses speak to the same belief, and as he lived in another village, and was obviously not on anything like the close terms with her that Munna Lal was, there is no reason to suppose that he would have the same incentive for getting rid of his brother-in-law. Accepting the evidence of Mt. Pirani and Jograj, all that there is against him, with one exception, is that he came with Munna Lal the guilty person and fetched Hari away, and was seen shortly afterwards in the company of the deceased and the guilty man. No doubt the guilty man had assistants, probably several. The exception which does create an additional factor in the case against Fateh Chand, is that he perpetuated the story which had been started by Lachhma that Hari had gone to the market with Narain, which certainly is a somewhat suggestive circumstance against him, because if it was untrue--he must have known it was untrue--he could have no motive but a guilty conscience for perpetuating this falsehood, especially as we believe that he was with the deceased and Munna Lal who may have had good reason for trying to conceal that circumstance. On the whole we have come to the conclusion that he is entitled to the benefit of a reasonable doubt. One cannot say that he may not have been a dupe and an unconscious assistant of Munna Lal. We, therefore, allow his appeal.

The result is that the convictions of Munna Lal Zamindar, Narain and Fateh Chand are set aside. They must be acquitted and discharged. The appeal of Munna Lal Brahman is dismissed, his conviction and sentence are confirmed, and the latter must be carried out according to law.

Appeal dismissed.

★★ 1925 ALLAHABAD 610

Full Bench.

LINDSAY, SULAIMAN AND DANIELS, JJJ.

Ram Sarup—Applicant.

v.

Gaya Prasad—Opposite Party.

Civil Revision No. 20 of 1925, Decided on 16th July 1925, from an order of the D. J., Bareilly, D/-23rd December 1924.

★★ (a) *Civil P. C., S. 115—Appellate order setting aside ex parte decree is "case"—Revision lies.*

The High Court can interfere in revision with an appellate order directing the setting aside of a decree *ex parte* as the order is a 'case' within S. 115 and not a mere interlocutory order. [P 611 C 1]

Per Lindsay, J.—Where there are independant proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree ex-parte for which the legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of the Section. 12 O. C. 405 Appr. [P 611 C 2]

★★ (b) *Civil P. C., S. 105—(Per Lindsay J.) "Decision" means decision upon merits.*

Per Lindsay, J.—The word "decision" in S. 105 (1) must necessarily be taken to mean the decision upon the merits 22 *C.* 981, 24 *A.* 464, 25 A. 280 *Foll.* 34 A. 592 *Diss* [P 612 C 1]

Per Daniels, J.—An illegal order and in consequence the illegality committed in passing that order, affects the decision of the case, if the order passed by the trial Court is one "but for which the decision might have been other than it was." Opinion of Piggott, J. in 43 *All.* 564 *F.B. Foll.* [P613 C 2]

★ (c) *Interpretation of Statutes—New words may be read into statute if context so requires (Per Lindsay J.* (*Sulaiman J.* Contra.)

Per Linday, J. (Sualiman J.) contra—Words not to be found in a section may be supplied by necessary implication if the context so requires. [P 612 C 2]

★ (d) *Civil P. C. S. 115—Other remedy open—Revision may lie.*

Sulaiman, J.—The existence of another remedy cannot be an insuperable obstacle in the way of interference by the High Court in revision. 43 *M.* 94. *Foll.* [P 612 C 2]

(e) *Civil P. C., O. 9, R. 13—Appeal from order rejecting application for setting aside* ex parte *decree—Appellate Court cannot go beyond R. 13. Civil P. C., O. 43, R. 1 (d).*

Per Sulaiman and Daniels JJ.—In an appeal from an order rejecting an application to set aside an exparte decree, the appellate Court cannot go beyond the provisions contained in O. 9. R. 13 for reasons for setting aside the decree. 1922 *All.* 441 and 43 *M. Foll.* 44 *Cal.* 929 *Dist.* [P 614 C 1]

Uma Shankar Bajpai and *K. N. Katju*—for Applicant.

B. Malik—for Opposite Party.

Referring order.—This is an application in revision from an appellate order setting aside an *ex parte* decree. Both the Courts below agree in finding that the plaintiff's absence on the date on which the case was decided was intentional. The Court below has restored the case for extraneous reasons, It is not seriously disputed that it acted contrary to the provisions of O. 9, R. 13 in doing so. A Bench of this Court in *Sheikh* v. *Nadir Baksh* (1) held that this was a mere interlocutory order from which no revision lay. We are at present inclined to think that this decision was wrong. We may point out that one of the reasons given in that ruling for holding that no revision lay was that the order could be attacked in appeal from the decree ultimately passed, under S. 105 of the Civil Procedure Code. Under the recent ruling in *Babu Ram* v. *Banke Behari Lal* (2) this is not the case.

Before dissenting from a recent Bench ruling of this Court we think it proper that the case should come before a Full Bench. We accordingly direct that the record be laid before the Chief Justice with a view to its being laid before a Full Bench for the decision of the question whether a revision lies from an appellate order setting aside an *ex parte* decree when the appellate Court had no power under the the provision of O. 9, R. 13 to direct the case to be re-heard.

Opinion of the Full Bench

Lindsay, J.—The question which has to be determined by the Full Bench is whether this Court can interfere in revision with an appellate order directing the setting aside of an *exparte* decree, when the appellate court had no power, under the provisions of O. 9 R. 13 to give such a direction,

There are two grounds upon which it has been urged before us that the Court cannot subject this order to revision :

(1) because the party against whom the order has been passed is not without another remedy ; and

(2) because the order does not fall within the purview of section 115 of the Code of Civil Procedure as there is no case which has been decided.

Dealing with these propositions in inverse order I would say that the second one of them is untenable. In my opinion

(1) 1922 All. 441=1 A. L. J, 907.
(2) 1925 All. 426=23 A. L. J. 444=6 L. R. A. Civil. 297

we have before us a case which has been decided. It cannot with any show of reason be maintained that the order complained of is a mere interlocutory order passed in the course of the trial of the suit, for the suit, had been brought to an end by the passing of the *ex parte* decree. At the time this order was made there was no suit pending between the parties. The proceedings in which the order was passed were quite distinct from the proceedings constituting the suit.

The defendant had had an *ex parte* decree given against him and was seeking to have it set aside under the provisions of Order 9, rule 13 which gives him a right to have the decree set aside provided he is able to satisfy the Court which passed it that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. By these proceedings he was endeavouring to enforce a right which did not, and could not, come into existence until the suit had been decided. These later proceedings being distinct from those in the suit, no order passed in the course of them could possibly be an interlocutory order in the suit. The application was rejected by the first Court, and the order of rejection was appealed. The order allowing the appeal is a final order not subject to further appeal and has clearly brought to a termination the proceedings instituted for the setting aside of the *ex parte* decree.

And this being so I have no doubt we have here a "case" which has been decided.

It would be unprofitable to discuss the various rulings concerning the meaning of the word "case" as used in S. 115. No definition of the word is to be found in the Code of Civil Procedure and probably no exhaustive definition of the word could be given.

The cognate expression "cause" has been defined in England in the Judicature Act of 1873 as "including any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown," and it seems to me that when an attempt is made by a defendant under Order 9, rule 13 to assert his right to have the *ex parte* decree set aside there is an "original proceeding" between a plaintiff and a defendant.

The meaning of the word "case" in S. 115 has been well discussed in *Hevanchal Kunwar* v. *Kanhai Lal* (3) and I would quote the following passage from page 413 of the report :—

"Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree *ex parte* for which the Legislature has provided an independent remedy or a different procedure such proceeding may be a case within the meaning of the section (*i. e.*, S. 115)."

I agree with this view and hold therefore that in the Courts below these proceedings under Order 9 rule 13 were a "case" and that that "case" has been "decided".

To turn now to the other proposition, the argument is that the applicant here has another remedy available, a circumstance which debars this Court from the exercise of its revisional jurisdiction, and reliance is placed upon the provisions of S. 105, sub-Section (1) of the Code of Civil Procedure. It is said that in the event of the plaintiff's suit being dismissed after fresh trial he will have a right of appeal and that in the prosecution of the appeal he would be entitled to challenge the order now under discussion by setting forth in his memorandum of appeal an objection to it on the ground of error, defect or irregularity "affecting the decision of the case." In reply to this it has been argued that as the appeal against the decree in the event contemplated would lie to the same Court which has passed the order now complained of, S. 105 (1) would be of little or no avail to the appellant.

It would, perhaps, be inexpedient or indiscreet to approach the appellate Court with a plea imputing error in its former order, but if the law allows the plea to be raised, the inconvenience of raising it would be no answer to the argument advanced here on behalf of the opposite party.

But I am definitely of opinion that S. 105 (1) does not provide any remedy for the prospective appellant in a case like the present.

I would observe, in passing, that on the grammatical construction of the latter part of the sub-section just mentioned, it is the "error, defect or irregularity" in the order which may be pleaded by way of objection, not the order itself: and that

(3) [1909] 12 O. C. 405=4 I. C. 878.

the ground of objection must be that the error, defect or irregularity is one "affecting the decision of the case." By the words "affecting the decision" I understand that there has been at work something which has influenced the Judge in the mental process of arriving at his decision, that the error, defect or irregularity in the order has, so to speak, warped the mind of the Judge so as to lead him to a wrong concluslon.

If this is the meaning to be attributed to the word "affect" it seems to me that the word "decision" must necessarily be taken to mean the decision upon the merits.

The learned advocate for the opposite party, while admitting that this view of the interpretation of the word "decision" has been taken protests against it as involving the introduction into the text of the sub-section the words "upon the merits" which are not there, and he has been able to fortify his argument by reference to a number of rulings which support it. But although these words are not to be found in the sub-section they must be supplied by necessary implication if the context so requires, and the use of the word "affect" does, in my opinion render it necessary that the word "decision" should be taken to mean "decision upon the merits."

I am quite unable to see how any error defect or rregularity in the order now complained of could in any sense "affect" the decision of the suit which may follow if the order setting aside the *ex parte* decree is maintained.

The error imputed to the Court below is that in spite of its finding that the defendant had no sufficient cause for non-appearance it has directed the *ex parte* decree to be set aside. The order which is vitiated by this error has, no douct, provided the occasion for a fresh trial of the suit and has thereby created a possibility that the new trial may result in a decision different from that which was reached on the earlier trial, but that to me appears to be a very different thing from saying that the decision in the second trial will be, or can be, affected by the preceding error of the appellate Court.

I am satisfied that "decision" in S. 105 (1) means "decision upon the merits". That was the view taken in *Chintamony Dassi* v. *Raghoonath Sahu* (4). That case has been followed in this Court in *Gulab Kunwar* v. *Thakur Das* (5), in *Tasadduq Husain* v. *Hayat-un-nissa* (6) and in other cases more recently decided.

I dissent from the contrary view expressed in *Nand Ram* v. *Bhopal Singh* (7) and in other cases decided in the same sense. My answer to the reference is that it is competent to this Court to exercise its revisional powers in the case now before us.

Sulaiman, J.—I agree that the answer should be in the affirmative. I would like to emphasise the fact that the revision before us is from the order of the District Judge passed on appeal. When the appeal was before the Judge, there was certainly a case pending before him. That case has been finally decided so far as the Judge is concerned. No matter is now pending before him at all. His order cannot therefore be called an interlocutory one. We undoubtedly have jurisdiction to interfere under S. 115 of the Code of Civil Procedure.

As to the contention that we should decline to exercise our discretion because another remedy is open to the applicant, I would say that the supposed remedy would by no means be convenient or expeditious, and could be availed of only after considerable expense has been incurred, and time spent. The remedy would at best be open only in second appeal, for the decision by an appellate Court would be binding on the parties so far at any rate as that Court is concerned. The existence of such remedy accordingly cannot be an insuperable obstacle in the way of our interference.

The question whether the propriety of the order setting aside the *ex parte* decree can be challenged at a later stage in the suit does not directly arise in this case. The answer would depend on the interpretation of the words "affecting the decision of the case." Does that expression mean affecting its decision *on the merits*, or affecting its result? I confess that I do not like the idea of introducing new words into the language of a section

(4) [1895] 22 Cal. 981.
(5) [1902] 24 All. 464=(1902) A. W. N. 136.
(6) [1903] 25 All. 280=1903 A. W. N. 39.
(7) [1912] 34 All. 592=16 I. C. 1=10 A. L. J 130.

in order to give it a suitable meaning. On the other hand the preponderance of authority is certainly in favour of the view that it means 'with reference to its merits.' I however do not feel that I am called upon in this case to express a definite opinion on the true interpretation of S. 105. Even a Full Bench of the Madras High Court, where apparently the view prevails that a revision lies even when a second remedy is open, had no objection to entertain a revision in such a case, *vide Neelaveni* v. *Narayana Reddi* (8).

Daniels, J.—The question referred for our decision is whether a revision lies from an appellate order restoring a case dismissed for default when the appellate Court had no power under the provisions of O. 9, R. 13 of the Code of Civil Procedure to direct the case to be restored. The revision was necessitated by a doubt on the part of the referring Bench as to the correctness of the decision in *Sheikh Kallu* v. *Nadir Baksh* (1), which held that no revision lay in such a case. The ground of that decision was that the case was covered by the Full Bench ruling in *Buddhu Lal* v. *Mewa Ram* (9). The Full Bench case is, however, clearly distinguishable. The order passed there was interlocutory. It was an order deciding separately a preliminary issue as to jurisdiction. Here the original suit had been decided when the order complained of was passed. It had been decreed *ex parte* by the Subordinate Judge, and the Subordinate Judge had rejected an application for restoration. The question is whether the restoration proceedings constituted a separate case within the meaning of S. 115 of the Code of Civil Procedure. I have no doubt whatever that this question must be answered in the affirmative, and this does not conflict in any way with the interpretation placed on the word "case" by the majority of the Full Bench in *Buddhu Lal* v. *Mewa Ram* (9). The original suit had been, so far as the trial Court was concerned, finally disposed of. The restoration application was a separate proceeding initiated not by the the plaintiff in the suit but by the defendant, and the order passed upon it by the appellate Court was in no sense an interlocutory order.

The respondent has sought to support his preliminary objection that no revision lies on the further ground that even if a case has been decided, this Court ought not to entertain a revision because the applicant, in the event of the case being ultimately decided against him, can question the validity of the order of restoration under S. 105 of the Civil Procedure Code. There is against him on this point the recent decision of a Bench of this Court in *Babu Ram* v. *Banke Behari Lal* (2). I am personally not satisfied of the correctness of the interpretation placed on S. 105 in that judgment. Where a suit has been finally decided, but an illegal order is subsequently passed setting aside the decision with the possible result that the case is heard over again and decided in the opposite way, it seems to me very difficult to say that the error committed in restoring the case has not affected the ultimate decision. Many things may affect the decision besides the reasons given by the Judge in his judgment. I am disposed to agree with the view taken by Piggott, J., in *Buddhu Lal* v. *Mewa Ram* (9) that an illegal order, and by consequence, the illegality committed in passing that order, has affected the decision of the case, if the order passed by the trial Court is one "but for which the decision might have been other than it was."

In this case the question does not really arise, because the order was one passed by the appellate Court. Supposing the case is ultimately decided against the applicant, it would be very difficult for him to go to the District Judge and contend in appeal that the order passed by the District Judge himself at an earlier stage of the case was illegal. Indeed, the District Judge might very properly refuse to entertain an appeal at all on the ground that the order previously passed by him was a final order so far as his Court was concerned which was passed after contest and could not be challenged by the applicant at any subsequent stage of the litigation. This objection has therefore no force. I accordingly concur in answering the reference in the affirmative.

By the Court.—The case is now returned to the Bench concerned for disposal in accordance with the answer to the reference.

(8) [1920] 43 Mad. 94=26 M.L.T. 377=37 M.L.J. 599=10 L. W. 603=53 I. C. 847=(1920) M.W.N. 19 (F.B.)

(9) [1921] 43 All. 534=63 I.C. 15=19 A.L.J. 558 (F.B.)

Judgment.

(Sulaiman and Daniels, JJ.)—The answer of the Full Bench to the question referred is in the affirmative. We therefore have jurisdiction to entertain this revision.

The lower appellate Court had itself found that there was no sufficient cause for the defendant for not appearing when the suit was called on for hearing and that his absence was intentional. The case accordingly did not fall under O. 9, R. 13. It is urged before us that, apart from O. 9, R. 13, the Court had inherent jurisdiction to set aside an *ex parte* decree. It is to be borne in mind that the order setting aside the decree was passed by the appellate Court to which an appeal had been preferred from an order under that rule. In our opinion it had no jurisdiction outside the provisions of that rule. This was the view clearly expressed by a Bench of this Court in the case of *Sheikh Kallu* v. *Nadir Baksh* (1). A Full Bench of the Madras High Court in the case of *Neelaveni* v. *Narayana Reddi* (8) has come to the same conclusion. The learned advocate for the respondent relies on the case of *Ghuznavi* v. *The Allahabad Bank Ld.* (10) which, however, is distinguishable inasmuch as there it was not an *ex parte* decree which had been set aside, but the case itself had been remanded by the appellate Court.

In our opinion the Court below had no jurisdiction to set aside the *ex parte* decree.

We accordingly allow this revision, and setting aside the order of the lower appellate Court restore that of the Court of first instance. We allow costs to the plaintiff in all Courts.

Revision allowed.

(10) (1917) 44 Cal. 929=21 C.W.N. 877=41 I.C. 598=26 C.L.J. 19 (F.B.)

1925 ALLAHABAD 614

DANIELS, J.

Bechan Teli—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 549 of 1924, Decided on 25th November, 1924, by the S. J., Ghazipur.

Criminal P. C. S. 137—Accused appearing to show cause—Evidence in support of order should be heard before calling on accused for defence.

When the accused person appears and shows cause why no order should be made against him, the Magistrate should hear evidence in support of the order against him before calling on him for his defence.

Where, on the day fixed for the production of evidence, neither party produced any evidence and the Magistrate made the order absolute.

Held: that the order must be quashed. [P 614, C 2]

Majid Ali—for Applicant.

Asstt. Govt. Advocate—for the Crown.

Judgment.—This is a reference by the learned Sessions Judge of Ghazipur recommending this Court to quash an order passed against Bechan Teli under S. 137 of the Code of Criminal Procedure. The Deputy Magistrate found that Bechan Teli had built a wall which had encroached on a public lane to the extent of twelve inches and directed him to demolish his wall to that extent. Notice under S. 133 was duly issued against Bechan and he was required to appear and show cause. He put in a written statement alleging that he had merely rebuilt his wall on the old foundation and that he had made no encroachment. He said that only his neighbour Jaikaran against whom proceedings were also taken had made an encroachment. The Deputy Magistrate very properly inspected the spot on 29th July. He records in his order that on that day he directed the parties to produce their evidence on the next day. On 31st July neither party produced any evidence and the Deputy Magistrate made his order absolute under S. 137.

The point taken by the learned Sessions Judge is that the Magistrate did not comply with the law which directs that when the defendant appears to show cause the Magistrate shall take evidence as in a summons case. The procedure applicable to a summons case is laid down in Ss. 242 to 244. When the accused person appears the Magistrate is first to ask him to show cause why he should not be convicted. If he does show cause then the Magistrate first hears the complainant's evidence and then the evidence for the accused. In this case Bechan did show cause why no order should be made against him. The Magistrate should therefore have heard evidence in support of the order before calling on him for his defence. The applicant was certainly prejudiced by this omission.

I, therefore, set aside the Magistrate's order and direct him to proceed under

S. 137 of the Code of Criminal Procedure and to hear evidence on both sides before disposing of the case. This order will not affect the case of Jai Karan who has not objected.

Reference allowed.

1925 ALLAHABAD 615

SULAIMAN AND DANIELS, JJ.

Ganga Chamar and others — Defendants—Appellants.

v.

Bindesari Rai—Plaintiff—Respondent.

First Appeal No. 118 of 1924, Decided on 7th May 1925, from an order of the Sub-J., Azamgarh.

Agra Tenancy Act, (2 of 1901) Ss. 167 and 199—Ejectment suit—Question of title raised in defence—Defendant directed to file suit in Civil Court—Suit filed after expiry of time prescribed but before the conclusion of suit in revenue Court is not entertainable—Civil P. C., S. 10.

If a party has been ordered by a revenue Court to file a suit in a civil Court within three months, he is not at liberty to ignore the restriction and file his suit after three months although the suit in the revenue Court may be pending. A suit instituted after the three months should be dismissed by the civil Court. (*Case law discussed*). [P 616 C 1, P 617 C 2]

Per Daniels, J.—S. 10 of the Code of Civil Procedure will not apply because the revenue Court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the civil Court. [P 616 C 1, & 2]

Per Sulaiman, J.—Although it is not possible to bring the case within the provisions of S. 10 of the Civil P. C., as the revenue Court is not competent to grant the relief asked for in the civil suit, nevertheless the principle underlying that section may be of wider application. [P 617 C 2]

Peary Lal Banerji—for Appellants.

Daniels, J.—In this case an ejectment suit was brought in the revenue Court against Bindesari Rai, the present plaintiff-respondent, on the allegation that he was the sub-tenant of the present defendants. His defence was that he was the mortgagee and proprietor of the land. The revenue Court, acting under sub-S (1) (*b*) of S. 199 of the Tenancy Act, ordered him to file a suit in the civil Court within three months for a declaration of his title. The question is whether he is entitled to ignore that order and file a suit after the expiry of the three months' period, and if he does so, whether the civil Court should entertain it. The date of the revenue Court's order was 19th November, 1921. The period of three months expired on 19th February 1922. The suit was filed two months later, on 19th April, 1922. It was subsequently withdrawn with liberty to file a fresh suit and a fresh suit was filed on 3rd January 1923. It may be taken as settled by the decision in *Randhir Singh* v. *Bhagwan Das* (1) that if the original suit had been filed in time, there would have been a sufficient compliance with the revenue Court's order. Here even the original suit was filed after three months. The lower appellate Court holds that the plaintiff can maintain the suit because it was filed not in accordance with the revenue Court's order but independently of it. The only reason it gives for this singular view is that the suit in the revenue Court is still pending. If the suit had been filed within three months, the revenue Court would have been bound to allow the ejectment suit to remain pending till the civil suit was decided. As the suit, though filed after three months, has been entertained by the civil Court, the revenue Court appears to be awaiting the result of this appeal.

The question is really concluded by the decision in *Taimur Ali Shah* v. *Shah Muhammad Khan* (2), decided with reference to precisely similar provision in the Land Revenue Act. That decision followed an earlier single Judge decision In *Banwari Lal* v. *Gopi* (3) which was a case under S. 199 of the Tenancy Act. As, however, the suggestion has been made that special period provided by S. 199 is prescribed only for the purposes of suit in the revenue Court and could not affect either the period of limitation provided by the Limitation Act or the jurisdiction of the civil Court to entertain the suit if brought at any time, it is perhaps desirable to examine the principles on which the decision rests.

S. 167 of the Tenancy Act reserves certain classes of suits and applications expressly for the decision of the revenue Courts. It not only provides that revenue Courts alone shall decide them but it goes further and excludes the Civil

(1) [1913] 35 All. 541=21 I. C. 654=11 A. L. J. 749.
(2) [1918] 41 All 211=57 I. C. 346=18 A. L. J. 83.
(3) [1907] 30 All. 44=4 A. L. J. 713=(1907) A. W. N. 282.

Court from taking cognizance of "any dispute or matter in respect of which any such suit or application might be brought or made." Among the matters reserved for the revenue Court is the ejectment of a tenant. In fact it may be said generally that a dispute as to whether the relationship of landlord and tenant exists between the parties is one within the exclusive jurisdiction of the revenue Court. On the other hand, questions of proprietary right are in general reserved for the civil Court. But the same question may be in one aspect a dispute as to the existence of tenancy and in another a dispute as to proprietary right. That situation arises whenever, as here, a defendant alleged to be the tenant of the plaintiff pleads that he is not a tenant but a proprietor or mortgagee of the land. In such a situation there was always a danger of conflicting decrees being passed. In the ejectment suit the revenue Court might hold that B was the tenant of A and eject him. The civil Court might hold that B was the proprietor of the land and A a trespasser. To prevent this conflict of jurisdiction the scheme of S. 199 was devised. The revenue Court before which the question of title was raised was given the option of deciding the question itself or of referring it to the civil Court. If it adopts the former course, it becomes a civil Court for the time being and its decision will be *res judicata* for any civil suit. If it adopts the second course, it must direct the suit to be instituted within a limited time, namely three months, and if the suit is not instituted within that time, must decide the question of title against the defendant. This decision will also be a final decision between the parties.

If a party who has been ordered to file a suit within three months is to be at liberty to ignore the restriction and file his suit after three months but before the decision of the revenue Court, the whole policy of the law will be defeated. The revenue Court must decide against him under the imperative provision of S. 199. The civil Court might conceivably decide in his favour. Such a decision would let in the very mischief which it is the whole object of the law to prevent—contrary decisions by independent tribunals each acting strictly within its jurisdiction. S. 10 of the Code of Civil Procedure will not apply because the revenue Court, though its decision may indirectly produce the same result, could not have granted the relief asked for in the civil Court.

The decision of the Court below is wrong in principle as well as contrary to authority and must be set aside.

Sulaiman, J.—I agree in the order proposed. In my opinion cases arising under the Land Revenue Act are not directly in point though they may be referred to by way of analogy. Under S. 233 (K) of the Land Revenue Act, the jurisdiction of a civil Court is barred in respect of all cases affecting partition or union of mahals. Suits relating to such matters are, therefore, ordinarily outside the jurisdiction of a civil Court. It is only when a reference is made by a revenue Court, under S. 111 of the Land Revenue Act, to the civil Court that the civil Court assumes jurisdicton. It is obvious, therefore, that unless the proper reference under S. 111 is in existence the civil Court would have no jurisdiction to entertain the suit at all. That is why I would distinguish cases like *Taimur Ali Shah* v. *Shah Muhammad Khan* (2), *Shah Muhammad* v. *Kadir Bux* (4), and *Randhir Singh* v. *Bhagwan Das* (1), and cases referred to therein.

In the present case we have to consider the effect of the provisions of the Agra Tenancy Act. If the revenue Court had actually decided the question of the relationship of landlord and tenant, and had held that the defendant in the revenue Court was a tenant, that would have been a finding by a revenue Court competent to decide that question, and the provisions of S. 167 as well as S 199 of the Tenancy Act would be applicable, and that finding would be final. This in effect has been held in several cases and I may only refer to the cases of *Chiranji Lal* v. *Kehri Singh* (5), *Baljit* v. *Mahipat* (6), *Kishore Singh* v. *Bahadur Singh* (7) and *Mullo* v. *Ram Lal* (8).

In the present case, however, the revenue Court has not yet finally decided that matter. I have no hesitation in saying that the Civil Court should not

(4) [1914] 12 A. L. J. 939=25 I. C. 188.
(5) [1910] 33 All. 1=6 I. C. 891=7 A. L. J. 810.
(6) [1919] 41 All. 203=49 I. C. 118=17 A. L. J. 60.
(7) [1920] 43 All. 97=48 I. C. 470=16 A. L. J. 933.
(8) [1921] 43 All. 191=58 I. C. 772=18 A. L. J. 1030.

try this question, and the only difficulty that I have felt is in trying to state the ground on which this view should be based. The difficulty in my mind arises because of the imperfection in the language used in the Tenancy Act. If we examine S. 167 carefully, it would appear that all suits and applications of the nature specified in the fourth schedule are exclusively triable by revenue Courts, and no Court other than a Revenue Court is entitled to take cognizance of any dispute or matter in respect of which any such suit or application might be brought or made. I think this must mean in respect of which any such suit or application might be brought or made in the revenue Court by the plaintiff to the civil suit. It would be impossible to throw out the plaintiff's civil suit on the ground that the defendant, if he so chooses, can raise the same dispute in a revenue Court. Now the present plaintiff could not possibly have filed any suit or application in the Revenue Court in which he could have asked the Court to try a dispute between him and the opposite party. So the only Court to which he himself could go was the civil Court. Suppose, for instance, that no suit in the revenue Court had been brought by the defendant at all and the present suit was the first suit instituted, can it be said for a moment that S. 167 would be a bar to such a claim? Obviously it would not have been because the present plaintiff could not have asked for a declaration of his proprietary title in any form whatsoever in the revenue Court. If that is so, then there would be some difficulty in holding that although S. 167 would not have been applicable if no suit in the ravenue Court had been pending, it has somehow or other become applicable because such a suit has been instituted. The language of S. 167 cannot bear this construction. On the other hand, it is possible to lose sight of the fact that although the present plaintiff could not himself have sued in the revenue Court, there is a suit pending in that Court which is exclusively triable by it and in which the same dispute arises.

I would, therefore, not base my decision on the provisions of S. 167 alone, but base it on the ground that I have a discretion to refuse to grant the declaration asked for when the question in dispute raised in this case is already pending before a revenue Court which is competent to try it and is raised in a suit which is exclusively triable by that Court, though raised at the instance of the defendant to the civil suit. The revenue Court is empowered to decide it; and if it decides it, its decision will have the force of a civil Court decree, and, subject to appeals, will be final. It is obviously undesirable that two Courts, even if they have concurrent jurisdiction to try the same point, should try it simultaneously. Although it is not possible to bring this case within the provisions of S. 10 of the Code of Civil Procedure, as the revenue Court is not competent to grant the relief asked for in the Civil suit, nevertheless the principle underlying that Section may be of wider application.

Under S. 199, sub-clause (2), if the defendant in the revenue suit has not complied with the order and has not instituted a civil suit, within the three months allowed, it will be the duty of the revenue Court to decide the point against him. In fact the inevitable result of the failure to file the suit in time will be a decision against the person claiming the proprietary right. If this is to be so, what is the use of the civil Court going on with the dispute as to such right? We are entitled to assume that the revenue Court would decide the point against the present plaintiff, and it will, therefore, be altogether futile to allow the civil Court to go into that question with the possibility of arriving at a contrary conclusion. The provisions of S. 199 are obviously intended to avoid such a conflict of jurisdiction, and the revenue Court alone must proceed with the case. The declaration, even if granted by the civil Court, will be useless and may altogether be ignored by the revenue Court.

The only case which I notice is similar to the present one is the case of *Banwari Lal* v. *Gopi* (3), where too a suit instituted in the civil Court more than three months after the time allowed by the revenue Court, was held to be not maintainable. The learned Judge who decided that case, however, based his decision on the ground that the ordinary period of limitation for a civil suit was suspended in view of the provisions of S. 199 of the Tenancy Act. He in effect held that Article 120 of the Limitation Act was overridden by S. 199 of the Tenancy Act and the period of

limitation was shortened. Although I agree with the view that the civil Court should not grant the declaration, I find it impossible to base my decision on the ground that the suit was barred by time owing to the period of limitation being shortened. As I have already said, I simply in my discretion refuse to grant the declaration asked for.

By the Court.—The appeal is accordingly allowed and the order of the lower appellate Court set aside and the decree of the Court of first instance restored with costs in all Courts.

Appeal allowed.

1925 ALLAHABAD 618

LINDSAY AND KANHAIYA LAL, JJ.

Jagmohan Agrahri and another—Plaintiffs—Appellants.

v.

Prag Ahir and others — Defendants — Respondents.

First Appeal No. 172 of 1922, Decided on 14th January 1925, from a decree of the Sub. J., Basti.

Hindu Law—Alienation — Father—Unyie'ding property—Difficult to manage—Proceeds applied to extension of existing family business—Sale is binding on sons.

Under the Hindu Law a transfer can be made by the manager of a family either for legal necessity or for the family benefit. A transaction which as entered into by the father manager of a joint family for the purpose of disposing of property, which yielded a small profit and was difficult to manage, and to apply the sale consideration to the extension of the existing family business, cannot be questioned by the sons. Where the business was not of a speculative nature, the subsequent failure of that business affords no criterion for determining whether the transaction was originally a prudent transaction which the manager of a Hindu family, and especially a father was entitled to make for the family benefit. [P 619, C 2]

Peary Lal Banerji and *N. Upadhiya*—for Appellants.

Uma Shankar Bajpai and *Saila Nath Mukerji*—for Respondents.

Judgment. — The plaintiffs are the sons of Narain, and seek to set aside a sale of certain ancestral property situated in the village Buzurgwar, which was effected by the latter in favour of Madho nd others, now represented by the defendants-respondents, on the 2nd of April, 1910. The sale was effected for a consideration of Rs. 3,200, the whole of which was paid in cash to the vendor at the time of registration. The allegation of the plaintiffs was that they were not bound by the sale inasmuch as it was effected for no legal necessity. The defendants-vendees, however, contended that the property sold was situated at a considerable distance from the place where Narain was residing, that it yielded a very small profit to the family, and that the sale in question was effected in order to benefit the family, by applying the proceeds to business which was likely to yield greater profit. The plaintiffs also asserted that the sale was effected without consideration and that the property sold was of greater value than that paid by the defendants-vendees. These facts were, however, controverted by the defendants vendees. The Court below found that the property in question was not of a larger value than that represented by the sale consideration paid by the defendants-vendees, that the sale was effected for consideration and for the benefit of the family, and that the plaintiffs were consequently bound by it. We have examined the evidence adduced in the case and are satisfied that the property sold yielded a very small profit to the family, and that owing to the distance at which it was situated, the family found some difficulty in managing it. The property sold comprised a 5 annas 5 pies share in one of the mahals of mauza Buzurgwar, which was situated at a distance of about 16 miles from Bardand where the family resided. The sale-deed mentioned that the village was situated at a great distance from the family residence, that the vendor was unable to make suitable arrangements for its management, and there was also a need for money to carry on business, which could not have been obtained except by the transfer of the said property. The khewat for 1320 F. filed shows that the mahal in which the property sold was situated yielded a gross rental of Rs. 345 14-6 per year, out of which Rs. 139 were payable as land revenue. It is not clear whether the latter amount included the cesses payable on account of the estate. But even if it did include, the share sold yielded, roughly speaking, about Rs. 69 per year, which would, in ordinary circumstances, be

barely enough for a family consisting of a father and two sons, with such other members as may have been dependent on them for their support. It is not clear whether the family possessed at the time any other landed property. The evidence, however, goes to show that they had a cloth business which was carried on in the name of Narain and his son Jagmohan, one of the present plaintiffs. Ram Deo states that in Sambat 1965 Baijnath and Nageshar had dealings with his shop in connection with the purchase of cloth, and that in Sambat 1965, which would correspond with the year 1908, there was a balance of Rs. 183 due by them under the previous account. Baijnath was the father of Narain. He had two sons, Nageshar and Narain. Gauri Dat states that in Sambat 1966 Narain and Jagmohan took cloth from his shop and that there was an account in their names in his books. He further states that there were similar dealings in Sambat 1966-67 and that cloth worth Rs. 847-8-0 was purchased by them from him out of which Rs. 671 were paid to him, and that in the following year, Sambat 1867-68, they again purchased cloth worth Rs. 1,125 from his shop, out of which Rs. 1,101-14-0 were paid by them. Gauri Dat is a whole sale dealer paying an income-tax assessed on an income of Rs. 18,400 per year, and his evidence, supported by the account books to which he refers and read with the statement of Ram Deo, leaves no doubt in our minds that there was a family business in cloth carried on at the time when the sale transaction in question was effected, and that Jagmohan was concerned in or jointly carried on that business with his father. Bandhu Lal, patwari of Buzurgwar, states that he was patwari of the village for the last 17 or 18 years and knew the plaintiffs to whose place of residence he used to go, and that the sale in question was effected by Narain for carrying on business in cloth which existed from before. The Court below evidently thought that the business for which the sale was effected was a new business started by Narain. But that is not the effect of the evidence which has been adduced in the case. The business was evidently a profitable business, for the income-tax register for 1918 goes to show that Narain was assessed at an income of Rs. 1,400 per year on his business besides house rent. It does not appear when Narain died and whether that business was continued after his death by his sons, namely the present plaintiffs. But even if the business eventually failed, that would not affect the validity of the transaction which was entered into in 1910 for the purpose of disposing of property which yielded a small profit and was difficult to manage, and to apply the sale consideration to the extension of the existing family business. The business was not of a speculative nature and the subsequent failure of that business if it did fail, affords no criterion for determining whether the transaction was originally a prudent transaction, which the manager of a Hindu family, and especially a father, was entitled to make for the family benefit.

Under the Hindu law a transfer can be made by the manager of a family either for legal necessity or for the family benefit. In *Hanooman Persaud Panday* v. *Mt. Babooee Munraj Kuonwaree* (1), their Lordships of the Privy Council said :

"The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded."

In *Girdharee Lal Muddim Thakoor* v. *Kantoo Lal* (2), and *Mohammad Mondul* v. *Nafur Mondul* (3), the same principle was extended to the case of sales. The decision in *Krishna Chandra Choudhury* v. *Ratan Rampal* (4) does not apply, because no speculative development of the family estate or business was hereby intended. What was intended was to get rid of an estate which was inconveniently situated, which had no sir land attached to it and was not sufficiently profitable,

(1) [1854-57] 6 M. I. A. 393=18 W. R. 81 n = Sev. 253 N.=2 Suther 29=1 Sar. 552 (P.C.)
(2) [1873] 1 I. A. 321 = 14 B. L. R. 187 = 22 W. R. 56=3 Sar. 370 (P. C.)
(3) [1899] 26 Cal. 820 = 3 C. W. N. 770.
(4) [1916] 20 C. W. N. 645 = 35 I. C. 673 = 23 C. L. J. 432.

and to substitute for it something that was likely to yield a larger income by an extension of the family business then being carried on, The decisions in *Ganga Prasad* v. *Ramsarup* (5), and *Krishnadhan Banerji* v. *Sanyasi Charan Mandal* (6) are also inapplicable.

The appeal, therefore, fails and is hereby dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

(5) [1921] 60 I. C. 68.
(6) [1919] 23 C. W. N. 500=29 C. L. J. 280=51 I. C. 597.

★ 1925 ALLAHABAD 620

MUKERJI. J.

Hafiz Nehal Ahmad —Appellant.

v.

Ramji Das—Respondent .

Criminal Appeal No. 906 of 1924 Decided on 11th December 1924, against the order of the Second Addl. S. J., Saharanpur.

★ *Criminal P. C. S. 476 B- Appellant dying—Appeal abates.*

The language of S. 476 B does not indicate that any legal representative of the deceased appellant may file an appeal, or support it on the death of the appellant. Hence on the death of the appellant the appeal abates. But S. 404 has no application to the case. [P.621. C. 1.]

M. A. Aziz—for Appellant.

Nehal Chand—for Respondent.

Judgment.—These appeals Nos. 906-920 are appeals under section 476-B of the Criminal Procedure Code filed by one Nehal Ahmad who has since died.

It appears that several people were prosecuted on a charge of dacoity at Saharanpur, the case being one of the now notorious Saharanpur riot cases. The learned Sessions Judge acquitted some of the accused persons and convicted others, Nehal Ahmad was one of the persons who was prosecuted and acquitted. On his acquittal Nehal Ahmad presented sixteen petitions before the learned Sessions Judge asking the Court to take action under section 476 of the Criminal Procedure Code, and to file a complaint for the prosecution of the witnesses for the prosecution. The learned Sessions Judge took action against only one, *viz.*, Badri Das, who has filed an appeal No. 695 of 1924. He dismissed the application against the rest. Nehal Ahmad came up to this Court in appeal.

Nehal Ahmad is dead, and with his death the power which he gave to Mr. A. Aziz, Vakil, to prosecute the case on his behalf came to an end. Mr. Aziz, yesterday, mentioned these cases, and stated that it was possible that he would be able to show that without a vakalatnama he was entitled to argue the appeals. His argument seemed to be that it was after all the duty of the Court to take up the prosecution and any member of the public could represent matters before an appellate Court. Mr. Aziz told the Court that he was going away and asked for a postponement. Mr. Nehal Chand, the learned Counsel appearing for the opposite parties, objected to a postponement on the ground that his clients were already here and waiting for the disposal of the appeals Mr. Aziz was, therefore, told that if he was going away he should hand over his brief (if indeed any brief is left) with a brother practitioner to argue the point if he was so advised. Evidently Mr. Aziz left no instructions ; for nobody is appearing to-day on behalf of his client.

The learned Government Advocate appeared and stated that as a Government Counsel he had examined the cases and he was not prepared to take up the appeals preferred by Nehal Ahmad and to prosecute them before this Court.

I do not quite see how the learned Government Advocate could come in and express his opinion on the merits. Section 476-B gives a right of appeal to a private person and it has nothing to do with the Government. Indeed it is a Government officer who has refused to order a prosecution and unless there is an instruction to the contrary from the Government the learned Government Advocate is not likely to take an application to upset the judgment of a Government officer. However, the matter is not of any importance. The fact remains that the private party who was entitled to move in the matter did move, but has died and there is no question of any survival of the right of appeal. Section 476 B says that any person on whose application a civil revenue or criminal Court has refused to make a complaint may appeal, etc., etc. The language does not indicate that any legal representative of the deceased ap-

pellant may file an appeal, or support it on the death of the appellant.

Mr. Nehal Chand, the learned Counsel representing the other side, has argued that under sections 404 and 431 of the Criminal Procedure Code the appeal abates on the death of an appellant. But so far as I can see, the appeal referred to in section 431 is an appeal either against an acquittal or by a convicted person. This is not a case like that. Section 404 has apparently no application, for *this is an appeal* under the Code.

Although sections 404 and 431 have no application, in my opinion the right of appeal does not survive.

I declare that the appeals have all abated.

Appeals declared abated.

★ 1925 ALLAHABAD 621

SULAIMAN, J.

Ambika Prasad—Plaintiff—Appellant.

v.

Madho Prasad — Defendant — Respondent.

Second Appeal No. 1118 of 1924, Decided on 31st July 1924, against the decree of the Sub. J., Mirzapur, D/- 11th April, 1924.

★ *Hindu Law—Alienation by limited owne for clearing debts binding on estate—Transferee need not prove dire consequences would have resulted if debts were not paid.*

A sale by a female owner to pay outstanding debts which are a charge on the estate and which bind the estate and which could not be got rid of by the reversioners without payment is one for necessity and it is not incumbent on the transferee to establish that some dire consequences would have ensued if those debts had not been discharged. 1923 *All*, 535 *Dist.*

[P. 621, C. 2.]

Shambhu Nath Chaube—for Appellant.

Judgment.—This appeal arises out of a suit brought by a grandson to set aside a sale deed executed by his deceased mother who held the property as the only daughter. The only question before the Courts below was whether there was legal necessity and justification for the sale deed. Both the Courts have found that this was so and accordingly dismissed it. On the findings of the lower appellate Court the plaintiff's mother executed the sale deed in order to pay off a debt which had been raised on the property by her own father, who was the last male owner of the estate, and to pay off certain debts previously raised by her for the purpose of maintaining and supporting the present plaintiff himself and for the purchase of seeds etc. for needs which have been found to constitute legal necessity. In my opinion the findings of the lower appellate Court really dispose of the appeal completely.

It is, however, urged on behalf of the appellant that the findings are insufficient inasmuch as there is no finding that there was *pressing necessity*. It is urged that the previous debts were debts on mortgages with possession and there is no finding that the mortgagee was demanding payment or that there was any urgency about their discharge.

Reliance has been placed on the case of *Bandhu Ram* v. *Ram Kishun Sonar* (1) It is to be noted that in that case it was the father (who did not represent the whole estate for the time being) who had executed certain sale deeds in lieu of a consideration, the bulk of which formed a mortgage debt which was not to fall due till long after the sale deed. The payment was thus premature. On the other hand in the present case it was the Hindu daughter, who represented the entire estate for the time being, who thought it necessary to discharge these old debts which were due. The payments were in no sense premature. It seems to me that a female owner as she represents the whole estate for the time being is bound to manage it to the best of her ability. She must therefore be allowed reasonable latitude in the exercise of her powers, provided she does not act unfairly towards the reversioners. So long as there are outstanding debts which are a charge on the estate and which bind the estate and which cannot be got rid of by the reversioners without payment, it is her discretion to decide whether she should pay them off or not. I do not think that it is further incumbent on the transferee to establish that some dire consequences would have ensued if those debts had not been discharged.

I accordingly dismiss this appeal under Order 41 rule 11.

Appeal dismissed.

---

(1) 1923 All. 535=21 A. L. J. 354=4 L. R. A Civ. 406.

★ 1925 ALLAHABAD 622

SULAIMAN AND MUKERJI, JJ.

Jodha Singh--Appellant.

v.

Padey Gokaran Das—Opposite Party.

Second Appeal No. 355 of 1923, Decided on 13th February 1925, from a decree of the Dt. J., Agra.

★ (*a*) *Civil P. C., S. 151—Mistake of Court—Court can rectify even apart from S. 151.*

Even apart from S. 151 the Court has an inherent power to rectify the mistake which had been inadvertently committed by itself.

A preliminary decree for sale was passed in favour of the appellant who within three years of the passing of the preliminary decree applied to the Court to pass a final decree. Notices were issued to the judgment-debtors and the case was adjourned from time to time; on one of the adjourned dates, the applicant happened to be absent. The defendants never appeared. In the absence of the parties, the Judge passed an order dismissing the suit for default.

Held: that the order of the Court was wrong and that the Court was right in setting it aside when the mistake was brought to its notice by the party. [P. 623, C. 1]

(*b*) *Civil P. C., O. 34, R. 5--Plaintiff is only to apply for final decree.*

R. 5 of O. 34 of the Civil, P. C. requires only this much of the plaintiff that he shall tell the Court that a final decree for sale has to be prepared. [P. 623, C. 1]

Baleshwari Prasad—for Appellant.

Narain Prasad Asthana—for Respondent.

Mukerji, J. — This appeal raises a question of some importance and is accordingly laid before a Bench of two Judges.

Briefly the facts are these. A preliminary decree for sale was passed in favour of the appellant and one Dina Nath on the 31st of January 1911. The appellant purchased the share of Dina Nath in the decree and on the 2nd of January, 1914, well within three years of the passing of the preliminary decree, applied to the Court to pass a final decree. Notices were issued to the judgment-debtors and to Dina Nath who had been made an opposite party to the application and the case was adjourned from time to time. On the 17th of July, 1915, when the case was ripe, the appellant happened to be absent. The defendants never appeared. In the absence of the parties, the learned Subordinate Judge passed an order which, though an biguous, has been treated as amounting to an order dismissing the suit for default. On the 28th of September, 1916 the appellant put in an application before the learned Subordinate Judge reciting all the previous history of the case and asking that his application dated the 2nd of January, 1914 might be revived and a final decree might be passed. He mentioned pointedly that the order of the 17th of July, 1915 was one which should not have been passed. The learned Subordinate Judge accepted the petition and passed by an *ex parte* order a final decree for sale.

At the instance of some of the defendants the *ex parte* final decree was set aside and the previous application dated the 28th of September, 1916 was restored.

When the application dated the 28th of September, 1916 came to be heard, it was urged on behalf of the defendants that it was a fresh application and that it was barred by time.

The learned Subordinate Judge held that the order dated the 17th of July, 1915 was an order which the Court ought not to have passed. He pointed out that under the law, namely provisions of Order 34, rule 5 of the Civil Procedure Code, nothing further was needed to be done by the plaintiff, the appellant before us. The decretal amount had not been paid into Court and the plaintiff had done all that could be done by him, namely that he had put in application before the Court asking it to pass a final decree. The learned Judge under the circumstances, thought that he was justified, nay it was his duty to rectify his own mistake possibly his predecessor's mistake and he dismissed the objection of the judgment-debtors and passed a final decree for sale.

An appeal was taken to the learned District Judge who accepted it and dismissed the application of the appellant for the perparation of the final decree.

Hence this second appeal.

It has been urged for the respondent that the Court of first instance was not right in saying that on the 17th of July, 1915 the appellant had not nothing further to do in the case. It was stated that he had to prove the assignment. Assuming that the argument is correct, all that was wanting was the proof as to the assignment; but that did not give the Court any right to dismiss the application *in toto*. It could have only said that it would pass a final decree for sale in favour of both the appellant and Dina Nath.

This argument, therefore, does not find favour with us.

Now the question is whether the judgment of the Court of first instance was right. It is clear that if we treat the application of the 28th of September, 1916 as a fresh application, it would be time barred. It we treat it as an application for review of judgment, it would still be time-barred unles we apply S. 5 of the Limitation Act to the case. On the other hand, there is no bar to the Court exercising its inherent authority under S. 151 of the Code of Civil Procedure and rectifying its own mistake. This is exactly what the Court of first instance purported to do.

The Privy Council, in the case of *Debi Baksh Singh* v. *Habib Shah* (1), laid down, under the following circumstances, that even apart from S. 151 of the Civil Procedure Code, the Court possessed an inherent power to rectify the mistake which had been inadvertently committed by itself. In the case before the Privy Council the plaintiff had died and the suit was dismissed for default in ignorance of the fact of the death. The legal representatives of the deceased plaintiff made an application to be brought on the record. It is clear that no suit was pending and an application for substitution of names could not be made where there was no suit pending. An application for restoration of the suit would have been time-barred. Yet the Privy Council had no hesitation in saying that, in the circumstances of the case, the Court was bound to correct its own error.

The case before us is different in facts but the same principle, as has been laid down by the Pri y Council is applicable. As already pointed out, the case was ripe on the 17th of July, 1915. Rule 5 of Order 34 of the Civil Procedure Code requires only this much of the plaintiff that he shall tell the Court that a final decree for sale has to be prepared. In the case of the defendant paying up the decretal amount, it is not even necessary for him to say to the Court that a final decree, discharging the mortgage, has to be passed in his favour. The plaintiff, however, is required to make an application and that application he did make. If, therefore, nothing remained to be done by the plaintiff the Court's duty it was to pass a final decree for sale. The Court has rectified its own mistake and we do not think that there is any real grievance to the defendants.

We allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have his costs in this Court and in the Court below, which will include counsel's fees in this Court on the higher scale.

Appeal allowed.

(1) [1913] 35 All. 331=40 I. A. 150=16 O. C. 194=17 C.W.N. 829=11 A.L.J. 625=18 C. L. J. 9=15 Bom. L. R. 640=14 M. L. T. 33=(1913) M.W.N 563=19 I. C. 523=25 M.L.J. 148 (P. C.)

★ 1925 ALLAHABAD 623

NEAVE, J.

Dayaram and others—Defendants—Appellants.

v.

Ram Narain Pande and others—Plaintiffs—Respondents.

Second Appeal No. 993 of 1922, Decided on 23rd April 1924, against the decree of the Dt. J. Ghazipur, D/- 19th May 1922.

★ (a) *Civil P. C., O. 22, R. 4—Joint decree for possession passed—Appeal preferred against decree—One decree-holder dying and his representative not brought on record—Appeal abates as against his heirs only, but the appeal is imperfectly constituted and cannot be heard.*

Where a joint-decree had been obtained and the defendants. appellants had failed to bring on the record the representatives of one of joint decree-holders, who had died,

Held: that, though under Order 22, R. 4, Civil P. C. the appeal abated against the heirs of the deceased plaintiff only, the result of such abatement was that the appeal was imperfectly constituted and that in the absence of a necessary party the Court would not proceed to decide the appeal on the merits. 24 C. W. N. 44 *Foll.*

[P. 624, C. 1]

(b) *Civil P. C., O. 22, R. 4—Joint suit for possession—Prior compromise merely defining shares but not perfected—Decree in suit is a joint decree.*

Where prior to a joint suit for possession, the co-shares had entered into a compromise defining their shares but there was no evidence that the compromise was perfected,

Held: that the decree passed in the suit was a joint decree. [P. 624, C. 2]

U. S. Bajpai—for Appellants.

M. L. Agarwala—for Respondents.

Judgment.—In this appeal a preliminary objection is taken by the respond-

ents. The suit was brought by three persons, (1) Ram Narain Pande (2), Nepal Misra and (3) Sheo Prasad Misra. They obtained a joint decree for possession of certain property and damages. After the appeal was filed Ram Narain Pande died. Steps for substitution of the names of his legal representatives were not taken for more than three months after his death, when the appellant's application was rejected and it was ordered that the appeal should abate at least as against Ram Narain Pande. An application to have this order set aside was also rejected. The preliminary objection is that, as the decree for joint possession is in favour of three persons, who are not members of a joint Hindu family, this appeal cannot lie against two of them only. In support of this contention, reliance is placed on a ruling of the Calcutta High Court in *Arjam Mirdha* v. *Kali Kumar Chakerbutty* (1). In the judgment in that case reference is made to a ruling of the same Court in *Kali Dayal Bhatta Charjee* v. *Nagendra Nath Pakrashi* (2), where the matter has been discussed in an elaborate judgment reviewing the authorities. It was held in this case that, where a joint decree had been obtained and the appellants had failed to bring on the record the representatives of one of the joint decree-holders, who had died, though under order 22, rule 4, Civil Procedure Code the appeal abated as against the heirs of the deceased plaintiff only, the result of such abatement was that the appeal was imperfectly constituted and that in the absence of a necessary party the Court would not proceed to decide the appeal on the merits. A number of earlier decisions of the Calcutta High Court to the same effect were referred to, in all of which the view taken was that in such circumstances the appeal could not be heard, because in the event of its being allowed on the merits the result would be that the decree would be set aside in respect of some of the plaintiffs but would remain intact in so far as the representatives of the deceased plaintiff were concerned, and there would be two contradictory decrees made in the same litigation.

The learned advocate for the apppellants refers to a compromise, which was entered into between the plaintiffs to the present suit at some time before the suit was instituted. He maintains that this compromise defined the shares of the plaintiffs in this property and that it would, therefore, be possible for this Court in the event of the appeal succeeding, to distinguish the shares of the surviving plaintiffs. It does not appear, however, that under this compromise any partition was perfected or that the parties to it ever took action under it. The decree obtained by them is a joint decree without any specification of shares. In my opinion, the view taken by the learned judges of Calcutta High Court is the correct one : and, though the appeal has abated as against the deceased plaintiff only, it cannot now be heard on the merits.

The preliminary objection accordingly succeeds and the appeal is dismissed with costs including in this Court costs on the higher scale.

Appeal dismissed.

(1) 1923 Cal. 294.
(2) [1920] 24 C.W.N. 44=54 I.C. 822=30 C.L.J. 217.

★★ 1925 ALLAHABAD 624

Full Bench

LINDSAY, KANHAIYA LAL AND DANIELS, JJ.

(*Lal*) *Bahadur Lal and another*—Defendants—Appellants.

v.

Kamleshar Nath—Plaintiff — Respondent.

First Appeal No. 273 of 1922, Decided on 21st July 1925, from a decree of the Sub-J, Basti, D/- 2nd May 1922.

★★ *Hindu Law—Alienation by father—One sixteenth of the total consideration found to be not for legal necessity—Sale was upheld.*

It is not correct to say that if any part of the consideration, however insignificant, was invalid and not binding on the plaintiff, as not being incurred for legal necessity, the plaintiff is entitled to have the sale set aside. On the contrary there is plenty of authority for the proposition that where the portion of the consideration for which no legal necessity can be proved is insignificant the sale will stand.

Where, out of the total consideration, about Rs. 6,000 was found to be for legal necessity and about Rs. 250 was not, but it was found that these Rs. 250 were actually paid to plaintiff's father.

Held: that the sale should be upheld and the defendant should not be made to refund the sum of Rs. 250 and odd. 1922 *All.* 321, *Appr.*

P. L. Banerji, N. Upadhiya and *Gadadhar Prasad*—for Appellants.

Shiva Prasad Sinha—for Respondent.

Order of Reference to a Full Bench.—This is the appeal of Lal Bahadur Lal who on the 25th of April 1918 bought a 2 annas share in village Phulpur from Adit Bahadur, the father of the plaintiff. The plaintiff commenced a suit for the setting aside of the sale on the ground that there was no legal necessity for it and that in truth there was no consideration. The learned Subordinate Judge analysed the six items which made up the consideration of Rs. 5,995/- and we have followed the same course dealing with each and every item because either the appellants or the respondent challenged one or other of them. We need not go into the details of these because they present no special features.

Item (a). The learned Subordinate Judge found that item (a) Rs. 356-0-0 was for legal necessity. Mr. Sheo Prasad Sinha has not been able to challenge this item.

As regards item (b) Rs. 849-0-0 that was disallowed, but having regard to the recent decision of the Privy Council in *Raja Brij Narain* v. *Mangla Prasad Rai* (1), which has been decided subsequent to the decision of the learned Subordinate Judge, that item of Rs. 849-0-0 must now be included.

Item (c).—The learned Subordinate Judge allowed Rs. 119-0-0 of the item of Rs. 256-0-0; but again it is agreed that the whole Rs. 256-0-0 is recoverable.

Item (d).—No question arises on this item, Rs. 250-0-0.

As regards item (e).—Rs. 1725-0-0 we are of opinion that the transaction of mortgage between the father and Ganesh Kunwari was a genuine transaction and that this Rs.1,725-0-0 was a debt due by the father and properly dischargable by an advance by the defendant.

Item (f). The learned Subordinate Judge allowed Rs. 1619-8-0 of the item of Rs. 2,559-0-0. It is this item which has been the subject of the greater part of the argument. Rs. 1,500-0-0 was said to have been the amount borrowed from Lal Bahadur Lal to pay for the redeeming of ornaments belonging to the daughter of Adit Bahadur which the latter had pledged. Completely satisfactory evidence was given showing the redemption of Rs. 1,307-0-0 worth, but there is no evidence as regards the Rs. 193-0-0 That amount therefore must be struck off. As regards Rs. 700-0-0, payment of rent, only Rs. 492-1-0 has been proved and therefore again Rs. 7-15-0 was disallowed. An item of Rs. 200-0-0 relates to a stamp. The appellants had in fact advanced Rs. 200-0-0 to Adit Bahadur for the purchase of a stamp in respect of a transaction which Adit Bahadur intended to enter into with a third party. For some reason, not material to this case, the transaction went off, but nevertheless that money had been borrowed and constituted a debt from the father, Lal Bahadur Lal. As regards the sum of Rs. 100-0-0 we disallow it on the ground that there is no evidence as to the circumstances under which this was advanced. It is admitted that the final amount of Rs. 300-0-0 was one properly incurred.

The addition of all these items allowed comes to Rs. 5,735-1-0 and, therefore, Rs.259-15-0 is declared to be the amount for which there was no legal necessity.

When these figures were arrived at there naturally arose the question as to the form of the decree, and our attention has been called to what undoubtedly is a conflict of opinion. We think it desirable that this case should be considered and that a Full Bench should be asked to say whether on the figures as found by us the sale should be set aside on payment by Kamleshar Nath of Rs. 5,735-1-0, or whether the sale should be confirmed to Lal Bahadur Lal on his paying to Kamleshar Nath Rs. 259-15-0, or whether a third course should be taken of giving no relief to Kamleshar Nath at all.

The difference between the views taken by Benches of this Court will appear from a perusal of the following cases:—

(1) 1924 P. C. 50=46 All. 95=51 I. A. 129=21 A. L. J. 931=L. R. 5 P. C. 1=28 C. W. N. 253=46 M. L. J. 23=5 P. L. T. 1=2 Pat. L. R. 41=(1924) M. W. N. 63=19 M. L. W. 72=33 M. L. T. 457=26 Bom. L. R. 500=11 O. L. J. 107=[illegible] P. L. R. 1924 (P. C.)

Ram Dei Kunwar v. *Abu Jafar* (2); *Bachchan Singh* v. *Kamta Prasad* (3); *Jai Narain Pande* v. *Bhagwan Pande* (4); *Dwarka Ram* v. *Jhulai Pande* (5); *Sanmukh Pande* v. *Jagarnath Pande* (6); *Mt. Allah Jilai* v. *Qabiz* (7); *Jiwan Singh* v. *Gauri Shankar* (8).

Reference might also be made to *Thirumalai Appa Mudaliar* v. *Nainar Theven* (9) and to *Girdharee Lal* v. *Kantoo Lal* (10).

On the return of the opinion of the Full Bench let this matter be put up before us again for final orders.

[On the case coming up before the Full Bench the following judgment was delivered.]

Judgment.-On the question which had been referred to us by a Bench we are of opinion that in this particular case the sale should not be set aside but should be confirmed in favour of the purchaser. The consideration which is mentioned in the sale deed is Rs. 5,995, and it is found that for only a sum of Rs. 259-15-0 out of this sum, no legal necessity has been established. In our opinion this item is an insignificant sum which should be left out of consideration in deciding the question whether the sale should or should not stand. The sale was a sale of a two annas share out of a five annas 4 pies share, and we have no reason to suppose that the precise sum for which legal necessity existed could have been realised by a sale of any less share than that of 2 annas.

We need not discuss the case law on the subject. The latest case to which we have been referred will be found in *Daulat* v. *Sankatha* (11). That refers back to recent decisions which are to be found in *Jainarain Pande* v. *Bhagwan Pande* (4) and *Sanmukh Pande* v. *Jagarnath Pande and Ram Baran Pande* (6). The whole case law on the subject has been referred to in one or other of these rulings. The only authority on which Mr Shiva Prasad Sinha for the respondent relies is the case of *Dwarka Ram* v. *Jhulai Pande* (5). We do not wish to criticise the merits of that decision, for we are satisfied that on the merits the decision was a perfectly correct one, if we may say so, but we are of opinion that there are certain expressions in the judgment which cannot be accepted literally and which are expressed too widely. We refer to the passage at page 432 of the report which runs as follows:

'If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much consideration as was required for the necessities of the family. This is the form of the decree in a suit of this kind which has always been maintained." We do not think, it is correct to say that if any part of the consideration, however insignificant, was invalid and not binding on the plaintiff the plaintiff is entitled to have the sale set aside. On the contrary there is plenty of authority for the proposition that where the portion of the consideration for which no legal necessity can be proved is insignificant the sale will stand. That was laid down in the case of *Girdhari Lal* v. *Kantu Lal* (10), and the relevant passage ofthat judgment will be found quoted in the Bench decision reported in 44 All., 683,(4). Nor again do we think it is correct to say that the form of the decree in a suit of this kind which has always been maintained is the form by which the plaintiff is given a decree for possession subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. On the contrary there are cases in which the suit of the plaintiff has failed altogether, *i. e.*, cases where the portions of the consideration money for which no legal necessity could be found

---

(2) [1905] 27 All. 404=2 A. L. J. 95=A. W. N. 68.
(3) [1910] 32 All. 392=5 I.C. 585=7 A. L. J. 337.
(4) 1922 All. 21=44 All. 683=20 A. L. J. 621=3 L. R. A. Civ. 427.
(5) 1923 All. 248=45 All. 429=9 O. & A. L. R. 494.
(6) 1924 All. 708=46 All. 531=22 A. L. J. 417=5 L. R. A. Civ. 280.
(7) F. A. No. 69 of 1922 decided on 11-6-1924 by Mukerji and Dalal, JJ.
(8) F.A. No. 140 of 1922 decided on 30-3-1925 by Lindsay and Kanhaiya Lal, JJ.
(9) 1922 P. C. 207=16 M. L. W. 478=3 M. L. T. 149=(1922) M. W. N. 801=27 C. W. N. 385=21 A. L. J. 282 (P. C.)
(10) [1874] 1 I. A. 321=14 B. L. R. 187=22 W. R. 56=3 Sar. 380 (P. C.)
(11) 1925 All. 824=47 All. 355=23 A. L. J. 55=6 L. R. A. Civ. 167.

were so inconsiderable as to be liable to be ignored.

The only other matter upon which we are called upon to express an opinion is whether in the circumstances of this case the purchaser is liable to pay to the plaintiff a sum of Rs. 259-15-0, for which no legal necessity has been held to be established. In our opinion the vendee in this case ought not to be made liable to pay this sum. It seems to have been held that this amount was actually paid to the father of the plaintiff, and that being so, we can see no good reason why the vendee should be required to pay the money over again.

Let this answer be returned to the referring Bench.

[When the case came up before the Bench of two Judges after the reference the following judgment was delivered:—]

The facts of this case will appear from our order, dated 24th of June 1925, referring a point of law to a Full Bench. The point referred to is also stated in that order.

The Full Bench have now decided the point and have held that the tale impeached by the son, who was the plaintiff-respondent in this Court, should be upheld in its entirety wihout any condition attached to the decree.

We accordingly allow the appeal and dismiss the plaintiff respondent's suit with costs throughout. The costs in this Court will include counsel's fees on the higher scale.

Appeal allowed.

★★ 1925 ALLAHABAD 627

Full Bench

MEARS, C J., MUKERJI AND BANERJI, JJ.

Raggha—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 356 of 1925, Decided on 5th June 1925, from a conviction of the S. J., Farrukhabad.

★★ (a) *Evidence Act, S. 24—(Mears, C. J., and Banerji, J.) Retracted confession can alone be the basis of conviction — (Mukerji, J. contra) — For rejecting confession positive proof of threat etc., is not necessary.*

A man of sound mind and full age, who makes a statement in ordinary simple language, must be bound by the language of the statement and by its ordinary plain meaning. If the statement is believed by the Court to be true, and if the Court is satisfied that there was nothing of the nature referred to in S. 24 of the Evidence Act, no improper conduct of anybody, but that the man of his own motion made a confession, and if that confession can legally be receivable in evidence and is corroborated, the plain simple meaning of the words used by him must have their full and proper significance, and the act spoken should be given its legal consequence. [P. 630, C. 2]

Per Mukerji, J.—Confession in a criminal case is another name for admission in a civil case. Both are dealt with in the Evidence Act and under S. 31 of that Act an admission is not conclusive. The language of S. 24 will show that to reject a confession it is not necessary that there should be positive proof to establish that the confession has been obtained by use of threat, persuations, etc. Anything from a barest suspicion to positive evidence would be enough for a confession being discarded. The weight, therefore, that has to be attached to a confession, in the view of the legislature, is small. 1925 *Cal.* 587 *Foll.* [P. 634, C. 2; P. 635, C. 1]

A confession in its normal state, is an entirely suspicious article. A retracted confession is worse. The Court should not lose sight of the fact that, assuming that a prisoner had been induced to confess he will not unlikely assure the Magistrate that his confession was voluntary, knowing that he will leave the Magistrate's presence in the custody of the police and remain in their custody for many days to come. (8 *B. H. C. R.* 126 *Ref.*) The use to be made of a confession is really a matter of prudence rather than of law. 19 *Bom.* 728 *Foll.* [P. 635, C. 1 & 2]

★★ (b) *Penal Code, S. 300—Murder proved by retracted confession — Dead body not discovered—Sentence should be one of death (Mears, C. J. and Banerji, J.; Mukerji, J., contra.)*

If one is satisfied that murder was committed the appropriate punishment should follow. The discovery of the body is not a material circumstance. It is the murder which is the thing to be regarded, that is to say, the killing of a human being by one or more human beings without just cause or excuse. It is not the finding of the body. The absence of the body is a circumstance which makes it necessary to proceed with the greatest care and caution, and one must never confirm a sentence of death, unless one feels completely satisfied about it. If there is such an element of doubt to render a Judge in the least degree uneasy, the proper course is not to change the nature of sentence from death to transportation for life, but to acquit the man altogether. [P. 631, C. 2]

Per Mukerji, J.—Where the dead body does not appear and the factum of death is established by nothing but a retracted confession, there is a suitable case where a sentence of transportation may be awarded instead of the heavier sentence. 1924 *All.* 662 *Relied on.* [P. 631, C. 1]

Uma Shankar Bajpai and *K. N. Laghate*—for Appellant.

G. W. Dillon—for the Crown.

Mears, C. J.—This is the appeal of Raggha, caste Kurmi, age 24, from the conviction of the learned Sessions Judge of Farrukhabad, who, on the 21st of April 1925, sentenced him (Raggha) to

death in respect of the murder of one Mangli.

The curious feature about this case, and which rendered it advisable, in my opinion, to seek the assistance of a third Judge, was that the body of Mangli was never recovered.

The facts can be stated very shortly. There had been a long standing quarrel over a piece of land in Balipurwa. Raggha, with the aid of other people, had forcibly dispossessed Mangli. Mangli had recourse to the Courts, and on the 5th of December, 1924, he being the plaintiff in a suit, was declared by a judgment on that date to have the right to the possession of this land. That decision, and possibly another circumstance connected with Mangli, namely, that he was said to have taken a Gadaria woman into his keeping, may have made Mangli an object of enmity to a number of people. But at all events, Mangli was beyond any question alive on the afternoon of the 6th of December, and his movements have been traced on that day with complete accuracy up to the point when he was at the village Beta, about a mile distant from his home. From that time, when probably it was beginning to be dark, Mangli has never been seen alive by anybody. Not having returned home, his relatives, after a time, became uneasy, and having learnt of his movements from the Court towards his home, they began to make a search, and on the 8th of December, probably when the light was failing, Jagan Nath passing along a nala which would be the way which Mangli would take if he were proceeding towards his home, found four patches of dried blood. Jagan Nath went back and brought another witness. They examined the marks, and eventually on that same afternoon they went to the thana and made the first information report. Therein they set out that there had been the litigation relating to land and the name of Raggha, the accused in this case, is the first name suggested as one of the men who might be the cause of Mangli's disappearance. From the 8th to the 15th no step was taken. On the 15th the Sub-Inspector returned to his thana and commenced his investigation. He having seen where the blood stains had been, the blood and the earth having been previously collected and sent to the Imperial Serologist, the Sub-Inspector called certain suspected persons to appear at the nala. Amongst them was Raggha. When Raggha was asked to walk across the place, he showed signs of great uneasiness and apprehension. Laltu, another suspect, was equally agitated. He is not before the Court. The Sub-Inspector thereupon took them back to Balipurwa and questioned them. Raggha made a statement—what that statement was in its terms we do not know. Laltu corroborated the statement with the result that a search was made in a large and deep pool in the river Aisan, about 1½ mile away from the place where the marks of blood had been found. A diver having been sent in and this pool having been dragged the result was that various articles of clothing, 4 or 5 in number, were recovered from that pool, and were subsequently satisfactorily proved to have been the property of Mangli.

These articles have been exhibited in this Court, and there can be no question that from their appearance they have been bitten through and torn and dragged about by crocodiles and possibly by smaller creatures such as turtles. One particular garment shows a hole of about 2 feet square and the edges of the garments are frayed and ragged and show teeth marks.

Raggha, being under arrest, was taken on the 17th to Fatehgarh, and at 3-30 in the afternoon of that date he appeared before Mr. Chakravarty, a Magistrate of the first class. When he came before Mr Chakravarty he had already apparently decided to make a confession. Very probably Mr. Chakravarty, who has been no doubt most rightly described as one of the most experienced Magistrates in the district, did not immediately record that confession but gave Raggha advice and caution. He explained to Raggha that he was not bound to make any confession, and that if he did make a confession, there was a likelihood that it might be used in evidence against him. Now in this Court we are all very familiar with those words and they may, to some of us, have lost some sense of weight and consequence, because we have heard them very frequently. But Raggha was a man brought before the Magistrate and told on that afternoon that there was no need for him to make a confession; that the law did not demand it; and that if he did confess, what he said might be used in evidence against him. The Magistrate having given

that caution to Raggha sent him away to think the matter over, and did not see him again until 12 o'clock the next day. Therefore Raggha had 20 hours in which to review his position and to think over what he had been told, free from any influence. When he appeared again before Mr. Chakravarty at noon on the 18th, again Mr. Chakravarty cautioned him and Raggha said that he wished to make a confession; that he was doing it freely; that there had been no threat and no inducement; and that nobody had told him that if he were to make a confession he would be acquitted; that he was not in any way being forced; and that he would make a free, full and true confession.

Now, in my opinion, there is nothing more that human care can do, than to talk to a man about to make a confession as the learned Magistrate did. The result was that Raggha persisted in his wish to make a confession and he made one, which I propose to refer to, not in its entirety but to extract from it certain passages which I consider to be of great importance. I may state that the impression the confession leaves upon me is that Raggha was a very clear headed, intelligent man, and if any part of the confession need be brought forward in truth of it, I will refer to the lines 42 to 54 on page 13 of our printed record where he states the facts with a power of compression and clearness as well as a trained advocate could do.

"I had 20 bighas of cultivation in Balipurwa. In Asarh last Jodha and Mangli sued me in the Civil Court over that land. The 3rd of December was fixed for delivery of judgment. The judgment was not delivered on that day; but my pleaders told me that I would lose the case. The judgment was delivered on the Friday following. I lost the case. There were ten men with me; they even gave evidence for me. They were Permeshri, Brahman of Rakha-ka-purwa, Chatar Kurmi, of Rakha-ka-purwa, Manna Brahman of Rakha-ka-purwa, Kampta Brahman of Rakha-ka-purwa, Gayadin Kurmi of Bali-ka purwa, Mangli Kurmi of Bali-ka purwa, Laltu, son of Mangli, of Bali-ka-purwa, Ishri Kurmi of Bali-ka-purwa, Ruttu Kurmi of Bali-ka purwa, Anga Kurmi of Bali-ka-purwa. All these ten men were present in Court on Wednesday, and on Friday only Mangli, accused, and I were present. We all eleven men conspired both on Wednesday and Friday to murder Mangli."

As will be seen there appears what may be a printer's mistake in the use of the word 'accused' after Mangli instead of the word "deceased." I am impressed by the clarity of that statement. Now the confession makes it perfectly clear that Raggha took a leading part in this matter. He started to track Mangli, deceased, who went to Sarai Mian. He and another followed him from Sarai Mian to Behta and met the other nine men at a nala, a distance of 3/4ths of a mile from Balipurwa. They gave to them the information that Mangli was near at hand in Balipurwa, and then they lay in wait. The confession shows that this man was such a close participant in the murder that a dhoti which he had used as head-dress was "spattered" over with blood.

The confession also records that it was owing to the information which he gave to the police that the cloths were recovered from this deep pool one and a half mile away from the scene of the attack. Now I have intentionally left out for the moment the story of what is said to be the murder. The accused describes the assault in this way:—

"Mangli, deceased, arrived at the said nala when it was dark. As soon as he got down the nala, Puttu hit him hard with a lathi. Mangli, deceased, cried out and ran. The others then followed him and caught hold of him. Puttu and I were on the other side of the nala. They dragged Mangli, deceased, 20 or 25 paces to the east and beat him very badly with lathies. Village Bahadurpur is at a distance of 9 or 10 fields from that place. There was heard some noise there. Thereupon we left Mangli, deceased, lying there and ran away. We came back there two hours after. On our return we found that Mangli was dead. We tied up the dead body of Mangli in his dhussa (wrapper). There were some articles in his jhola (bag), such as lota, string, shoes, etc. There was also his lathi. We took the dead body and the said articles and went to the river. We loaded the jhola (bag) and the dhussa (wrapper) with earth and threw them into a kund (deep place in the river). We also threw the lathi into the river which floated away."

Corroboration of this confession is to be found in the fact that the place where

Raggha said the clothes had been thrown, in fact proved to be the place. When the clothes were brought to the surface they were found to have been at one time loaded with sand, and indeed the sand was still in them. It happened that the search proved unavailing in so far as the finding of any trace of the body of Mangli, and that is the circumstance which has been spoken of as creating a difficulty in the case.

The circumstances, apart from the confession, which point to Mangli having met his death, have been summarised by Mr. Dillon, and he points out that Mangli was last seen on the afternoon of the 6th of December within a mile of his house and half a mile from the nala and at a point where in the ordinary course he would have crossed the nala on his way to his house. He states that apparently there was no motive for Mangli to disappear. He had in fact been the winning party in the litigation and Mr. Dillon, relies of course upon the information by which the clothes were recovered, and he calls in aid the fact that the very appearance of the clothes, presented to us in this Court, showed beyond any doubt that "something edible" had been wrapped in those clothes, something which would appeal to crocodiles. There is evidence that crocodiles and alligators lived in this river.

On the 18th of February Raggha withdrew the confession and said :

"I made such confession through the fear of the darogahji. Darogahji caused me to be in water till midnight, and caused my dhoti to be removed, and both my hands to be tied to a cot. This was why I made the confession. I made the confession as I was asked by the darogahji to do so."

When the darogah was in the box, not a single question of any kind was put to him in cross-examination, to suggest that he had done any of these monstrously improper things, or that he had done anything at all in violation of his duty. One knows the common argument that is used when one points out the omission. It is that the darogah would have denied it. The answer to that is that if you are going to charge a man with such conduct, you ought to give him an opportunity of explanation by putting the charge definitely to him. The darogah might have been able to prove that three or four persons were throughout in the company of the darogah and the accused throughout the time, or the darogah might have been able to prove convincingly that his interview with the accused lasted only a few minutes. Ram Dayal, who has come forward, says that the Sub-Inspector shouted at him and threatened him. That was not followed up and one does not know when that was supposed to have been done, but there is nothing to prove the suggestion that the man was put into water till midnight. I do not accept this statement of the accused in the slightest degree, any more than I accept the grounds of appeal which were furnished to this Court in which the darogah is said to have told him that if he did what the darogah advised, he would be made witness for the Crown, and thus be acquitted.

In these cases of confession whenever one wishes to draw the ordinary inference from the plain statements of the accused, one is invariably told that he is "only an ignorant villager." "Ignorant villagers" give evidence in Civil Courts with great acumen, they carry on agriculture or village trade with success, they are unite in the normal village life and take a greater or less degree of interest in affairs, local, provincial and national. I think "ignorant villager" is a misnomer and that whatever usefull function that phrase may have served in influencing Courts in the past, its range ought to be restricted in this, the year 1925. I am of opinion that a man of sound mind and full age, who makes a statement in ordinary simple language, must be bound by the language of the statement and by its ordinary plain meaning. If the statement is believed by the Court to be true, and if the Court is satisfied that there was nothing of the nature referred to in S. 24 of the Evidence Act, no improper conduct of anybody, but that the man of his own motion made a confession, I am opinion that, if that confession can legally be receivable in evidence and is corroborated, the plain simple meaning of the words used by him must have their full and proper significance, and the act spoken to be given its legal consequence I dissent entirely from the view that when an ordinary villager says that he hit a man on the head with a lathi that those words are not to be given the weight which

would be attched to them if they issued from the lips of an educated man,, provided always, as I have said, that the man has not been the victim of malpractice, threat or inducement in making such statements. People must be responsible for what they say as well as what they do.

This case furnishes a most excellent illustration of what I mean, and I need seek no other. The principal questions we have got to consider in this case are, Was Mangli killed on the evening of the 6th of December in such circumstances as to constitute a murder? If so, was the accused one of the murderers? The first essential is that we must be satisfied that Mangli was a dead man on the evening of the 6th of December. I have already mentioned the various circumstances that Mr Dillon points out as being indicative of the death of Mangli. When we come to the confession of Raggha, we find that he says: 'On our return we found that Mangli was dead." He then described how the body was carried away to the pool and how disposed of. How can Government or the work of these Courts be carried on in any degree satisfactorily if we are to say that a statement of that simple kind, given under circumstances of the gravest solemnity, is not to be accepted as of well understood import by the man who uttered it? He may of course be wrong in his inference that Mangli was dead, but his confession must at least be taken against him to the extent that he believed Mangli to be dead. I believe Raggha when he says that there was a quarrel of long standing, that there was litigation ending adversely to him, that he tracked out Mangli, that he gave information to the other persons, that there was a general agreement to murder him. I accept the way in which he describes the assault, the dispersal of the assailants because they believed that the villagers of Bahadurpur were aroused. I accept the fact that they returned to Mangli and I certainly accept his statement that eventually Mangli was found to be dead. I also accept the story as to what happened subsequently.

In these circumstances what is the position? Why should not the ordinary consequences follow? Here we have a brutal murder, perpetrated undoubtedly by a considerable number of persons; at all events, there were enough men to enable them to carry the body 1½ miles. The man was struck down, dragged, beaten and eventually found to be dead. There is, as far as I can see no extenuating circumstance whatever. Raggha was a participant in the matter from the beginning, the known object of it being to kill Mangli.

It is said by Mr. Laghate that we should not pass the sentence of death, but should pass the lesser sentence of transportation for life. Why? If one is satisfied that murder was committed, why should not the appropriate punishment follow? It is the murder which is the thing to be regarded, that is to say, the killing of a human being by one or more human beings without just cause or excuse. It is not the finding of the body. The absence of the body is a circumstance which makes it necessary to proceed with care and caution. But I say that in every case of murder one has to proceed with the greatest care and caution, and one must never confirm a sentence of death, unless one feels completely satisfied about it. If there is such an element of doubt as to render a Judge in the least degree uneasy of mind, the proper course is not to change the nature of sentence, from death to transportation for life, but to acquit the man altogether. Having myself not the slightest degree of uneasy feeling about this matter I believe it is my positive duty in the circumstances to accept the plain, definite unqualified statement of Raggha "on our return we found that Mangli was dead". Believing it to be my duty to accept that, recognising that it is the death which constitutes the crime, and not the recovery of the body, and recognising also the excellent reasons which have been given for the failure to find the body, I am of opinion that the decision of the learned Sessions Judge was in every way correct, and that he passed upon Raggha the only sentence that should have been passed, namely, that of death. In these circumstances my opinion is that the decision of the learned Sessions Judge should be confirmed, and that the sentence of death passed upon Raggha should be duly carried out.

Banerji, J. — Three points arise in this case. The first is: Was Mangli, killed on the 6th of December? The second is: Was Raggha one of the persons responsible for the murder of Mangli.? The third is: Which of the two sentences, namely,

death or transportation for life, is the proper sentence in this case?

It has been proved by the evidence of Laltu and Jagan Nath that on the 5th of December Mangli came back to his house and informed his brother and relations that he had won the case against Raggha and that he was going the next day to deposit in Court the costs of execution. Laltu and Jagan Nath say that on the morning of the 6th Mangli left his house with a certain number of articles and with some money, for the purpose of getting the decree, he had obtained against Raggha, executed. We have the evidence of Ram Narain to prove that Mangli was seen on the way from his house to the Court and it has been proved beyond all reasonable doubt that Mangli was in Court, that he indentified one Mullu in the Court of the Munsif where Mullu had a case which was compromised. It is further proved by the two clerks of the pleader Jogeshar Prasad that Mangli deposited Rs. 24 for executing the decree which he had obtained against Raggha forthwith. The next we hear of Mangli is from Mullu, who says that he left the Court at about 4 o'clock and he was followed by Mangli. They came together to Behta and there they parted, Mangli going in the direction of his house in Balipurwa and Mullu to his house. That was when Mangli was last seen. It is not suggested anywhere by the defence that there was any object or reason why Mangli should have disappeared without leaving any trace. It is not suggested that there were wild animals prowling about the jungles, which could have eaten up Mangli. Lallu went and made a report at the police station on the night of the 8th of December where he not only described the enmity he had with Raggha but also gave details of the search he had made, the information which he had got from Mullu, and described the clothes that Mangli had on him. It is not controverted that in consequence of the report the head constable proceeded to a spot near a *nala* which was between Behta and Balipurwa, and which Mangli would have had to cross if he was going to Balipurwa where his home was. The head constable proves that several patches of blood-stained mud were found there. The blood-stains have been proved to contain human blood. We hear nothing further until the 15th of December when the Sub-Inspector came on the scene. The Sub-Inspector tells us that he made enquiries in the village, took the statement of Mullu, and then took the persons mentioned in the first report as suspects to the scene of occurrence, where the blood patches were found, and on account of the suspicious conduct of two of the persons, Raggha and Lallu, he arrested them. Raggha made some statements to the Sub Inspector, and in consequence of that statement the Sub-Inspector, Raggha and some witnesses proceeded to a place 1¼ miles from the *nala*, where the blood had been found, and there in the presence of witnesses Raggha said he would show the place where the body and the clothes had been thrown. Raggha showed the place were the body had been put down, the place where earth had been taken from, the position in the river where the body had been thrown. He said the earth had been taken in order that it might be put in the clothes to prevent the body from floating. There was a hole showing where the earth had been taken from. In the presence of Lalman, the *mukha*, Raggha showed the pool in which the body had been thrown, and certain articles which have been put up as exhibits in this case, were found in the pool, and it has been proved beyond doubt that those articles belonged to Mangli and that Mangli had them on the morning of the murder.

I am of opinion that this is sufficient to prove that Mangli is dead.

The next point for consideration is whether Raggha was one of those who were responsible for the death of Mangli. I have no doubt in my mind that Raggha was one of those persons who were responsible for the death of Mangli. It is proved beyond all doubt that early in July Raggha came back to this village and forcibly took possession of 20 bighas of land, which has been found by a Court of competent jurisdiction to be that of Mangli, but which Raggha still persists in calling "my occupancy holding" in the petition which he has submitted to this Court. It is not shown that Raggha had ample means, or funds, and that these 20 bighas meant nothing to him. It is unusual to find that a villager would execute his decree the day after he obtained it, and in this case we find that Mangli intended and did intend to execute

his decree forthwith. Mangli had not taken the law into his own hands in trying to forcibly eject Raggha, a state of things which we ordinarily find when a man takes forcible possession of another's land. So that Raggha had not only a motive, but a very good motive for getting rid of Mangli. He was exasperated at this all and it is not at all surprising to me that he would conspire with others to kill Mangli. The only evidence which conclusively shows the guilt of Raggha is his own confession. I must state that the confession as recorded by Chakravarty, was recorded with much greater care than is ordinarily done. It is proved beyond all doubt that Raggha was sent back from the Magistrate's Court to the Jail, and not in the custody of the Sub Inspector who was investigating the case, on the day when he was first put up before the Magistrate for his confession to be recorded. Raggha was brought back at 12 o'clock from the Jail, and I cannot lose sight of the fact that the policeman, who must have been in charge of Raggha, could not have been the policeman of the police station concerned with the investigation of the case. Although various pleas have been urged by Mr. Laghate on behalf of the accused to show that this confession must be held to have been brought about by some inducement, I cannot find anything from the record to suggest any act by any of the policemen concerned which I would call suspicious, and unless and until I am of opionion that something suspicious had been done, I cannot wipe out the confession which I believe, taken with other evidence, shows to me that Raggha was one of the persons concerned in the murder of Mangli, and that he was one of the chief offenders in the case. Nothing has been shown to suggest that anybody else in the village had a greater motive than Raggha to kill Mangli. Nothing has been shown why I should assume that Raggha had taken a minor part in the killing when he had the greatest motive for the killing.

The last point is what is a suitable sentence to pass under the circumstances of this case. If I had the slightest doubt as to the guilt of Raggha, I would certainly give him the benefit of it, and direct him to be acquitted. I have none. There are no circumstances in this case, such as an act of Mangli which had been of great annoyance to Raggha, or an act of Mangli although legal yet morally wrong, or such provocation by Mangli which might not come under the definition of grave and sudden provocation but provocation as understood in the ordinary language, so that I would give Raggha a lesser sentence. I have no hesitation in agreeing to confirm the sentence of death passed upon Raggha.

Mukerji, J.—I have the misfortune to differ slightly from the judgments that have just been delivered in the case,

The facts of the case have already been given and I will state only so much as may have a direct bearing on what I am going to say.

About 11 to 12 years ago one Murli died and there was a dispute about the property held by him (some lands) between the appellant's father Jhunni and the deceased Mangli and his brothers. There was a litigation in which the appellant's father lost. The father and son then left the village and went to live in the adjoining district of Cawnpore. In July 1924, apparently on the invitation of some of the people of the village, Bali ka purwa, in which Murli lived, the appellant came there and tried to recover by force possession over the property which had been lost in suit by his father. Mangli, the deceased, lodged a complaint before the police and filed a civil suit. The suit succeeded on the 5th of December, 1924. On the 3rd of December 1924 the appellant knew that he was going to lose the case although the judgment had not yet been delivered. On the morning of the 6th of December the deceased went to the place where the Munsiff, was situated *viz.*, Sarai Miran, with a view to hand over the costs of execution to his counsel. It appears, on the confession of the appellant, that he also followed Mangli apparently with a view to see what he was doing. It has been definitely established that Mangli went back homewards towards the evening and arrived as far as the village of Behta. There he took a little rest at the house of the witness Ram Narain and then started for home. There is no evidence, apart from confession of the appellant, as to what happened to Mangli after that. The witness Mullu, who had seen the deceased at Sarai Miran on the 6th of December, asked casually the deceased's

brother Lalu where the deceased was. He was informed that the deceased had not come back. Mullu told Lalu that the two had left Behta together, each on his way home. This caused some anxiety in the minds of Lalu and his brothers, and a search was made. On the evening of Sunday, the 8th of December, some blood marks were found beside the foot-path that led from Behta to Bail-ka purwa and it was suspected that Mangli had been murdered. A report was accordingly lodged at the thana at 8 p. m. on the 8th of December. A head constable was in charge of the thana. He at once went to the spot and collected what blood marks were to be found on the spot. It appears that between the 9th and 14th of December nothing further was done. On the 15th of December the Sub-Inspector appeared on the scene (he was away between the 8th and the 14th December) and started investigation. In the first information report certain names had been mentioned and among them was prominently the name of the appellant. The Sub-Inspector collected the people who had been mentioned in the report and tried a sort of experiment in order to guess which of them, if any, took part in the murder. He thought that one Laltu and the appellant Raggha showed some sign of nervousness and he got them arrested. Then, says the Sub-Inspector, some information was furnished by the appellant and on foot of that information a deep place in the bed of the river Aisan was dragged and clothes and other articles, which were subsequently identified as the property of the deceased, were recovered. The appellant was sent, on the ground that he was inclined to make a statement, to the headquarters, and he arrived there on the 17th of December 1924. He was placed before a Magistrate who took the precaution of sending the appellant back into jail custody with the idea that he should think over the matter before he made any statement. The appellant was produced before the Magistrate on the 18th of December, and he made a long statement which has been accepted by my learned brothers and myself as substantially a correct statement of facts. The appellants stated the facts, including the litigation that had taken place between the appellant and the deceased and his brother. He mentioned certain persons who, he said, had taken part in the murder and added that he handed a dhoti which had blood stains to the Sub-Inspector.

It has been conceded that, apart from the confession of the appellant, there is not enough evidence to show that the appellant was concerned in the murder of Mangli. Apart from the confession, there is no evidence to establish conclusively that Mangli was in fact murdered. On the question of conviction I am quite satisfied that there is no clear reason to reject the confession of the appellant, he having failed to raise in my mind any doubt as to the genuineness of such confession. I hold with my Lord Chief Justice and my brother Banerji that the appellant was present at the time of murder, that he was one of the persons who had planned the murder and that he is guilty under S. 302 of the Indian Penal Code read at least with S. 114 of the same Code.

The point on which I have the misfortune to differ is the question of sentence. What I am going to say must not be taken as a rule laid down for all cases irrespective of the facts of the present case. Indeed it is always dangerous for a Judge to attempt to lay down a rule of law for the decision of a case, the facts of which are not before him, and I am not going to do anything like that. In the circumstances of the present case, in my opinion, sentence of transportation for life is the only suitable sentence and my reasons are these :

As already stated, the conviction of the appellant is mainly, though no tentirely, based on the confession of the appellant. A confession in a criminal case is another name for an admission in a civil case Both are dealt with in the Evidence Act and under S. 31 of that Act an admission is not conclusive. Indeed, so far as a confession goes, a special section has been enacted in the Act. It is S. 24. The language used will show that to reject a confession it is not necessary that there should be positive proof to establish that the confession has been obtained by use of threat, persuasion, etc. It has been held in many cases, the last case on the point may be quoted as *Emperor* v.

Panchkowri Dutt (1), that anything from a barest suspicion to positive evidence would be enough for a confession being discarded. The weight, therefore, that has to be attached to a confession, in the view of the Legislature, is small. Such is all the more the case where, as in this case, the confession was withdrawn at the earliest possible opportunity. The reason for the rule is not far to seek. It is difficult indeed to believe why a person accused of a guilt should confess at all without some undue inducement even if he be really guilty of the charge that has been brought against him. He does everything that lies in his power to conceal the crime he is going to commit. He takes all possible precaution to make the result of his action disappear and irrecoverable. Under the circumstances, it is difficult to believe why a man should confess at all unless he has some inducement. There are indeed some cases in which a man would be so very careless of his life and his determination so strong that he would after committing the crime, himself go to the authorities and give himself up and hand over the instrument of the crime. But such cases are rare. In the majority of cases a culprit tries his best to hide his crime and to escape punishment. In this particular case, it will be noticed, every attempt was made to do away with the dead body. The appellant did not appear before the Sub-Inspector till several days had elapsed between the murder and the appearance of the Sub-Inspector on the spot. Under the circumstances, the confession of the accused person is not a thing which is entirely normal. I must not be misunderstood, and I do not for a moment suggest that there is anything on the record which shows that the confession should be rejected in accordance with S. 24 of the Indian Evidence Act. If that had been the case, I would have acquitted the man entirely. But what I do mean to say is this that a confession in its normal state, is an entirely suspicious article. A retracted confession is worse. The language which is oft quoted of Mr. Justice Cave, in the case of *Queen* v. *Thompson* (2), will bear repetition. Mr. Justice Cave delivered himself as follows :

"I would add that for my part I always suspect these confessions which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory ; but when it is not clear and satisfactory the prisoner is not unfrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession, a desire which vanishes as soon as he appears in a Court of justice."

If this could be said of a country like England where the Police is by far more efficient than here in India, where the people are by far more literate than the people in India, what is to be said of a country like this? It is true that under the Evidence Act it is for the accused person to show by something that there are reasons to discredit his confession. But, is it possible for an accused person to be in a position, in majority of cases, to show anything like that? He is arrested and placed before a man in authority, usually a Sub Inspector of Police. Nobody, connected with the accused person, is allowed to approach the place where he is kept. Those, in whose presence the Sub-Inspector talks to him or deals with him, are persons who would not come forward to give evidence of the talk that took place between the accused person and the police officer or of the treatment meted out to him. What evidence, then, can be brought forward by the person in the position of an accused person, to prove that his confession is due to something which was told to him by the Sub-Inspector or to the treatment received by him. Few would accept his bare word of mouth. It is said that the fact that the accused person confesses before a Magistrate, after due warning, should be enough for the acceptance of the confession. I entirely agree and that is the law. But we cannot lose sight of the fact that, assuming that a prisoner had been induced to confess, he will not unlikely assure the Magistrate that his confession was voluntary, knowing that he will leave the Magistrate's presence

(1) 1925 Cal. 587=52 Cal. 67=29 C. W. N. 300=26 Cr. L. J. 782.
(2) (1893) 2 Q. B. D. 12=62 L. J. M. C. 93=5 R. 392=57 J. P. 312=17 Cox. C. C. 641 =69 L. T. 72=41 W. R. 525.

in the custody of the police and remain in their custody for many days to come. See remarks of Westropp, C. J. in *R. Kassinath Dinkar* (3). That being the position of a person confessing, I would not place more weight on a confession than it would reasonably bear. I may here point out that it was held by two learned Judges of the Bombay High Court that the use to be made of a confession is really a matter of prudence rather than of law. See *Queen-Empress* v. *Gharya* (4). It is this idea of prudence that dictates to me that, in this particular case, the sentence to be passed is to be lesser of the two sentences prescribed by the law.

I have already stated and I need not repeat that I am perfectly satisfied that the appellant took part in the plot and was present at the time of murder. I may further add that there is no reasonable doubt in my mind as to what I already stated. If there were any reasonable doubt the appellant would have been acquitted by me. But there are degrees of doubt and there is no harm in being cautious. On certain facts, a man may be quite prepared to risk a sum of Rs. 500 but when it comes to risking a sum of Rs. 5,000 he may very well be cautious and not act on them. If the sentence of death were the only sentence awardable under the law, I would have been obliged to pass that sentence on the appellant. But in this particular case, the factum of death of Mangli is proved by the retracted confession of the appellant alone and by no other substantial evidence. The fact that the clothes were recovered from the water does not necessarily prove that Mangli's dead body was consigned to the water. There are at least four cases in the books in which it has been held that the lighter sentence might be passed where the dead body of the person alleged to have died is not forthcoming or where the facts were not quite clear. One of these cases is to be found in *Queen* v. *Buddruddeen* (5). In the case quoted before, *viz.*, *Queen-Empress* v. *Gharya* (4) the Judges, Jardine and Ranade, accepted an appeal from an acquittal but passed the sentence of transportation and one of the grounds given was that all the facts of the case were not clear. Again, in a case the full report of which is unfortunately not available, but which will be found mentioned at pp. 660 and 661 of Ratan Lal's Law of Crimes, 8th edition, two learned Judges of the Bombay High Court convicted the accused person before them of the offence of attempted murder, where the body of a child of two was thrown into a heavy river. Again, in this very Court, so late as last year, two learned Judges, in *Bandhu* v. *Emperor* (6), held that where the dead body was not recovered, the crime was one of attempted murder only. The circumstances of this last mentioned case were briefly these; A man was beaten till he became unconcious. He was dragged along the ground and taken towards the river The man was never again seen alive. The probabilties were that the body of the man had been thrown into the river. As I understand the judgment, the dead body not being forthcoming, and therefore, the factum of death not being absolutely certain, the learned Judges thought that a sentence of transportation for life, under the charge of attempted murder, would be the safer sentence to pass. It will be perhaps said that they were more logical than I am. But I would further explain the reason of the view that I take.

I have already mentioned that the amount of doubt that arises in the mind of a man may be of different degrees. It is only when there is a reasonable doubt about the guilt of an accused person that he is entitled to an acquittal. Doubts will always arise in human mind, but all doubts are not entitled to respect. There may be, as in this case, in my mind, a doubt which is less than a reasonable doubt, but which still is a doubt that is entitled to respect and which is entitled to ask me to be cautious in passing the sentence. I need not quote again the judgment of the Bombay High Court where it was said that the amount of weight to be attached to a confession is really a matter of prudence than of law.

Under S. 302 of the Indian Penal Code two sentences are provided, for a case of murder, *viz.*, the capital sentence and that of transportation for life. S. 367 of the Criminal Procedure Code enacts that where in a case of murder the Court does not pass a sentence of death it is for it to explain the reasons. I think it is a per-

(3) 8 Bom. H. C. 126.
(4) [1895] 19 Bom. 728.
(5) 11 W. R. Cr. 20.
(6) 1924 All. 664=22 A. L. J. 340=5 L. R. A. Cr. 59=25 Cr. L. J. 900.

fectly legitimate reason to say that where, as in a case like this, the dead body does not appear and the factum of death is established by nothing but a retracted confession, there is a suitable case where a sentence of transportation may be awarded instead of the heavier sentence. If, in acting like this, a Judge errs, he errs on the side of prudence alone.

For reasons given above, I would convict the appellant under S. 302 of the Indian Penal Code read with S. 114 of the same Code and sentence him to transportation for life.

By the Court.—The order of the Court is that the conviction by the Sessions Judge be confirmed and sentence of death be carried out in accordance with law.

Conviction confirmed.

★★ 1925 ALLAHABAD 637
Full Bench

LINDSAY, SULAIMAN AND DANIELS, JJ.

Fateh Singh and others—Defendants—Appellants.

v.

Gopal Narain Singh and others—Plaintiffs and Defendants—Respondents.

First Appeal No. 158 of 1924, Decided on 6th July 1925, from the order of the D. J., Benares, D/- 9th July 1924.

★★ *Specific Relief Act, S. 42—Civil & Revenue Courts — Suit for declaration in civil Court—Object of declaration being to affect the decision of Revenue Court in a pending suit—Declaration should be refused—Jurisdiction.*

Where a suit is filed before a civil Court for a declaration the effect of which, if granted, would be to affect the decision of a revenue Court in a pending suit within the exclusive jurisdiction of that Court the proper course for the civil Court to adopt is to refuse the declaration asked for on the ground that such relief, if granted, would be nugatory. [P 639, C 2]

M. L. Agarwala—for Appellants.

K. Verma—for Respondents.

Referring Order.—The question for decision in this case is briefly this:—

While an ejectment suit is pending in the revenue Court in which the main issue is whether the defendant is or is not a tenant of the plaintiff, will the civil Court entertain a suit the object of which is to compel the revenue Court to hold that the defendant is not a tenant?

The plaintiffs respondents Gopal Narain Singh and Sri Narain Singh are mortgagees from certain occupancy tenants under a mortgage executed in 1882.

The mortgage was a burdensome one as the interest exceeded the profits of the holding.

The tenants relinquished their holding in favour of the zamindars on the 23rd of March 1923.

On 1st October 1923 the zamindars B. Fateh Singh and others, brought a suit in the revenue Court for the ejectment of the respondents Gopal Narain and Sri Narain as non-occupancy tenants. Their position was that as the occupancy tenants had relinquished the tenancy, the occupancy tenure had come to an end and the mortgagees were liable to ejectment either under S. 31 of the Tenancy Act or as tenants-at-will. The mortgagees contested the suit, and while it was pending they instituted on 17th December 1923 the present suit in the civil Court against the zamindars for a declaration that the two deeds of relinquishment executed by the occupancy tenants are of no effect against them, and for an injunction restraining the zamindars from dispossessing them.

The Subordinate Judge in whose Court the suit was instituted issued an injunction to the revenue Courts to prevent their going on with the ejectment suit. It seems at least doubtful whether he was competent to do so, but this is a point we need not consider. On 16th April 1924 he dismissed the present suit as barred by S. 167 of the Tenancy Act. On 30th June 1924 the revenue Court decreed the ejectment of the present plaintiffs, and on the morning of 9th July 1924 the zamindars, who are appellants before us, obtained actual possession. In the meantime the plaintiffs had appealed to the District Judge against the decision of the Subordinate Judge. On the very day on which the zamindars had got possession, *viz* 9th July 1924, the District Judge allowed the appeal, and remanded the suit for decision on the merits. Against that order the present appeal is preferred.

We are now informed by means of an affidavit that an appeal has been preferred to the Commissioner against the decision in the ejectment suit, and is still pending.

Two principles are clearly established by the decisions of this Court. The first is that a suit by a mortgagee of an occu-

pancy holding for a declaration of the invalidity against him of a relinquishment executed by the occupancy tenant is entertainable by a civil Court. This is settled by the Full Bench decision in *Brij Kumar Lal* v. *Sheo Kumar Misra* (1).

The second is that the civil Court will not entertain a suit the object of which is to nullify a decree of the revenue Court in a matter within the revenue Court's exclusive jurisdiction. That is settled by the Full Bench decision in *Mullo* v. *Ram Lal* (2). The same principles have been followed in many subsequent cases of which *Jagannath* v. *Balwant Singh* (3) and *Kundan Lal* v. *Parshadi* (4) are instances.

The difficulty arises in the intermediate case in which the civil suit is instituted while the suit in the revenue Court is still pending Here there is a real danger of a conflict of jurisdiction. Are both Courts to go on trying the same question independently, and is the result to depend on which Court comes to a decision first ? Or is each Court to ignore the other altogether ? Where the revenue Court is seised of a case which it has exclusive jurisdiction to try it is, we think, beyond the power of the civil Court to issue an injunction prohibiting it from proceeding with the case. We suggest that the best way out of the difficulty would be to lay down a rule of practice, on the principle of S. 10 of the Civil Procedure Code, though that Section may not in terms apply. that the Court in which proceedings are last instituted should stay the suit before it until the decision of other Court. We think that in all probability if such a rule were laid down the Board of Revenue would be prepared to concur in it. They equally desire to prevent any conflict of jurisdiction arising.

That the decisions are not uniform and that there is a need of a Full Bench decision to settle the question may easily be seen by reference to a few cases. Dr. Agarwala for the appellants has been able to show us two cases almost exactly parallel to the present case, in which the civil Court refused to entertain a suit of this nature on the ground that any decree the civil Court might pass would be wholly nugatory. They are (1) *Ram Devi Kuari* v. *Bindesri Upadhya* (5) and (2) *Shiva Prakash* v. *Karna* (6).

In the first of these cases the civil suit was actually filed first, though the suit in the revenue Court was first decided. On the other hand, in *Jaigopal Narain Singh* v. *Uman Dat* (7) another case, almost precisely parallel, the decision was the other way, as the matter was still held to be *sub judice* in the revenue Court because a revision was pending before the Board of Revenue. It has been argued that the question was settled by implication in the Full Bench case in 37 *All.* 444, because there also a revenue suit had been filed and was pending. The Full Bench, however, did not touch this question in their judgment. This therefore appears to be a case for the application of the principle that a case is only authority for what it decides and not for every thing that might appear to be implied in it It would not be safe to extend the scope of the decision beyond the point actually decided. Similarly in the very recent case of *Ammar* v. *Govind* (8) the Letters Patent Bench avoided the question of the effect of an ejectment suit having been previously filed in the revenue Court by suggesting that the revenue Court's decision would not necessarily conclude the question raised in the civil Court, *i, e.*, the revenue Court might hold that the defendant before it was not a sub-tenant, and still he might not be entitled to a declaration that he was a co-tenant. It was, however, quite certain that he could not be both, and a reference to the record would show that the actual dispute between the parties was as to which of the two characters he actually filled

We direct the record to be laid before the Chief Justice with a view to reference to a Full a Bench of the question :

What course is the civil Court to adopt when a suit is filed before it the object of which is to affect the decision of the revenue Court in a pending suit within the exclusive jurisdiction of that Court.

We put forward for the consideration of the Full Bench the suggestion that the most satisfactory course would be to apply the principle of Section 10 of the

(1) [1915] 7 All. 444=29 I. C. 255=13 A.L.J. 640 (F. B.)
(2) [1921] 43 All. 191=58 I. C. 772=18 A. L. J. 1030.
(3) 1922 All. 272=44 All. 692=20 A.L.J. 570.
(4) 1924 All. 744=46 All. 570=22 A.L.J. 465.
(5) [1911] 8 A. L. J. 940=11 I. C. 287.
(6) [1912] 35 All. 464=21 I.C. 2=11 A.L.J. 671.
(7) [1911] 8 A. L. J. 695=10 I. C. 573.
(8) 1925 All. 465=23 A. L. J. 449.

Code of Civil Procedure and direct the civil Court to stay proceedings till the ejectment or other suit in the revenue Court is decided. This is the only course which appears to us to prevent a conflict of jurisdiction arising. If once the revenue Court has finally ejected the defendant before it, it cannot be compelled to restore him because he has got a declaration of his right from the civil Court. Indeed in some of the cases in which the civil Courts have granted declarations the Judges who decided them have suggested that the declaration they were granting would be of no use to the party to whom they granted it. If the civil suit was first instituted, then, on this view, it would equally be the duty of the revenue Court to hold its hand till the civil suit was decided. Upon the Reference coming up before the Full Bench the following judgments were delivered :—

Lindsay, J.—This case has been referred to a Full Bench. There is no need to set out the facts which are narrated in full in the referring order. The immediate matter for decision is set out at page 7 of the referring order as follows :—

"What course is the civil Court to adopt when a suit is filed before it the object of which is to affect the decision of the revenue Court in a pending suit within the exclusive jurisdiction of that Court ?"

Without going into any discussion of the numerous cases which have been cited before us it is prefectly plain that all the trouble which has arisen in matters of this kind is due to different interpretations of the act of surrender by an occupancy tenant who has made a mortgage of his occupancy holding.

Since the case reported as *Khiali Ram* v. *Nathu Lal* (9) was decided it has been uniformly held in this Court that a mortgage of an occupancy holding made by an occupancy tenant prior to the enactment of the present Agra Tenancy Act, cannot be avoided by the occupancy tenant making a surrender of his occupancy rights to the zamindar.

On the other hand, the Board of Revenue have taken a different view and have held that such a surrender operates to put an end to the relation of mortgagor and mortgagee. It is this conflict of decisions which results in the difficulties which are illustrated in the case which is now before us.

If the fact is that the Board of Revenue refuse to accept the view of the law which has been taken by this Court it seems useless to insist that a civil Court, which necessarily follows the law as laid down in this Court, must give a declaratory decree in favour of a mortgagee who comes to the civil Court in order to obtain a declaration that surrender made by his mortgagor is void and of no effect. When all is said and done, the granting of relief by way of declaration, is a matter within the discretion of the civil Court, and if it is made to appear that the declaration, when granted to the plaintiff, will be of no avail to him that seems to me to be a very good reason for holding that in such a case the Court should exercise its discretion against the plaintiff and decline to grant any relief. This is not to say that a suit for a declaration of the nature just mentioned is not entertainable by a civil Court. That I think would be going too far. But it is clear that any civil Court is entitled, in the exercise of its discretion, to refuse a declaration of this kind if it is to turn out to be purely nugatory. Here, in the case before us, if the civil Court decides that the mortgage is still subsisting and that a surrender made by the occupancy tenant to his landlord has not in any way affected the relation of mortgagor and mortgagee, all that can happen is that the mortgagee may go to the revenue Court and seek to use the decree of the civil Court as a weapon of defence. If the revenue Court follows, as it is bound to follow, the decision of its own superior Court, that weapon is of no avail whatever to him in the revenue Court. I am of opinion, therefore, that the course which the civil Court ought to adopt in a case of this kind is to refuse the declaratory relief asked for by the plaintiff on the ground that such relief, if granted, would be nugatory. I would, therefore, answer the question which has been propounded in this sense.

Sulaiman, J.—I concur in the proposed answer. Where it is clear to the civil Court that its declaratory decree would be futile the simple course would be to refuse to exercise its discretion for granting a declaratory relief. In fact I myself acted on that very ground in the case of *Ganga Chamar* v. *Bindesari Rai* (10). In that case I declined to say that

(9) [1893] 15 All. 219=1893 A.W.N. 125 (F. B.)

(10) 1925 All 635=23 A. L. J. 529.

the civil suit was barred by S. 167 of the Agra Tenancy Act or by any rule of limitation, but held that inasmuch as the revenue Court was bound to proceed under S. 199 (2) of the Act, the civil Court had discretion to refuse the declaration. In cases where the revenue Court has already decided the dispute, the matter is concluded in view of the pronouncement of the Full Bench in the case of *Mullo* v. *Ram Lal* (2). Where, however, a case previously instituted in a revenue Court is still pending there, I would think that the more appropriate procedure would be to stay the civil suit till the matter is decided by the revenue Court and then to accept its decision. This procedure will obviate the possibility of the revenue Court litigation proving infructuous by reason of a dismissal for default, withdrawal or otherwise. In the present case however, the matter has already been decided by the revenue Court of first instance, and this is therefore a fit case in which the declaration should be refused.

Daniels, J.—I concur in the answer proposed and in the judgment of Mr. Justice Lindsay.

By the Court:—The case is returned to the Bench for disposal in accordance with the answer to the reference.

[When the case came up before the Bench of two Judges after the reference to the Full Bench the following judgment was delivered:—]

In view of the opinion expressed by the Full Bench we allow this appeal, and setting aside the order of the lower appellate Court restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

1925 ALLAHABAD 640

DANIELS, J.

Ravi Chander Sahai and others—Applicants.

v.

Sunder Singh—Opposite Party.

Criminal Mis. No. 213 of 1924, Decided on 5th December, 1924, from the order of the Mag. First Class, Hamirpur.

Criminal Trial—High Court—Same relief obtainable from Subordinate Court—High Court will not interfere.—Cr. P. C., S. 528 (2)

The High Court will not ordinarily entertain an application for a relief which could equally be granted by a Subordinate Court until recourse has first been had to the Court. [P 640 C 2]

Baleshwari Prasad—for Applicants.

Opposite Party not represented.

Judgment.—There is one grave objection to this application which is for the transfer of a case pending in the Court of the Magistrate, First Class, of Hamirpur district to the Court of any other Magistrate in that District. It offends against the rule that this Court will not ordinarily entertain an application for a relief which could equally well be granted by a Subordinate Court until recourse has first been had to that Court. This rule has been repeatedly laid down with reference to applications for revision and it was laid down with special reference to applications for transfer by the late Sir George Knox at the conclusion of his judgment in *Muneshar* v. *Raghubar* (1). In this case the transfer applied for could be granted by the District Magistrate under S. 528 (2) of the Code of Criminal Procedure. Admittedly no application has so far been made to the Magistrate. If this fact had been brought to the notice of the Court at the time when the application was filed I have no doubt that it would have been rejected at the outset.

As notices have now gone and the matter has been argued it is perhaps unnecessary to do now what I should ordinarily do in such a case, namely to reject the application until such time as the applicant had first applied to the District Magistrate. The reasons given in support of the application are not particularly strong especially in view of the explanation which the Magistrate has submitted, but as only two witnesses have been examined in the case, as the application is not opposed, and as the Magistrate concerned says that he has no objection whatever to the case being transferred, I direct that it be transferred to any other Magistrate to whom the District Magistrate may make it over.

Transfer ordered.

---

(1) [1913] 11 A.L.J. 741=21 I.C. 155=14 Cr. L. J. 555.

★ 1925 ALLAHABAD 641

Full Bench

MEARS, C.J., LINDSAY AND MUKERJI, JJ.

A Vakil—In the matter of.

Mis. Case No. 116 of 1925, Decided on 6th April, 1925.

★ *Legal Practitioner—Unprofessional conduct—Groundless and insulting charges against witness made in pleadings—Insulting questions to witness asked without any ground for the implied allegations—Conduct is unprofessional.*

While drafting pleadings a counsel is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge.

Counsel should not import personal ill-will into pleadings, and especially should refrain from making charges against witnesses for which there is no conceivable ground. It may become the positive duty of counsel to tear a man's character into pieces if his character is in issue, but only when the fullest and clearest material exists. For instance, where questions to credit are material, questions, however damaging, may be put and must be answered, but counsel must always safe-guard himself by being able to show that he had reasonable ground for believing in the charges which he in his cross-examination makes against a witness. No questions attacking a witness's honour should be put, unless and until counsel by inquiry has satisfied himself that the damaging fact is well founded, and this he ought to do before he comes into Court.

A counsel drafted a written statement containing defamatory allegations against a Mukhtar knowing fully well that the allegations had no foundation in fact. Subsequently in the cross-examination of that Mukhtar the counsel asked him if he had not a notice served on him under Criminal P. C., S. 476. The counsel had no ground for making the allegation.

Held: that he was guilty of professional misconduct. [P. 641, C. 2, P. 642, C. 1 & 2.]

G. W. Dillon—for the Crown.

Iqbal Ahmad and *Uma Shankar Bajpai*—for Opposite Party.

Mears, C. J.—Mr. Iqbal Ahmad: There is no doubt that you and the counsel who have represented the respondent have acted wisely in the course which has been followed. We wish this case to be clearly understood and not to be twisted into something quite different from the reality. It is not a case in which we have asked the respondent to come forward and to justify a pleading which he had a perfect right to make; it is a case of quite a different nature. A client who consults a counsel and who requires a plaint or written statement to be drafted instructs the counsel as to the facts of the desired document. It unfortunately does not always happen that those facts are true, but from the counsel's point of view that is not a material matter, and indeed, if one looks at pleadings in cases generally, it is obvious that a plaint and the written statement cannot both be true because an issue or issues arise out of the denials of the truth of the averments on one side or the other and that enables the case to be fought upon clear lines. A counsel is entitled to accept the instructions of the client subject to this, that, as a matter of prudence and for one's own reputation, it is not well to associate oneself with reckless charges of fraud and criminality or to indulge in abuse; and counsel should explain to clients that these charges, if unproved, gravely injure the case, and prejudice the Judge. Counsel is not supposed to go hunting here, there and everywhere to test by extraneous circumstances the veracity of his client. It cannot be done, nor is it the practice to do it. Counsel have to depend upon the statement that the client makes, the penalty being that, if the client is not telling the truth, he may probably lose the case. In those circumstances the rule is that the client is entitled to have the particular document drafted according to the instructions given. But that is not the case here in the slightest degree. This case is, as set out in the order calling upon the respondent to show cause, a charge that he maliciously drafted the third written statement at a time when he had the fullest and most abundant proof, as it happened, that those statements ought not to be repeated, and had to his knowledge no foundation in fact. It is part of the Crown's case that the respondent had some cause for feeling a grievance with Mr. Indar Prasad, and that he sought this method, under the protection of what he supposed to be a privileged document, for maliciously taking the opportunity of insulting and defaming Mr. Indar Prasad and alleging criminal acts against him. To our minds the written statement, although there has been a long discussion about it, except for the passage about the Fingerprint Bureau which may well be regarded as a dishonest statement, is not so important as the question put to

Mr. Indar Prasad by the respondent as to S. 476. We think, however, that there is a good deal to be said on the ground of the written statement being a malicious document.

Mr. Indar Prasad went into the box for the third time in this series of cases, and for the fifth time on the question of promissory notes of husband or wife, and on the fifth occasion when he was in the box (he having been successful in all the four previous cases) the respondent, knowing perfectly well that there was not the slightest shadow of foundation for the allegation, said to this Mukhtar in open Court: "Did you not have a notice served on you under S. 476 in Mt. Chillo's case?" Mr. Indar Prasad quite truthfully said, "No." That was a wicked thing to ask of a man of the same type of profession, in his own native town, a man who was probably finding it quite hard enough to make a livelihood, when Raj Bahadur knew full well that no notice had been served because he himself had been the counsel for Mt. Chillo in the execution proceedings and in the appeal out of which the notice was suggested to have been served.

That was an unprovoked, unfounded attack, an attack that no liberty of counsel justifies, and one which has not been attempted to be justified. That is the view that we have taken of this matter, and on that view our decision would have been given. When, however, a respondent comes in, even as late in the day as this respondent, and tells us that the apology which his counsel has read is a sincere apology (and that we hope includes a determination not to do this sort of thing again), it behoves us to take various matters into consideration. One matter undoubtedly that has to be borne in mind is the very unfortunate circumstance that nine pleadings out of ten contain reckless charges and terms of abuse which have nothing to do with the case. One must take that regrettable practice into account.

We have considered the whole matter. We certainly hope that it will be a lesson, not only to the respondent, but to everybody else, not to import personal ill-will into pleadings, and especially to refrain from making charges to witnesses for which there is no conceivable ground. It may become the positive duty of counsel to tear a man's character into pieces if his character is in issue, but only when the fullest and clearest material exists. It would have been the respondent's positive duty to have put the question about S. 476 to Mr. Indar Prasad if the fact was true and he had proof of it; and he was entitled to ask Indar Prasad any further questions that would have destroyed Indar Prasad's credit and shown that Indar Prasad was a man whose word could not be believed provided always that he had good grounds for his questions. He had, however, no grounds at all for attacking the entire honesty of Mr. Indar Prasad. No counsel is justified, for instance, in opening the Indian Penal Code and asking without the least information to support it: "Were you not charged with bigamy? (No). Were you not charged with murder? (No); and so on. Where questions to credit are material, questions, however damaging, may be put and must be answered, but counsel must always safe-guard himself by being able to show that he had reasonable ground for believing in the charges which he in his cross-examination makes against a witness. No questions attacking a witness' honour should be put, unless and until counsel by inquiry has satisfied himself that the damaging fact is well founded, and this he ought to do before he comes into Court. We have said enough, and we are content to accept the apology, and we trust, if there has been bad feeling between the parties in the past, that there will be no further bad feeling and no further manifestations of enmity by or between the principal parties and their relatives. There will, therefore, be no order on this rule except that it will be recorded that the respondent made the apology through his counsel, and has to pay the costs.

The office will communicate with the respondent with regard to the payment of the fee of the Government Advocate and the costs of the attendance of Mr. Indar Prasad. The respondent undertakes, through his counsel, to pay whatever sum the office may fix within seven days from the receipt of the notice.

Order accordingly.

1925 ALLAHABAD 643

MEARS, C. J. AND PIGGOTT, J.

Rajai Singh and others — Appellants.

v.

Randhir Singh and others — Respondents.

Letters Patent Appeal No. 77 of 1924, Decided on 16th February 1925, from a judgment of Daniels, J.

T. P. Act, S. 60—Agreement practically making redemption impossible is clog on equity of redemption—Right of redemption postponed for 96 years—Stipulation for payment of interest along with the principal sum only—Conditions were held to be "clog."

In considering whether a condition in a mortgage amounts to a clog on the equity of redemption, each case must be examined individually on its own merits. The whole circumstances of the case must be looked at and it must be seen whether the agreement was drafted with the intention that redemption of the property should be practically frustrated, *i. e.*, made so difficult and so hedged about that there was no human likelihood of its ever being redeemed.

A property was mortgaged for about 95 years. There was a stipulation that the mortgagor should not seek for redemption before the expiry of the period fixed. There was also a stipulation for payment of interest not periodically but only along with the principal sum at the time of redemption. The principal sum together with the interest that would be payble to the mortgagee at the time of redemption was more than three times the value of the property at the time it was mortgaged.

Held: that it would be inequitable to uphold the transaction in its literal terms and that the mortgagor should be allowed to redeem the property before the expiry of the term stipulated, on payment of the principal money together with the interest due up to the date of redemption.

[P. 644, C. 2]

Peary Lal Banerji and *Gadadhar Prasaud*—for Appellants.

N. C. Vaish—for Respondents.

Mears, C. J.—On the 20th of April 1897, Randhir Singh, being then an occupancy-tenant of a holding, mortgaged it usufructuarily by two documents of that date receiving Rs. 200, or its equivalent in value, in respect of one mortgage and Rs. 500 in respect of the other. The mortgage for Rs. 200 was not to be redeemable for 95 years, the mortgage for Rs. 500 was not to be redeemable for 96 years, and to that there was added a stipulation that, inasmuch as the usufructuary return was not sufficient to give the proper amount of interest on the outstanding money there should, at the expiration of the 96 years, be paid with the principal sum, interest at the rate of four annas per cent. per mensem. A similar provision is to be found in the second deed. The figures of liability for interest at the end of 95 and 96 years which have been given to us are not disputed and amount to Rs. 1,940 and Rs. 485. The position therefore on the 20th of April, 1897, was that the mortgagor bound himself not to seek redemption for periods of 95 and 96 years and further to be prepared at that time to provide sums respectively of Rs. 1,940 and Rs. 485 and Rs. 500 and Rs. 200 as well. Randhir Singh brought a suit for redemption, and to that suit it was objected that the transaction was really a sale, and inasmuch as an occupancy tenant was forbidden by law to sell his holding, the parties had designedly cloaked the transaction in this mortgage form. Randhir Singh took the point that the documents were really mortgages and that he was entitled to redeem them disregarding the provisions as regards the 95 years and the 96 years. He seemed also to be of opinion that he could disregard the provision as regards the accumulation of interest, because, we are told, that he tendered the sum of Rs. 200 and the sum of Rs. 500 before commencing the action. We have been shown, we believe, all the authorities bearing on this matter and broadly they may be taken as falling under two heads. It appears that there is a consensus of opinion amongst all the Courts in India that, if a period is fixed prior to the expiry of which redemption cannot be granted and that stipulation is assented to, redemption cannot be granted before that period has in fact expired, and the cases which have been cited to us were cases in which very long periods of years have been fixed. In one case a period of 150 years was fixed. Then there is another view of the law exemplified by the case of *Sarbdawan Singh* v. *Bijai Singh* (1). In that case there was a considerable period fixed, namely, 40 years. There was also an extraordinary provision, namely, that, unless the mortgage money was tendered on a particular day, the mortgage would be irredeemable for a further period of 40 years. There was also an unjust and illegal stipulation that the mortgage should not be redeemed with borrowed money. These being the main facts, this

(1) [1914] 36 All. 551=24 I. C. 705=12 A. L. J. 927.

being a person who was entitled to a right of pre-emption. As regards this argument it is sufficient to say that S. 14 does not make it obligatory on the vendor to give a notice to a person who has a right of pre-emption.

Reference is also made to S. 15 which deals with the extinction of the right of pre-emption of any person to whom a notice has been given under S. 14. It is argued before us that when a notice is issued under S. 14 the person who receives the notice is allowed a month to make up his mind as to whether he will or will not take the property, and so it is said that if this period is given to a person with a right of pre-emption in order to determine whether he will purchase the property, similarly a right should be given to a person in the position of the present plaintiff to whom no registered notice was given under S. 14. We cannot agree with this contention either. S. 15, as we have said, merely lays down that when a notice has been issued to any person under S. 14 his right of pre-emption is extingushed unless he communicates his intention to purchase the property within one month.

We think the learned Judge of the Court below was right in saying that it is not compulsory for a vendor to give a notice under S. 14. He may, by word of mouth or in any other way, inform a person having a right of pre-emption of his intention to sell. If, as is found in the present case, the person to whom that communication is made states there and then that he refuses to purchase the property, then we think he is disqualified from maintaining a suit for pre-emption. There is no need to refer to any special procedure laid down in Chapter III of the Agra Pre-emption Act. As the learned Judge of the Court below observes the case is really a case of estoppel under to S. 115 of the Evidence Act. The person whom a notice has been given having intimated his refusal and the sale having been made after that refusal cannot be allowed to turn round and seek to enforce his right of pre-emption through the Court. The doctrine of estoppel applies to all sorts of cases including pre-emption cases and we think it was properly applied in the Court below. We uphold the judgment of the Court below and dismiss the appeal under O. 41, R. 11.

Appeal dismissed.

★ 1925 ALLAHABAD 646

LINDSAY, J.

Jaideo Prasad and others—Plaintiffs—Appellants.

v.

Ghasi—Defendant—Respondent.

Second Appeal No. 173 of 1925, Decided on 19th February 1925, against the decree of the Sub-J., Moradabad, D/-15th October 1924.

★ *Limitation Act, Art.* 182—*Payment of process-fee for attachment does not extend limitation.*

The payment of process-fees for the issue of attachment in execution of a decree is neither an application for execution nor an application to take a step-in-aid of execution within the meaning of Art. 182 (5). 22 *All.* 358 and 30 *All.* 179 *Foll.* [P 647 C 1]

Durga Prasad—for Appellants.

Judgment.—On the whole, after hearing the learned Counsel in this case, I have come to the conclusion that the decision of the lower appellate Court is correct.

The question was a question of limitation. It seems that the decree-holder obtained a decree for possession of certain lands and also a decree for costs. On the 3rd of January 1921 he sought out execution of this decree by making an application (1) for delivery of possession and (2) for attachment of certain property for the realization of his costs. On the 18th of January 1921 the decree-holder got delivery of possession by execution of a *dakhalnama*. On the 22nd January 1921 he was ordered to pay into Court the necessary process-fees for attachment and on that date he paid in a sum of Rs. 3-12.

It was reported after this that no property of the judgment-debtor was available for attachment and so the application was infructuous. On the 16th January 1924 the decree-holder again applied for attachment of property in order to satisfy his decree for costs and he was met with the plea of limitation.

The last application for execution had been made undoubtedly on the 3rd of January 1921, and the application of the 16th January 1924 was therefore made more than three years afterwards. *Prima facie*, therefore, the application was barred.

It was contended, however, that the payment of the process-fee on the 22nd of January 1921 saved limitation. I do not

think that argument can be maintained. The ruling in *Thakur Ram* v. *Katwaru Ram* (1) seems to me to be clear authority against it, and there is also the other ruling of a Bench of this Court in *Sheo Prasad* v. *Inder Bahadur Singh* (2).

It seems to me that the only previous application which was made for execution was the application of the 3rd of January 1921 and I cannot treat the payment of process-fee on the 22nd of January 1921 as another and distinct application for execution or even as an application to take some step-in-aid of execution. The payment of this process-fee must clearly be associated with the application for execution dated the 3rd January 1921. The two things cannot be detached and treated as separate transactions.

For these reasons I think the judgment of the Court below must be maintained, and I dismiss this appeal under O. 41, R. 11, C. P. C.

Appeal dismissed.

(1) [1900] 22 All. 358=(1900) A. W. N. 108.
(2) [1908] 30 All. 179=5 A. L. J. 258=(1908) A. W. N. 74.

1925 ALLAHABAD 647

MEARS, C. J. AND MUKERJI, J.

Lahori—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 316 of 1925, Decided on 8th May 1925, from an order of the S. J., Meerut.

Penal Code, S. 302—Accused, a person of considerable intelligence accepting unequivocably his guilt—Accused can be convicted without taking whole evidence in the case—Accused's petition of appeal to High Court raising bare possibility of applicability of I. P. C., S. 304—Whole evidence was directed to be taken—Penal Code, S. 304.

The accused was undoubtedly a man of very considerable intelligence, and having beyond question killed a woman, made a few hours later, on the same day, a perfectly clear statement about the facts, and later, on the day after the crime, gave to a Magistrate of the first class the most clear and convincing account of the whole occurrence, and stated as a preliminary to it that he knew that he could be convicted on his own statement. Before the S. J. he agreed that he had made the two statements referred to above, and he pleaded guilty and said he killed the woman with the chopper produced and the reason for killing her was jealousy. The accused elaborated in his petition of appeal to the High Court, the statement he had made before the S. J. to the effect that he killed the woman out of jealousy. That document gave rise to the bare possibility that the accused might be able to put forward some ground for the application of S. 304 of the I. P. C.

Held: that though there was before the S. J. enough material to make him perfectly confident as to the guilt of the accused, yet in view of the contents of his petition of appeal to the High Court, the safer and better course would be to return the case to the S. J. with a direction to him to put accused up for trial again, to take his plea, and whether that be guilty or not guilty to hear the whole of the evidence in relation to the case. 1922 *All.* 233, *Dist.*

[P 647 C 2, 648 C 1]

Ambika Prasad—for Appellant.

G. W. Dillon—for the Crown.

Mears, C. J.—The only point that has been taken by Mr. Ambika Prasad, who appears on behalf of the appellant, is that the learned Sessions Judge accepted the plea of guilty and did not hear any evidence. He has called our attention to a case of *Dalli* v. *King-Emperor* (1). In that case Mr. Justice Ryves said: "After all murder is a mixed question of fact and law, and unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried, and in dealing with people of the status of Dalli, this of course can never be the case." There are points of distinction which can readily be drawn between the case of this appellant and that of Dalli, because the appellant is undoubtedly a man of very considerable intelligence, and having beyond question killed this woman, made a few hours later, on the same day, a perfectly clear statement about the facts, and later, on the 9th March, the day after the crime, gave to a Magistrate of the first class the most clear and convincing account of the whole occurrence, and stated as a preliminary to it that he knew that he could be convicted on his own statement. When before the learned Sessions Judge, he agreed that he had made the two statements to which we have referred, and he pleaded guilty and said he killed the woman with the chopper produced, and the reason for killing her was jealousy. We think there was before the learned Sessions Judge enough material to make him perfectly confident as to the guilt of this man. Lahori, accused

(1) 1922 All. 233=20 A. L. J. 326=23 Cr. L. J. 283.

did, however, state when pleading guilty that he killed her out of jealousy. He elaborates that in the petition of appeal to this Court, and it is that document which gives rise to the bare possibility that the accused may be able to put forward some ground for the application of S. 304 of the Indian Penal Code. Under these circumstances we are of opinion that the safer and better course would be to return this case to the Sessions Judge with a direction to him to put Lahori up for trial again, to take his plea, and whether that be guilty or not guilty, to hear the whole of the evidence in relation to the case. We, therefore, set aside the conviction and sentence and direct a re-trial.

Conviction set aside.
Re-trial directed.

★ 1925 ALLAHABAD 648

MUKERJI AND DANIELS, JJ.

In the matter of Shyam Lal Shah and another.

Mis. No. 277 of 1924, Decided on 15th December, 1924.

(a) *Hindu Law—Migrating family—Party pleading the original law as different from local law must prove.*

When a Hindu migrates, he is entitled to carry his own law, that is to say, the personal law from his home of origin, to the new place. He may continue to observe these rules or laws or may abandon them; but where the law to be pleaded is different from the law prevailing in the locality, it must be on the party who pleads that law, to say so. [P. 649, C. 1 & 2]

★ (b) *Evidence Act, Ss. 35 and 57—Officer specially deputed to record customs prevailing in a locality—Record by such officer is evidence and is admissible without further proof.*

Where the local Government had deputed a special officer to record customs in the Kumaun area.

Held; that a book prepared by him recording such customs was evidence and was admissible under S. 57 without further proof. [P. 649, C. 2]

Kashi Narain Malaviya—for Applicants.

Kailas Nath Katju—for Opposite Party.

Mukerji, J.—This is a reference under Rule 17 of the Kumaun Rules by the Local Government for the opinion of this Court.

The facts, which have given rise to *this* reference, are briefly these: A Hindu resident of Kumaun, by caste a Vaish, namely, Lachi Ram, died and he was succeeded by his wife Musammat Nimja. He left him surviving, besides the wife, a daughter and two daughter's sons. The daughter's sons were the defendants in this suit out of which this reference has arisen. At the time when Nimja died, three of the brothers of Lachi Ram were living, namely, Tula Ram, the plaintiff, and Parsi and Gangi, the respective fathers of the two other plaintiffs. The plaintiffs claimed that by the custom obtaining in Kumaun they were entitled to the property of Lachi Ram to the exclusion of his daughter's sons. To this claim the defendants filed a written statement and denied the existence of the custom. They pleaded that they were entitled under the Hindu Law to succeed to the grandfather. They never stated that they had come from any other part of the country or that they had carried with them any local law or local custom.

The learned District Judge of Almora heard the evidence, discussed it and came to the conclusion that the evidence produced by the plaintiffs was not sufficient to establish the custom which they had pleaded. There was an appeal to the High Court of Kumaun, and the learned Commissioner, who presided over that Court, was of opinion that the plaintiff ought to succeed. It appears that the Local Government deputed Mr. Panna Lal, I. C. S., to enquire into and collect the customs that were prevailing in Kumaun. Mr. Panna Lal has accordingly written a book in which he has stated the different customs which he found prevailing in that area. The learned Commissioner was of opinion that in view of the fact that a record of custom was made by Mr. Panna Lal after an elaborate enquiry, he was entitled to accept the statements in the book as affording good *prima facie* evidence of the law prevailing in Kumaun, in preference to the law as found in the Hindu text-books. He accordingly threw the burden of proof on the defendants to establish that they were entitled to succeed in the teeth of the Kumaun custom, namely, the custom which excluded a daughter or daughter's son from inheritance. The learned Commissioner also examined the evidence on record, and was satisfied that a custom had been established to his satisfaction.

The defendants went up to the Local Government and at their instance the present reference has been made.

The questions sent to us for answer are as follows:

(1) Was the Commissioner right in refusing to apply the provisions of Mitakshara law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana? *Jawahir Lal* v. *Jaran Lal* (1).

(2) Was the Commissioner justified in accepting Mr. Panna Lal's book as a definite authority on customary law, and in throwing the burden of proof not on the parties alleging, but on the parties denying a custom which is contrary to Mitakshara Law?

With reference to the first question, it will be noticed that it has been contended on behalf of the defendants that they were Vaishyas who originally resided in Rajputana and migrated to Kumaun. I have already indicated that in the written statement no such case was set up. There is no such case, no such pleading and there was no issue on the point. In the circumstances the Commissioner was right in accepting the statement of law contained in the report of Mr. Panna Lal and in declining to apply the provisions of the Mitakshara Law.

It is to be mentioned that under the Hindu Law itself, custom stands supreme to the written laws. In the case of *Collector of Madura* v. *Mutto Ramalinga* (2), their Lordships of the Privy Council said: "Under the Hindu system of law clear proof of usage will outweigh the written text of law." It being the fact that the parties were residents of Kumaun, and it being the fact that Mr. Panna Lal's book purported to contain a statement of law prevailing in Kumaun, the Commissioner was right in applying what should be taken as a good *prima facie* evidence of the local custom. If anybody wanted to plead that no such custom obtained, or for any particular reason the local custom did not apply to him, it was for that party to say so specifically. It is true, as held in the case quoted in the letter of reference, namely, *Jawahir Lal* v. *Jaran Lal* (1) that when a Hindu migrates, he is entitled to carry his own law, that is to say the personal law from his home of origin to the new place. He may continue to observe those rules or laws or may abandon them; but where the law to be plead ed is different from the law prevailing in the locality, it must be on the party who pleads that law to say so. Under the circumstances, I am of opinion that the Commissioner was right in the way he acted.

Coming to the question No. 2, we have to say what is the weight to be attached to Mr. Panna Lal's book. I have aleady stated that Mr. Panna Lal was directed by the Local Government to hold an enquiry as to the customs prevailing in Kumaun. He was, therefore, acting under the orders of the Government and his enquiry was carried on under the provisions of S. 35 of the Indian Evidence Act. We have numerous authorities to establish that entries as to customs recorded in the wajib-ul-arz are good evidence and admissible under S. 35 of the Evidence Act. The reason is this the that record has been made after due enquiry. In the case of *Balagobind* v. *Badri Prasad* (3) their Lordships of the Privy Council found a single entry in a wajib-ul-arz enough to establish a custom that had been pleaded before them. If a wajib-ul-arz may be admitted into evidence and given the weight that has been attached to it, the record prepared by Mr. Panna Lal is certainly entitled to much more weight. The book witten by Mr. Panna Lal will be admissible under S. 57 of the Evidence Act writhout further proof that it is a book witten by him. If we attach to Mr. Panna Lal's book the weight to which it is entitled, we must say that it is definite evidence on customary law as prevailing in Kumaun. My answer to the rest of the question has practically been given in answering question No. 1. To put it shortly, I would answer this question also in the affirmative and say that in view of the circumstances the Commissioner was justified in accepting Mr. Panna Lal's book and in throwing the burden of proof on the defendants.

Daniels, J.—I agree and merely desire to add a few words in consideration of the extreme importance of the questions involved in this reference. The first ques-

(1) 1924 All. 350=22 A. L. J. 49=5 L.R.A. Civ. 130.

(2) [1867-69] 12 M.I.A. 397=10 W. R. 17=1 B.L.R. 1=2 Suther. 135=2 Sar. 361 (P. C.)

(3) 1923 P. C. 70=45 All. 413=50 I. A. 196=21 A.L.J. 578=25 O. C. 217=45 M.L.J. 289=38 C.L.J. 302=33 M. L. T. 317=(1923) M. W.N. 799=10 O.L.J. 368 (P. C.)

tion is "Was the Commissioner right in refusing to apply the provisions of Mitakshara Law to a family of Vaishyas now resident in Kumaun but who previously migrated from Rajputana? *Jawahir Lal* v. *Jaran Lal* (1).

If the question had been put as an abstract proposition of law the answer to it admits of no doubt. The Privy Council in the case, of *Balwant Rao* v. *Baji Rao* (4) lays down four propositions:

1st, that *prima facie* a Hindu residing in the particular province of India is governed by the law of that province:

2nd, that if any such family migrates to another province it carries its own law with it:

3rd, that any such family may renounce its original law and adopt the law of the province to which it migrates but that such renunciation must be proved by evidence:

4th, that the personal law which a migrating Hindu carries with him is the law as it stood at the time of the migration.

The question put by the Local Government is, however, whether in this case the Commissioner was right in refusing to apply the provisions of the Mitakshara Law to a family of Vaishyas now resident in Kumaun but who previously migrated in Rajputana. We have no hesitation in saying that he was right in so refusing and for the following reasons. First, it was no part of the case of the defendants that the family were governed by any different law from that prevailing among their caste in Kumaun, nor was any issue framed on this point. Secondly, the statement that the parties originally migrated from Rajputana is based on the evidence of three witnesses: L. Thakur Das Sah, L. Bansi Lal Sah and L. Ram Lal Sah, P. Ws. 4 to 6, and all these witnesses, while stating that their family migrated from Rajputana many generations ago state at the same time that the family is at present governed by the customs prevailing in Kumaun. It may be noted further that these witnesses, though it is true that they belong to the same clan of Jagati Sahas as the parties, made no statement as to the family of the parties, but only as to their own family.

On the second question I also agree with my learned brother that the answer must be in the affirmative. It appears to me that the question as put involves a certain misunderstanding of what the Commissioner really did. Undoubtedly the burden of proving a custom at variance with Hindu Law lies in the first place on the person who sets it up. The burden of proof is however liable to be shifted by the evidence adduced by the parties. If the plaintiffs produced *prima facie* evidence of the existence of the custom the burden was thrown on the defendants to rebut it. In this case the plaintiffs did produce *prima facie* evidence in the shape of Mr. Panna Lal's report. That report was clearly admissible in evidence under S. 35 of the Evidence Act, being a public record made by a public servant in the discharge of his official duty. Where evidence is admissible the weight to be attached to that evidence is a matter for the Court which has to decide on the facts, but we are certainly not prepared to say that the Commissioner was wrong in attaching very great value to that evidence. It appears from the book itself that the record was prepared after an exhaustive enquiry in the course of which as many as 20,000 witnesses were examined by Mr. Panna Lal and his assistant. The reason which led to Mr. Panna Lal being placed on special duty to prepare this record was that there was a danger of Kumaun customs being disregarded by the Courts owing to the inability of parties to produce the necessary evidence in individual cases and it would be a grave public misfortune if the Courts were to be precluded from attaching to that record the value to which the circumstances under which it was prepared naturally entitle it.

The principles on which the record is admissible are precisely those on which an entry in the wajib-ul-arz is admitted as evidence of custom. The language used by the Privy Council in *Ram Kishore* v. *Jainarayan* (5) in dealing with a record of tribal custom prepared in the Gurgaon district in the Punjab applies with even

(4) [1920] 48 Cal. 30=47 I. A. 213=25 C.W.N. 243=12 L. W. 679=16 N.L.R. 187=39 M. L. J. 166=18 A.L.J. 1049=28 M.L.T. 157=(1920) M.W.N. 483=57 I. C. 545=22 Bom. L. R. 1070 (P. C.)

(5) 1922 P.C. 2=49 Cal. 120=48 I.A. 405=15 M. L. W. 144=42 M. L. J. 80=26 C. W. N. 881=30 M.L.T. 144=20 A.L.J. 857=(1922) M.W.N. 125 (P. C.).

greater force to Mr. Panna Lal's report. What the Commissioner did in this case was to treat the report as *prima facie* evidence of the existence of the custom which it was open to the defendants to rebut but which was sufficient to establish the plaintiffs' case unless and until it is rebutted. He held and rightly that it had not been rebutted and further that there was other evidence of very great weight which went to establish the custom in question. He was fully entitled to accept the report as *prima facie* evidence and having so accepted to throw on the other side the burden of rebutting it by other evidence. This is my answer to the reference.

By the Court

For the reasons given above we answer the first question in the affirmative. The second question as put makes an erroneous assumption and cannot therefore, be answered by a simple affirmative or negative. Mr. Panna Lal's report was not admitted by the Commissioner as an authoritative statement of the law but as a *prima facie* evidence of a fact, namely, the existence of a custom. Our answer to that question, therefore, is that the Commissioner was right in accepting Mr. Panna Lal's report as *prima facie* evidence of a custom, applicable to the community to which the parties belong, excluding daughters and daughter's sons from inheritance and in throwing on the defendants the burden of rebutting it. We think that the costs of this reference should be borne by the applicants.

Reference answered.

1925 ALLAHABAD 651

MEARS, C. J. AND PIGGOTT, J.

Har Prasad and others—Appellants.

v.

Gulzari Lal—Respondent.

Letters Patent Appeal No. 111 of 1924, Decided on the 13th March 1925, from a judgment of Daniels, J.

(a) *Deed—Construction—Tenant permitted to plant grove—Agreement that tenant should become owner of part of the grove subject to restrictions stated in agreement—One restriction being against sale by tenant to outsider—Restriction was held not to prevent mortgage to stranger.*

Under an agreement between a tenant and his landholder as to the terms on which the former would be permitted to plant a grove, the tenant was to become the owner of one quarter of the grove, subject only to such restrictions as were laid down in the agreement itself. One of these restrictions was that he should not sell this one quarter share to any stranger, but only to the proprietor by whose permission the grove was to be planted, or to co-sharers of such proprietor.

Held: that there was no covenant against mortgaging. [P.651C.2]

Kailas Nath Katju and *Gulzari Lal*—for Appellants.

Bhagwati Shankar—for Respondent.

Judgment.—The only question raised by these two connected appeals is as to the interpretation of a document. That was an agreement between a tenant of the names of Bhola and his land-holder as to the terms on which Bhola would be permitted to plant a grove. The parties are agreed that Bhola was to become the owner of one quarter of the grove, subject only to such restsictions as were laid down in the agreement itself. One of these restrictions was that he should not sell this one quarter of the grove to any stranger, but only to the proprietor by whose permission the grove was to be planted, or to co-sharers of such proprietor. As a matter of fact there has been no sale of the share in question, but only a mortgage, and the sole point for us to determine is whether this prohibition in terms directed only against a sale must be read, either by necessary implication, or on a view of the position of the parties and the terms of the document as a whole, as being also a covenant against mortgaging. The learned Judge of this Court has held that the prohibition is directed against a sale to an outsider, and that the proprietary rights which Bhola was to take under the agreement could not be further modified except by express covenant. He holds that there was no covenant against mortgaging. In our opinion he was right in so deciding. This finding determines both the appeals, which we dismiss accordingly with costs.

Appeal dismissed.

1925 ALLAHABAD 652

SULAIMAN AND DANIELS, JJ,

Mahomed Mazhar Ali—Decree-holder—Appellant.

v.

Mt. Bijja Begam—Judgment-debtor—Respondent.

Execution First Appeal No. 420 of 1924, Decided on 6th May, 1925, from a decree of the Sub. J., of Moradabad.

★ *Civil P. C., S. 60—Pension—Saleability decided upon by the trial Court—Executing Court cannot question—Civil P. C., S. 47.*

The question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against him and a decree under O, 34, R. 4, was passed for the sale of that pension, it no longer remains open to the judgment-debtor to say that the pension was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. In cases where no attachment is necessary and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property S. 60 will not be applicable to decide the saleability of the property so as to prevent the Court from selling the property. 1924 *All.* 328 *Rel. on.*

[P 652, C 2 & 653, C 1]

Hamid Hussain—for Appellant.

S. Raza Ali—for Respondent.

Sulaiman, J.—This is a decree-holder's appeal arising out of certain execution proceedings. In 1889 *Mt.* Kundan, who owned certain preperties and was entitled to a pension from Government, executed a usufructuary mortgage of all these properties including the pension in favour of certain mortgagees. She took possession of the properties under a lease from the mortgagees, and for the due payment of rent she executed another mortgage-deed by way of security in which that pension was again included. The previous mortgage-deed was paid off ; but a suit was brought on the basis of the second one and a decree obtained against the representatives of the mortgagor. Mazhar Ali was a purchaser of part of the mortgaged properties, and so was the respondent Bijja Begam. It appears that Mazhar Ali had to pay more than his due share in order to save his property from being sold, and having done so instituted a suit for contribution against Bijja Begam and certain other judgment-debtors. In this suit he claimed that he was entitled to enforce his claim against the portion of the pensions purchased by *Mt.* Bijja Begam on which he had a charge. The suit was first decided by Ch. Abdul Hasan, who decided issues Nos. 1 add 6 relating to the question whether the pension in dispute was or was not saleable in favour of the plaintiff. He ordered that a decree under O. 34, R. 4, should be prepared for recovery of the amount out of the properties in the hands of the various defendants. An appeal was preferred to the High Court, and that judgment was set aside and the suit was remanded to the Court of first instance. This time the suit was disposed of by Mr. Ram Chand Saksena, who decreed the claim against the properties purchased by the various defendants as detailed in the plaint. He added that the amount decreed will be a charge on the properties purchased by the defendants. He further directed that a decree should be prepared according to R. 4 of O. 34, Civil Procedure Code, six months time being allowed for payment. The learned Subordinate Judge seems to have accepted the findings arrived at by his predecessor, although the whole suit had been remanded, and he only dealt at length with the question of the proportionate liability of the various defendants. The decree-holder appealed to the High Court, and *Mt.* Bijja Begam and another defendant filed certain cross-objections. By the judgment of the High Court the amounts were slightly varied, but the decree was not set aside, nor was the order of the Court that a decree under O. 34, R. 4, be prepared in any way upset.

The decree-holder is now seeking to recover the amount decreed to him by sale of the pension in the hands of *Mt.* Bijja Begam. The learned Subordinate Judge has held that this pension is not attachable, and therefore cannot be sold. He has, therefore, dismissed the decree-holder's application.

In our opinion the question whether a certain pension is of such a character as not to be liable to be sold is a mixed question of law and fact. If the point was expressly raised by the defendant concerned in the suit itself and decided against her, and a decree under O. 34, R. 4, was passed for the sale of that pensior, it no longer remains open to the judgment-debtor to say that the pension

was of such a character as not to be saleable at all. It would not be proper for the execution Court to reopen the question which has already been decided in the original suit. Of course, if the question had not been decided at all the execution Court were called upon for the first time to consider whether it would proceed to sell the property, which, either on the face of it or admittedly, was not saleable, there might be some force in the contention that the Court would not be justified in selling it. But the case here is quite different and we think that the question, which depended on a consideration of a number of facts, should not now be allowed to be reopened. We may note that in the Full Bench case of *Mubarak Hussain* v. *Ahmad* (1), two out of the three learned Judges held that in cases where no attachment is necessary, and the sale takes place in pursuance of a mortgage decree directing a sale of the mortgaged property, S. 60 of the Code of Civil Procedure will not be applicable so as to prevent the Court from selling the property.

The learned Vakil for the respondent has drawn our attention to the judgment of a single Judge of this Court which was afterwards affirmed in appeal under the Letters Patent in the case of *Mazhar Ali Khan* v. *Mahfuz Hasan* (2) where the learned Judge referring to the final judgment referred to above remarked at pages 698 and 699 that the question whether a particular piece of property in the hands of the defendant was "attachable" was irrelevant in the suit, which was brought to determine the liability of that defendant, and he felt satisfied that the point was not decided by anybody so as to be binding upon the parties. That judgment, however, was between the decree holder on the one hand and Mahfuz Hasan on the other, to which *Mt.* Bijja Begam, the present respondent, was not a party. It is, therefore, obvious that *Mt.* Bijja Begam cannot take advantage of that judgment as if it were *res judicata*. The remarks in that judgment must be considered to be *obiter dicta* so far as the present litigation is concerned.

We have already said that a decree under O 34, R. 4, was prepared, and it is, therefore, obvious and that there has not been any question of an "attachment" of the pension, but only whether the charge was enforceable against this property.

Considering the case on the merits we are satisfied that this pension is saleable. It may be that in the case of *Mazhar Ali* v. *Mahfuz Hasan* (2), the decree-holder could not adduce sufficient evidence to satisfy the Court that the pension was saleable. In the present case, however, there is plenty of documentary evidence on the record which points to that direction. This pension is entered in the register which was prepared for entering pensions coming under S. 7 (2) of the Pensions Act (No. 23 of 1891), which are expressly declared to be transferable. The learned Subordinate Judge says that this pension was entered wrongly in this register. There seems to be no ground, however, for suspecting that it was so. The reason given by the learned Subordinate Judge is that this pension was granted under an order of 1887, but the register itself shows that this pension was certainly of an earlier date. In a judgment, dated the 27th of May, 1896, which was delivered in a suit betwen Khuda Bakhsh the mortgagee and *Mt.* Alimunnisa, a representative of the mortgagor, it was expressly decided that the pension which had been previously mortgaged was transferable. That judgment shows that the pension was granted at least as early as 1886. This judgment was affirmed on appeal on the 26th of August 1901. Subsequently there was another litigation between Khuda Bakhsh on the one hand and Alimunnisa on the other in which on the 10th of October 1906, there was a similar finding. The predecessors-in-title of the parties were parties to those suits and, therefore, even if those judgments do not operate *res judicata* they are certainly admissible in evidence.

There is the further fact that these pensions have been transferred from one person to another. *Mt.* Bijja Begam, the objector, is herself a transferree of the portion in her hands, and so is the decree-holder Mazhar Ali. There are also other transferees of this pension.

Having regard to all these circumstances we are convinced that this pension was not a political pension which is declared to be non-transferable under S. 11 of the Pensions Act.

(1) 1924 All. 328=46 All. 489=22 A. L. J. 321 =5 L. R. A. Civ. 201 (F. B.)
(2) 1922 All. 429=44 All. 697=20 A.L J. 679.

The result, therefore, is that this appeal is allowed, the decree of the Court below set aside, and the objection of *Mt.* Bijja. Begam dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 654

MUKERJI, J.

Narain Dutt Tewari—Applicant.

v.

Rudra Dutt Bhatt and another—Opposite Parties.

Criminal Reference No. 178 of 1925, Decided on 20th May 1925, made by the District Magistrate, Almora.

Penal Code, S. 477A—Accused obtaining by falsifying accounts securities worth amount justly going to be due to himself in near future but whose realisation is doubtful acts fraudulently.

If together with the intention of deceiving there be an attempt to obtain an undue advantage, there would be in law an intent to defraud.

Where an accountant in a Bank noticing that the Bank might fail any day and that it might become difficult for him to recover the money deposited by him as security which was going to be justly payable back to him shortly, obtained securities worth his deposit by falsification of accounts and without the higher authorities of the bank being aware of the fact, and where in an enquiry in respect of a charge under I. P. C., S. 477-A, the accused was discharged.

Held: that the order of discharge was wrong and that there was enough material on the record to direct further enquiry. 21 *All.* 113 *Foll.*

[P 655 Cs 1, 2]

M. L. Agarwala—for Applicant.

M. Waliullah—for the Crown.

Tej Bahadur Sapru, Hamid Hasan and *P. N. Sapru*—for Opposite Parties.

Mukerji, J.—This is a criminal case on the revision side of this Court. The Court took action of its own accord and sent for the record of the case.

It appears that the opposite parties, Rudra Dutt Bhatt and Gauri Dutt Karnatak, were two accused persons who were called before a Magistrate to answer charges under Ss. 423 and 477-A of the Indian Penal Code at the instance of one Narayan Dutt Tewari. The learned Magistrate, in a judgment in which he stated the facts and the evidence very clearly, came to the conclusion that on the facts found by him no offence under either of the sections had been made out. He accordingly discharged the accused persons. Narayan Dutt Tewari took the matter to the District Magistrate, and while the case was still before him, this Court sent for the record. The Magistrate, in sending on the record, recorded his opinion that there was no case made out under S. 423 of the Indian Penal Code, but there was enough material before the learned trying Magistrate on which he could and should have framed a charge under S. 477-A of the Indian Penal Code.

The case has been very ably argued on either side and the question for determination is whether on the facts found, the accused persons were entitled to a discharge or whether a charge should have been framed and the case tried either by the Magistrate himself or committed to the Court of Session. As in my view the order of discharge was not warranted by the statement of the law I will briefly state the facts as found by the Magistrate, without expressing any opinion whatsoever as to whether the facts should be finally accepted or not as correct. It will be for the Court which finally tries the opposite parties to come to conclusions of facts on hearing such evidence as may be adduced on behalf of the defence. The accused persons, I understand, have already been examined by the learned Magistrate.

The Punjab Industrial Bank opened a branch at Almora some time in August, 1922 and it closed its doors on or about the 6th of March, 1924. The complainant, Narain Dutt, was appointed the cashier on making a deposit as security of a sum of Rs. 5,000. This money was to bear certain interest, and was repayable on the expiry of 12 months unless of course a fresh contract as to security was entered into. Similarly Gauri Dutt, one of the opposite parties, was appointed an accountant and he deposited a sum of Rt. 1,000 for a period of six months. His appointment was made some time in July 1923 and the money deposited by him was repayable some time in January 1924. The opposite party, Rudra Dutt, as the manager of the local branch, made a deposit of a sum of Rs, 2,000 for a period of 12 months. He was appointed in May 1922 In spite of his repeated offer to resign and request to be relieved, he was obliged to continue in office up to some time in January 1924. Narain

Dutt Tewari, on the expiry of the six months for which he had made the deposit, brought a suit against the Bank for recovery of his money and obtained a decree. In execution of it he caused the attachment of certain securites (promissory notes) held by the local branch of the Bank, and then it was discovered that the securities had been transferred. It is this transfer and the method by which it was done which forms the subject-matter of Narain Dutt's complaint.

It appears that there was a firm trading at Almora under the name and style of J. Bhatt and Sons, and Rudra Dutt, one of the opposite parties, was interested in that firm. On the 22nd of December 1923 an entry was made in the books of the Bank showing that J. Bhatt and Sons made a deposit of a sum of Rs. 1,000 in the Bank. On the same date a debit entry was made against Gauri Dutt showing that he borrowed a sum of Rs. 1,000 from the Bank and gave by way of security a promissory note executed by himself and his father. On the same date promissory notes held by the Bank to the value of nearly Rs. 1,000 were sold to J. Bhatt and Sons and they transferred the same to Gauri Dutt. It has been found by the Magistrate that as a matter of fact no payment in cash or kind was made by J. Bhatt and Sons into the Bank. It has been found by the Magistrate that the whole arrangement was really a fictitious transaction and the real transaction was this : the deposit made by Gauri Dutt was repayable to him on the 17th of January 1924. The doors of the Bank might be closed on any day, it being in such a tottering condition. Guari Dutt and his father gave the promissory note as against the deposit and in the meantime got back their money in the shape of promissory notes.

On these findings, briefly stated, the question that the learned Magistrate had to decide was whether there was an intention to defraud the Bank within the meaning of S. 477-A of the Indian Penal Code. It has been conceded before me, and it was conceded before the learned District Magistrate that S. 423 of the Indian Penal Code was probably not applicable. The question is as to the applicability of S. 477-A. That the account-books were falsified admits of no doubt. If an intention to defraud is established, there would be a case apparently established against the opposite parties so as to justify further proceedings.

Sir Tej Bahadur Sapru with his usual lucidity and clearness has put the entire case of his clients before me. He argued that the opposite parties had not the slightest interest to injure the Bank or any creditors of the Bank to the extent of a single pie. All that they were anxious for was to secure their own money which was going to be justly due to Gauri Dutt. The Bank was still operating though in a very unsatisfactory condition. No undue advantage was taken and only a legitimate claim was satisfied. He pointed out that the District Magistrate himself expressed an opinion on the point as follows :

" The extent to which others would be defrauded is no doubt somewhat nebulous and uncertain. "

Sir Tej Bahadur argued that if in the course of liquidation (the Bank has already probably gone into liquidation) it transpired that in the circumstances in which the Bank was situated Gauri Dutt was not entitled as a creditor of the Bank to the entire amount of his deposit, there would be civil liability against him and he could be made to disgorge the whole or a part of the money taken by him under proceedings taken in liquidation. He cited several cases English and Indian.

I have given my best consideration to all arguments and have examined the various cases cited. In my opinion, which I wish to state briefly for reasons already given, viz., the case will have to be retried there is enough material on the record for directing a further enquiry. Some of the facts as found by the Magistrate have been disputed by the opposite parties and it has been expressly stated that there were material documents in the opposite parties' hands which would establish their innocence conclusively. In the circumstances I will briefly indicate whether in my opinion a case under S. 477-A could be held as proved on the facts found by the Magistrate.

As already stated, falsification of account is admitted. It has been established that J. Bhatt and sons never made a deposit of Rs. 1,000 and were, therefore, not entitled to purchase any securities of the Bank. The whole arrangement was one by which Gauri Dutt obtained securities worth his deposit without the higher authorities of the Bank being

aware of the fact. The sole question, therefore, is whether in the method adopted there was or was not an intent to defraud. That the falsity of the account was made to deceive the Bank authorities and the officers of the Court in case of liquidation admits of no doubt. If together with the intention of deceiving there be an attempt to obtain an undue advantage, there would be in law an intent to defraud. The case of *Queen-Empress* v. *Mohammad Said Khan* (1), decided in this Court as long back as in 1898, is in point. Banerji, J., quoted from Sir James Fitz-James Stephen's History of the Criminal Law of England, Vol. II, p. 121, and held, in the case before him, that whether the wider or the narrower construction adopted by different Courts were adopted, the intention to defraud was established in the case before him. In that case a Police Head Constable had removed adverse remarks from his service roll and fabricated favourable remarks. It was found that the object of Said Khan was to obtain an advantage to himself by way of advancement in service which he was not likely to gain if the adverse remarks were left on the record. I have no doubt that the interpretation put by Banerji, J. was a proper interpretation to put on the word fraud and various expressions involving the word as used in the Indian Penal Code. In this case the intention was to obtain an advantage which could not be obtained at once in a fair manner. The Bank might fail any day and it might take years to recover the money. Then the Bank might not be able to pay its debts to the fullest extent and some of the money deposited might not be realized at all. The mere fact that a sum of Rs. 1,000 was going to fall due shortly was really immaterial. The points urged by Sir Tej Bahadur are really matters that go to extenuate the seriousness of the offence, and I have no doubt that they would be considered (if there be a conviction) when sentence is passed.

I hold that the order of discharge was not justified and I send back the record to the District Magistrate of Almora with the direction that it be sent down to the Magistrate who tried the case and, in the case of his transfer, to some other Magistrate for further enquiry.

Further enquiry ordered.

(1) [1898] 21 All. 113.

1925 ALLAHABAD 656

MUKERJI, J.

G. I. P. Railway—Defendant—Applicants.

v.

Firm Radhey Mal Manni Lal—Plaintiffs—Opposite Party.

Civil Revision No. 216 of 1924, Decided on 16th February 1925, from an order of the Judge, Small Cause Court, Cawnpore.

(a) *Lim. Act, Art.* 30—*Goods missing on date on which consignees apply for delivery—Time runs from that date where goods are not proved to have been lost previously.*

Where on the date on which the consignees apply for delivery, the goods are missing and where there is nothing to show that the goods were lost prior to that date, time will run only from that date. [P 657 C 1]

(b) *Railways Act, S.* 55—*Plaintiff making honest attempt to remove goods but not allowed to do so—Company subsequently asking plaintiff to take delivery but plaintiff not complying—S.* 55 *does not apply.*

Nine bags of goods were consigned for despatch. When the goods arrived at their destination, it was found that two of the packages sent were not the same as had been consigned. Consignees who were also the consignees of the goods proposed that seven of the bags should be handed over to them and the two remaining bags, which did not belong to the consignment, should be left there. The station master did not agree to this arrangement. Later on higher railway officials wrote agreeing to this arrangement. Even then the station master would not agree. On two subsequent occasions the Railway Company again asked the consignors to take delivery of the seven packages. But the consignors did not comply with the request. [P 667 C 2]

Held: that no hard and fast rule can be laid down for all cases. But in this case the consignors could very well say that they made two honest attempts to obtain delivery of goods and if the Railway Company retained the goods, at the time, they did so at their own risk. The consignors were entitled to recover the market value of the goods consigned and were not bound to accept such price as was fetched by the sale held at the instance of the railway administration.

Held: further, that S. 55 of the Railways Act applies to ordinary cases, but does not apply where the plaintiffs, at the request of the Railway Company themselves, wanted to remove the goods, but were not allowed to do so. [P 657 C 2]

(c) *Railways Act, S.* 72—*Company cannot dispute consignor's title to the goods consigned.*

As between the Railway Company, on the one hand, and the consignors, on the other, the Railway Company cannot dispute the title of the consignors to the goods. [P 658 C 1]

Ladli Prasad Zutshi—for Applicants.

Satish Chandra Das — for Opposite party.

Mukerji, J.—This is an application to revise a judgment of the Court of Small Causes at Cawnpore.

The respondents consigned goods in nine bags to Salamatpur from a railway station at Cawnpore. When the goods arrived at Salamatpur, it was found that two of the packages sent were not the same as had been consigned at Cawnpore. The person who wanted to take delivery on behalf of the consignees proposed that seven of the bags should be handed over to him and the two remaining bags which did not belong to the consignment, should be left there. The station master did not agree to this arrangement. Later on, higher railway officials wrote agreeing to this arrangement. Even then the station master at Salamatpur would not agree that the seven bags admitted to be a part of the consignment should be removed. Thereafter, there was some correspondence and the suit was brought. Several defences were taken, including a plea of limitation, and they have all been decided against the defendants; hence this petition in revision.

Three points were urged, and I will consider them.

The question of limitation arises in this way. The goods were booked on the 21st of November 1922. On the 5th of December 1922 the consignees went to the railway station and wanted to take away seven of the packages, but the station master refused. On the 3rd of December 1923 the suit was brought. Thus the suit was within one year of the failure of the Railway Company to deliver goods (*vide* Art. 31 of the Limitation Act). It is said that as regards two of the packages Art. 30 would apply. Even if Art. 30 applied, there is nothing to show that the two packages which were missing on the 5th of December 1922 had really been lost earlier than that date. The matter was within the peculiar knowlege of the defendants and it was for the defendants to have proved when the actual loss took place. The point of limitation, therefore, fails.

The second question is whether the defendants were justified in selling the goods and offering the sale price to the plaintiffs after deducting the costs due to them. As already stated above, the plaintiffs or their men made two attempts to obtain delivery of their goods. On the second occasion they went to the spot at the request of the Railway Company themselves. It is true that on the third and fourth occasions, *viz.*, on the 10th of April 1923 and the 20th of April 1923, the Railway Company again asked the plaintiffs to take delivery of the seven packages. The question is whether the plaintiffs could very well say that they were not going to hear the Railway Company after two attempts of obtaining delivery had failed. No hard and fast rule can be laid down for all cases. But in this case it appears to me that the plaintiffs could very well say that they made two honest attempts to obtain delivery of goods, and if the Railway Company retained the goods at the time they did so at their own risk. I agree with the Court below that the plaintiffs are entitled to recover the market value of the goods consigned and are not bound to accept such price as was fetched by the sale held at the instance of the railway administration.

I may mention here that I read S. 55 of the Railway Act. It applies to ordinary cases. It does not apply where the plaintiffs, at the request of the Railway Company themselves, wanted to remove the goods, but were not allowed to do so.

The last point urged is that the plaintiffs have no right to sue. This point was taken by way of an amendment of the written statement. The argument is based, in this Court, on the rule of law that a railway receipt is a mercantile document of title and it passes title in the goods to which it relates on an endorsement. This does not appear to have been exactly the point raised in the Court below. Indeed, the judgment of the Court below does not bear any indication of any such argument having been brought forward before it. The fourth ground of appeal, which alone relates to the right to maintain the suit, does not cover the point. The question involves questions of fact and I decline to entertain it without proper findings.

The lower Court found that the plaintiffs consigned not only their own goods, but some goods which their customer purchased for himself and had asked them to consign with the plaintiffs own goods. An argument was based on this fact, *viz.*, the plaintiffs were not the owners of the entire goods and that, therefore, they could not maintain the suit. To this argument the clear answer was that as

between the Railway Company, on the one hand, and the p'aintiffs, the consignors, on the other, the Railway Company could not dispute the title of the consignors to the goods.

The petition in revision fails, and it is hereby dismissed with costs.

Petition dismissed.

1925 ALLAHABAD 658

MUKERJI, J.

Jaunpur Sugar Factory Ltd. (in Liquidation)—In the matter of.

M sc. Ref. No. 119 of 1924, Decided on 13th May 1925.

(a) *Practi e—Precedents—Authorities are useful only for law laid down.*

Authorities are useful only so far as they lay down the law, but they are usually not safe guides when questions of fact are involved. [P 660 C 2]

(b) *Contract Act, Ss.* 31, 32 33 *and* 34—*Contract to purchase shares on condition of being made sole agent of Company—Company going into liquidation before appointing purchaser sole agent —Latter is not liable as contributory.*

The agreement was that *R* would become a member of a sugar manufacturing Company by purchase of shares in case he was appointed the sole agent of the Co pany for sale of sugar at a certain centre. The Company was not manufacturing any sugar at the time of the agreement. The terms of the agency were not settled when *R* signed the application for shares. The Company either declined or failed to ppoint *R* their sole agent at the said contre, and later went into liquidation.

Held ; that there was nothing in law to prevent the Company from appointing *R* their sole agent by settling the terms although sugar was not being manufactured at the time and the agreement on the part of *R* to become a member of the Company was contingent, *i. e.*, dependent for its validity and enforcement on the condition of the Company appointing him their sole agent, and as the Company either declined or failed and later made it impossible to appoint *R* their sole agent, *R* was not liable to contribute towards the liquidation. [P 661 C 2, P 662 C 1]

Kailas Nath Katju—for Objectors.

Indu Bhusan Banerji—for Liquidators.

Mukerji, J. The liquidators of the Jaunpur Sugar Factory Limited, in liquidation, placed, for the decision of the Court, the objection on the part of the firm, Lallu Mal Ramchunder, to be put on the list of contributories.

The case of Lallu Mal, as stated in his Counsel's letter addressed to the official liquidators, is briefly as follows :

" An agent of the Jaunpur Sugar Factory, Ld., by name of Simeon approached the sale proprietor Ram Chunder in company of a broker, Lachmi Narain, with a view to Ram Chunder's purchasing some shares in the Company which had just been started. Ram Chunder trades in sugar and other commodities and he cared more for the profits that might accrue to him by sale of sugar than for any dividend which the Company might declare later on. He stipulated with Simeon that he would purchase the shares on condition that he was appointed the sole agent of the Company for sale of sugar in Cawnpore. To this Simeon agreed and accordingly Ram Chunder signed the application for 500 shares and paid the deposit money of Rs. 500 at the rate of Re. 1 per share. This was on the 20th of February 1921. Later on the Company gave information to Ram Chunder of the fact that 500 shares had in fact been allotted to him and called upon him to pay Rs. 2 more per share which was payable on allotment. Ram Chunder declined to pay anything till the question of agency was settled. Later on the Company made the first call of Rs. 2 per share and this too Ram Chunder declined to pay on the grounds already mentioned. "

Ram Chunder's contention, therefore, is that his purchase of shares was conditional on his being appointed the sole agent for sale of sugar in Cawnpore and that the Company having failed to appoint him the sole agent, he is not bound to carry out his promise.

The liquidators have not filed any written statement, but their case has been put something like this by their learned counsel, Mr. Indu Bhusan Banerji, who has argued their case extremely well. The Company say :

" We told Ram Chunder ' take shares we will give you agency. ' We could not give Ram Chunder any agency at the time because no terms had been settled and no sugar was actually being manufactured at the time. We promised to give him agency and would have given him the agency if we had manufactured sugar and if terms had been settled upon. The condition attached to Ram Chunder's purchase of shares was a condition ' subsequent ' and failure of the ' subsequent ' condition does not entitle Ram Chunder to back out of the promise. "

The question that has to be decided is primarily a question of fact, *viz.*, What was the agreement between the parties?

The evidence on this point consists of certain letters exchanged between the parties and the testimony of Ram Chunder and the broker Lachmi Narain. Before examining the evidence, I may state at once that there is a certain document Ex. F. which, if accepted as trustworthy, would at once decide the case in favour of Ram Chunder. But I feel considerable difficulty in accepting the document as trustworthy. It appears that Messrs. Behari & Co. were the Managing Agents of the Sugar Factory. No evidence has been adduced to this effect, but it appears to be the case that one Mr. S M. Bose was one of the moving spirits of Behari & Co. The document Ex. F. purports to be a letter from Bose bearing date 11th of April 1921 by which it is said Bose confirmed the undertaking given by Simeon to Ram Chunder, that Ram Chunder's purchase was conditional on his being appointed agent at Cawnpore, and that if the contract of agency fell through, the purchase of shares of Ram Chunder would be treated as cancelled It has been proved that the document was signed by Bose. But throughout the correspondence between the parties we never hear of this letter. Lachmi Narain, the broker, says that he was told that Bose was staying in the Civil and Militrary Hotel at Cawnpore and he went and saw him and obtained the letter Ex. F. Ram Chunder had to explain the reason why this letter was never mentioned in the correspondence and was not even mentioned in his Counsel's letter addressed to the liquidators. The explanation was put forward through the mouth of Lachmi Narain. The latter said that he kept the letter with himself simply because he was a relation of Ram Chunder and it mattered little whether the document remained with him or with Ram Chunder. The relationship that is supposed to exist between Ram Chunder and Lachmi Narain is this : that the paternal uncle of Lachmi Narain's wife was married in Ram Chunder's family. Needless to say that I entirely disbelieve Lachmi Narain as to how he obtained Ex. F, and I accept Mr. Indu Bhusan Banerji's suggestion that the letter was obtained from Bose after the present question of contribution by Ram Chunder had started.

Discarding then Ex. F, there is enough in the correspondence and statement of Ram Chunder to show that Ram Chunder wanted to have the sole agency at Cawnpore and he agreed to purchase the shares only because he was told that he could not be appointed an agent without purchase by him of 500 shares. Oral testimony of what happened in February 1921 when given in May 1925 is bound to be hazy and somewhat indefinite and we have to remember this in examining the evidence of Ram Chunder and Lachmi Narain. Ram Chunder says that two gentlemen dressed in European costume went to him with Lachmi Narain for sale of shares. Then says Ram Chunder :

" I told the Sahabs that I wanted agency and I wanted to sell sugar. The Sahabs said that they would give me the agency. The Sahabs told me that I would get my agency if I purchased 500 shares. "

Further on he says :

" If the Sahabs had not offered me the agency, I would not have agreed to purchase any shares. "

In cross-examination he said :

" The Sahabs told me that I could get the agency only by purchase of 500 shares and not otherwise. "

This statement on oath of Ram Chunder is supported by the copy of his letter he wrote on receipt of notice of allotment Ex. I. The letter which has been marked as Ex. A acknowledges the allotment letter and goes on as follows :

" In the meantime we would point you out that our application for the shares was on condition of your agency in Cawnpore being given to us, but we regret that we have not yet been favoured with the rules thereof. We shall feel obliged if you will let us know if the Company is prepared to grant us the agency and send us the rules to see if they are agreeable to us. We can take the shares only if we are able to get the agency. "

It is common ground that Ram Chunder declined to pay the allotment money of Rs. 2 per share. Evidently, this conduct on his part supports his case. In reply to Ex. A, which does not bear any date, but which was probably written on the 6th of March, 1921, the Company wrote on the 14th of March, 1921. This is Ex. J. They said :

"We have registered your name for the above agency and shall be glad to offer you our terms and conditions regarding the same when we are able to produce our manufacture of sugar in the market which will probably be in July next. Please write to us on the subject then."

It will be noticed that the Company's answer was not a fair and honest answer to Ram Chunder's letter. Later on the Company made the first call of Rs. 2 per share and wrote the letter Ex. K, dated the 9th of August, 1921 to the firm of Lallu Mal Ram Chunder. The firm again replied on the same terms as before. They said, among other matters:

"Will you kindly let us know if your mill has commenced manufacturing sugar and whether you have decided finally to appoint us sole agents at Cawnpore for the same. Unless we are placed in a clear position on this subject, we regret we cannot make further remittances."

The Company's reply (Ex. L, dated 3—9—21) was again as evasive and non-committal as before. Behari & Co. purported to offer the terms of agency but without entering into any details. They said that the firm Lallu Mal Ram Chunder would have to undertake to purchase certain quantity of sugar per year, but did not mention what that quantity would be. Then they said that Lallu Mal Ram Chunder would be required to make a certain deposit per maund for sugar delivered to them, but here again they did not mention what the amount of deposit would be. It is clear that the Company were avoiding coming to any definite terms as to the question of agency.

It is clear to my mind that Mr. Simeon, the agent of the Sugar Company, agreed that as a condition precedent to Lallu Mal Ram Chunder becoming subscribers to 500 shares, they would be appointed the sole agents at Cawnpore for sale of sugar. This agreement on the part of Simeon was impliedly, ratified by Behari & Co., by not disputing the correctness of the statement contained in Lallu Mal Ram Chunder's letter, dated the 6th of March, 1921 (Ex. A).

Now the question is what is the position in law of the parties? Mr. Indu Bhusan Banerji argued that the appointment of Lallu Mal Ram Chunder as agents of the Company was not a condition 'precedent' to the former's purchase of shares and he relied upon three cases—two English and one Indian. These are *Moti Lal Chunni Lal* v. *Thakorlal Chiman Lal* (1), *In Re Richmond Hill Hotel Company, Elkington* (2) and *In Re Southport, etc., Co.* (3). I have considered all the three cases and it appears to me that all that they lay down is this—where persons agreeing to take shares have attached to it a condition 'precedent' to their purchase, the purchase is not effective and does not make the would-be purchaser a member of the Company till the condition is fulfilled. Further, where the condition attached to the purchase is a subsequent condition, the would-be purchaser becomes a member although the subsequent condition be not fulfilled. Authorities are useful only so far as they lay down the law, but they are usually not safe guides when questions of fact are involved.

In *Elkington's* case (2) it appears that Elkington & Co. applied for 150 shares of £10 each in a Company on the faith of an agreement with a promoter (the agreement was subsequently ratified) that they should pay only 30s. per share in cash and the further calls should be set off against the goods to be supplied by them. Elkington & Co. paid a deposit of 10s. per share and the shares were allotted to them and then they paid the further sum of 20s. per share. They received the certificates and they were entered on the register. No goods were ordered because the Company had to be wound up. The question then arose whether Elkington & Co. were liable to be put on the list of contributories or not. It was held that they were liable. Dealing with the position of Elkington & Co., the facts and law were discussed and the Lord Justices hearing the appeal differed from the Vice-Chancellor (who had heard the case in the first instance) as to the position of Elkington & Co. They pointed out that as a matter of fact Elkington & Co. had agreed to become members of the Company and the condition that was attached as to purchase by the Company of the goods of Elkington & Co. was, as a matter of

(1) [1912] 36 Bom. 557=16 I. C. 696=14 Bom. L. R. 648.
(2) [1866-67] 2 Ch. 511=16 L. T. 301=15 W. R. 655=36 L. J. Ch. 593.
(3) 31 Ch. D. 120=55 L. J., Ch. 497=53 L. T. 832=34 W. R. 49.

fact, not a condition precedent. Lord Justice Cairns says at p. 526 :

"Therefore of the two questions which seem to me to represent the two alternative views of the case, I am bound to answer in the affirmative the one which suggests that Elkington & Co. intended to be share-holders *in præsenti*. If that be so, that is enough for the present application."

At p. 525 the same Judge said :

"Now I am not prepared at all to say that it would not have been perfectly competent for Elkington, on receiving the letter of allotment, to have returned it to the Company and to have said: 'There is a complete misunderstanding in sending us this letter of allotment ; referring to the correspondence that has passed between your promoter and ourselves, you will find that although we went through the form of applying for shares, the whole of that was subject to the understanding that either you should give us a resolution of the Company that we were to be under no liability upon those shares, or that we should have right of refusing to take shares upon which we were to be liable.' They did nothing of the kind. They received the letter of allotment; they kept it."

It is clear that the case was decided on a question of fact. So every case must be decided, mainly on the question of fact.

It is rather curious that none of the learned Counsel for the parties ever thought of referring to the Indian Law on the question. English Law is certainly useful in clearing up obscure points, but it is after all the Indian Law that matters most. It is conceded by the parties that there is nothing in the Companies' Act itself which would differentiate the case from ordinary cases of contract. That being so, in my opinion, the law in India would be found in Ss. 31, 51 and allied sections of the Contract Act. S. 31 defines a "contingent contract" as a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. S. 51 lays down the rule as to performance of reciprocal promises in the following terms:

" When a contract consists of reciprocal promises to be simultaneoulsy performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise." S. 34 of the Contract Act lays down : "If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies "

In the case before me the agreement was that Ram Chunder would become a member of the Company by purchase of shares in case he happened to be appointed the sole agent of the Company for sale of sugar at Cawnpore. Under S. 31 of the Contract Act, such a contract would be a contingent contract and under S. 32 of the same Act the contract could not be enforced unless and until that event happened. Further, whereas in this case, that event became impossible by the company going into liquidation, under S. 33, the contract cannot be enforced at all. Even if we treat the agreements of the parties as reciprocal promises, we shall see that Ram Chunder was under no legal liability to perform his part of the contract unless and until the Company were ready and willing to perform their promise, *vide* S 51 of the Contract Act. Under the Indian Law, therefore, the Company having failed to appoint Ram Chunder their sole agent, Ram Chunder is absolved from his liability to become a member of the Company.

It has been pointed out that at the time of the agreement with the firm of Lallu Mal Ram Chunder it was known to the parties that the Company was not, as a matter of fact, manufacturing any sugar and it is also common ground that the terms of the agency had not yet been settled when Ram Chunder signed the application for shares. From these facts it is argued that the circumstances were such that Lallu Mal Ram Chunder knew that they could not at all be appointed agents. I do not agree with this contention. There was nothing in law to prevent the Company from appointing Lallu Mal Ram Chunder their sole agents in Cawnpore by settling the terms although sugar was not being manufactured at the time. The agreement would have been that if, and when, sugar was produced in the Factory, Lallu Mal Ram Chunder would be the only firm which would sell sugar manufactured by the Company at Cawnpore. The terms were not settled,

but there is no reason why they could not be settled at once and if they could not be settled it was clear that the agreement on the part of Ram Chunder to take the shares would fall through at once.

I hold, therefore, that in terms of the English Law it was a condition 'precedent' to Lallu Mal Ram Chunder becoming a member of the Company that they should be appointed the sole agents of the Company for sale of sugar at Cawnpore. In the language of the Indian Contract Act the agreement on the part of Lallu Mal Ram Chunder to become a member of the Company was contingent, *i. e.*, dependent for its validity and enforcement on the condition of the Company appointing them their sole agents. In the events that have happened the Company either declined or failed, and later made it impossible, to appoint Lallu Mal Ram Chunder their sole agents, and it would follow that Lallu Mal Ram Chunder are not liable to contribute towards the liquidation.

I allow the objection of Ram Chunder, the proprietor of Lallu Mal Ram Chunder with costs. The liquidators are not to be blamed for having contested Ram Chunder's application for the matter was not entirely clear, and a good deal could be fairly said on behalf of the liquidators. The liquidators will get their costs out of the estate and I assess the Counsel's fees of the liquidators as between Counsel and client at Rs. 75.

Objection allowed.

★ 1925 ALLAHABAD 662

MUKERJI AND BOYS, JJ.

Ram Charan Sahu—Appellant.

v.

Salik Ram Sahu—Respondent.

Second Appeal No. 585 of 1924, Decided on 18th February 1925, from a decree of the Dt J., Azamgarh.

★ *Civil P C., O. 21, R. 16 –Execution of decree granted- Judgment-debtor cannot afterwards say decree is not executable.*

So long as an order allowing execution of the decree at the instance of the transferee of the decree stands, the judgment-debtor cannot be heard to say that the decree is not executable. The proper time for the judgment-debtor to raise the objection is when the notice is sent to him under O. 21, R. 16, to show cause why the execution should not be granted.

[P. 662, C. 2 & 63, C. 1]

A. P. Bagchi—for Appellant.

Iqbal Ahmad—for Respondent.

Mukerji, J.—This appeal arises out of execution proceedings under the following circumstances :

An Insolvency Court, namely, the District Judge of Gorakhpur, passed a decree against the appellant Ram Charan Sahu in order that some money, belonging to the judgment-debtor which he had realized, he might repay. That decree having been passed, the receiver, Babu Raghubar Prasad, transferred the decree to the opposite party, Salik Ram. Salik Ram, having obtained an assignment applied for execution and obtained an order of transfer of the decree to the Court of the Subordinate Judge of Azamgarh. In that Court, for the first time, Ram Charan Sahu raised the objection that the decree that had been passed by the Insolvency Court was a nullity. That objection having failed, he preferred an appeal to the District Judge.

The District Judge held that the Court which passed the decree had recognized the title of Salik Ram to execute the decree and that it was not open to the Court at Azamgarh to go behind that order.

In this Court in the memorandum of appeal not a word has been said as to why this view of the learned District Judge was unsound. The appellant in the memorandum of appeal reiterates his objection to the validity of the decree as it was passed.

Under O. 21, R 16 of the Civil Procedure Code, when a transferee applies for execution of a decree, a notice has to be issued to the judgment-debtor to show cause why the execution should not be granted. The Court is directed not to execute the decree till the objection of the judgment-debtor has been heard. Evidently it was the order which allowed execution that is mentioned by the learned District Judge in his judgment. According to a ruling of this Court namely *Taj Singh* v. *Jagan Lal* (1) the order allowing execution operates as *res judicata*.

In our opinion, so long as the order allowing execution of the decree at the

(1) [1916] 38 All. 289=35 I. C. 234=14 A. L. J 70.

instance of Salik Ram stands, the appellant cannot be heard to say that the decree is not executable. When the notice was sent to him, that was the time when the appellant should have raised the objection as to why the execution should not be granted.

The appeal fails and is hereby dismissed with costs which will include counsel's fee in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 663

LINDSAY AND KANHAIYA LAL, JJ.

Jagat Narain Dube—Appellant.

v.

Nageshwar Prasad Tiwari and others—Respondents.

Second Appeal No. 627 of 1924, Decided on 2nd February 1925, from a decree of the Addl. Sub. J., Basti.

Civil P. C., S. 11—Pre-emption suit—Vendee and pre-emptor were rival pre-emptors in previous suit—Interpretation of wajib-ul-arz *in previous suit is binding in later suit.*

The present plaintiff and defendant were parties to a previous suit in which they figured as rival pre-emptors. In that suit a certain interpretation of the *wajib-ul-arz* was adopted.

Held: that that interpretation was binding between the parties in the later suit in which one of them was the vendee and the other was the pre-emptor. [P. 663 C. 2.]

(b) Wajib-ul-arz—*Entries in are evidence of custom of pre-emption.*

Entries in *wajib-ul-arz* afford evidence of the existence of a custom of pre-emption in the village. [P. 663 C. 2.]

Kashi Narain Malaviya—for Appellant.

N. Upadhiya—for Respondents.

Lindsay, J.—This appeal arises out of a suit for pre-emption brought in respect of certain property situated in the village Ajgara. The plaintiff is a co sharer in the patti in which the share sold is situated. The defendant vendee is a co-sharer in another patti, but claims to be related by blood to the vendor. The Court of first instance found that no custom of pre-emption was established and did not proceed to try the other issues raised in the case The lower Appellate Court, however, contented itself by holding that even if there was a custom of pre-emption, the plaintiff was not entitled to preference because the defendant vendee was related to the vendor and was consequently entitled to preference.

The *wajib-ul-arz* of the village Ajgara, prepared in 1820, allows a right of pre-emption in the first instance to the co-sharers of the village. The *wajib-ul-arz* prepared in 1862 is more specific. It gives a right of pre-emption to near co-sharers (*hissedar qaribi*) and in case of their refusal to the co-sharers of the village. The *wajib-ul-arz* prepared in 1890 describes more fully how the right of pre-emption between the near co-sharers (*hissedar qaribi*) was to be regulated. It lays down that the right of pre-emptions all belong in the first instance to a co-sharer who was a near relation *sharik aziz qaribi* after him to a co-sharer who was a more distant relation (*sharik baeed*), and after the latter to a co-sharer in the patti, and in case of his refusual, to the co-sharers of other pattis In the connected First Appeal No. 24 of 1921, decided to-day, we have held that these entries afford evidence of the existence of a custom of pre-emption in that village, and the only question left for consideration in this case, therefore, is whether under that custom the plaintiff Jagat Narayan Dube is entitled to preference as against the defendant vendee Nageshar Prasad Tiwari. It appears from the record of F. A. No. 328 of 1921, which has been decided to-day, that this *wajib-ul arz* has been the subject of interpretation in previous suits, to one of which both Nageshar Prasad Tiwari and Jagat Narayan Dube were parties. They were rival pre-emptors, and the finding of the Court which decided that suit was that the only person who could claim, in the first instance, a right of pre-emption as against the others was a co-sharer of the patti who was related to the vendor, and that the right of the co-sharers of the other pattis related to the vendor would be postponed to a co-sharer in the patti though not related. The result of that decision, which is final between the parties to the present appeal, is that the plaintiff Jagat Narayan Dube, who is a co-sharer in the same patti, is entitled to preference over the defendant vendee who, though a blood relation, is not entitled to preference over him. because

he is a co-sharer in another patti. The other points arising in the suit have not been dealt with by the Courts below. The appeal is, therefore, allowed and the case is remanded to the Court of first instance through the lower appellate Court for disposal after the determination of the other points raised in the suit in the manner prescribed by law. Costs here and hitherto will abide the result.

Appeal allowed.

★ 1925 ALLAHABAD 664

MEARS, C. J. AND SULAIMAN, J.

Ajudhia Prasad and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 622 of 1924, Decided on 2nd December 1924, from an order of the S. J., Shahjahanpur.

(a) *Penal Code, Ss. 300 and 146—Organized fights with lathis—Combatant using fire-arm—Transportation for life is the only proper sentence for such combatant.*

Organized fights with each side armed with lathis are grave infractions of the law and frequently result in the death of one or more combatants. The introduction of the pistol is an added aggravation and in such cases transportation for life is the only appropriate sentence that could be passed against the combatant who uses the fire-arm and brings down a man to the ground though not dead, at least wounded. [P. 666, C. 1.]

★ (b) *Criminal Trial—Conviction for rioting—Plea of self defence raised for first time in appeal—Court should examine the plea.*

Where the accused were convicted of the offence of rioting and in appeal they raised the plea of self-defence for the first time in the whole proceedings.

Held: that they were entitled to have the plea examined by the Court. [P. 666, C. 1.]

(c) *Penal Code, S. 96—Impending attack by one faction on another—Members of latter collecting together to resist—Riot—Latter party were held to act in self-defence.*

There were two factions, A and B, in a certain village. A member of group A was severely beaten and hurt by the members of B. Two days later, the members of A gathered together to take revenge on B. On hearing the news, the members of B also collected together. The members of A marched against B and in the result there was a riot. One of the members of A used a fire-arm whose shot brought down a member of B. A member of B thereupon shot the man in A who had used the fire-arm.

Held: that if the members of B had a reasonable apprehension that if they separated they would be individually pursued and punished, they were justified in remaining together and resisting the attack.

Held: further, that considering the state of feeling between the parties, this was the fact and that B were justified in resisting the attack of A and that a member of their group was justified in shooting the man who had shot another member of their party. [P. 666, C. 2.]

H. Cecil Desanges—for Appellants.

Govt. Pleader—for the Crown.

Judgment.—These are two appeals against convictions for rioting in a fight which is said to have taken place between two rival factions at the village of Kundri in the Shahjahanpur district. There are in all ten appellants before us. There appears to have been a long-standing quarrel between what in this Court has been called group A and group B. Group A in this Court consists of Ajudhia Prasad, Misri Lal, Chetram, Jwala Prasad and Jangi Lal; group B of Hardwari, Lal Bahadur, Bhagwandin, Gokul and Tika Ram. All of these people are the appellants before us. The first four persons in group A are represented by Mr. Desanges. Jangi Lal was not represented but at our request Mr. Desanges was good enough to bear his interest in mind and has at the end discussed the case of Jangi Lal separately with a view to assist him. Group B are represented by Mr. Jamini Mohan Banerji.

There is no doubt that for a long time there has been extremely bad blood between these two parties represented by Ajudhia Prasad as the ring-leader on the one side and Hardwari on the other and their relatives and friends. There had been previous litigations and criminal proceedings, but on the 8th of April last there was an encounter which we are told is still the subject of a judicial enquiry, with the result that a man named Jagannath belonging to faction A was so injured that he died four days later. In our opinion that circumstance, the injury of Jagannath on the 8th, has an important bearing on what took place on the 10th of April. We may pause for a moment to say that we are satisfied that both sides have told falsehoods about this matter; that group A have deliberately concocted a story as to Ajudhia Prasad being dragged from the neighbourhood of Dwarka's sitting-room towards the threshing-floor of Hardwari; whilst on Hardwari's side there has been a deli-

berate fabrication of evidence putting the wounding of Jangi Lal as the act of a man named Pubup Ram. There are three or four witnesses who are independent in the sense that they are not relatives of any of the accused, nor do they appear to be members of group A or group B ; but with the solitary exception of a man named Tilak it is obvious on reading the evidence of the so called independent witnesses that their sympathies can be plainly marked out as leaning either towards group A or group B. Tilak however, holds the balance very evenly, and we attach very considerable weight to his evidence; and from his evidence and the evidence of the other witnesses in the case we are able to construct with sufficient certainty and safety what in fact in our belief took place. It should be understood that group A and group B in this village undoubtedly consisted of more persons than are before us to-day. We have no doubt that group A were vengeful and resentful because of the injuries to Jagannath, which had been received by him two days before, and that a number of persons adherent to group A did gather at Dwarka's sitting-room either about midday or in the early afternoon. News of this gathering, we believe, was communicated to Hardwari, and it may be that Hardwari, on learning that a considerable number of men, certainly more than 10 and probably less than 20, had gathered at Dwarka's sitting-room, felt it prudent in the circumstances to get his brothers and friends also to come to his threshing-floor. But however that may be, we have no doubt whatever that this fight arose from an advance made by group A party towards the threshing-floor of Hardwari. It is common ground and agreed, and we have been most precise and careful about this, that the fight took place on a piece of waste ground belonging to Hardwari and at a distance of about 40 paces from the sitting-room of Dwarka and about 30 paces or less from that of Hardwari. In other words the fight took place at a distance of 2/3 from the sitting-room of Dwarka and 1/3 from the threshing-floor of Hardwari. There is one point on which the evidence is perfectly clear, and that is that there was some preliminary abuse and a reference by Ajudhia Prasad to what had been done to Jagannath on the 8th, and then, before any *lathi* blow was struck, Jangi Lal fired a pistol. There is no doubt that the bullet from that pistol hit Shamacharan. On the evidence we accept what Tilak says, that thereupon Hardwari, who had come down from his threshing-floor, turned back, grasped a pistol and fired it in the direction of and in fact hit Jangi. Thereupon a *lathi* fight became general. No more pistol shots were fired on either side and in the result Pimmi Singh, an adherent of the A group, was so seriously injured in this fight that he died on the same day, the 10th of April. Shamacharan of B group, the man who was wounded by Jangi, was trampled upon in the fight and received other severe injuries and died of pneumonia on the 19th of April.

There are two principal questions which we must settle at the outset. The first is, who were the participants in this fight who are proved by the evidence beyond any reasonable doubt to have been engaged in it? Secondly, are there any circumstances to exonerate anybody either in group A or group B individually or collectively?

Turning now to group A, as we have said, there is no doubt that this encounter was started by Jangi firing the shot and we have no doubt whatever that Ajudhia Prasad was the ring-leader, or at all events a very important person, in this fight. Jangi and Ajudhia Prasad also received injuries which cannot be accounted for except on the ground that they were present.

It has been pressed upon us that Misri Lal was not present in the capacity of a combatant and indeed he asserted that he received the slight injury that he did when he was engaged in helping his injured brother Ajudhia Prasad. We have a great deal of doubt about that story but Misri Lal has had the advantage of evidence given in his favour by Binda who states that Misri Lal got hurt when helping his brother, and Jhabu who says also that Misri Lal was not in the fight. With some hesitation we have decided to give Misri Lal the benefit of the doubt.

As regards Chetram and Jwala Singh, they stand on quite a different footing. It is agreed that they are not relatives of any of the members of group A. They in fact live in a different village. They admit that they were present on the 10th of April in Kundri. They explain their presence by saying that they were

indebted to Ajudhia Prasad and they came to the village on business without any knowledge of any impending *marpit* and that they did nothing whatever in the matter at all. We have gone through the evidence very carefully with regard to these men and there does seem to be evidence in their favour, as for instance of Komal, who says that Chetram did not use a *lathi*. Binda said that Chetram and Jwala Singh took no part in the *marpit* and generally there seems to be very little evidence against them. In these circumstances we are acquitting them also.

The result, therefore, as far as it concerns group A, is that we uphold the conviction as regards Ajudhia Prasad and we do not interfere with the sentence of 10 years' rigorous imprisonment passed upon him.

Jangi has been sentenced to 10 years rigorous imprisonment. In our opinion that is not sufficient punishment. He commenced the affray by the firing of a pistol and we regard the importation of a fire-arm into a village faction fight of this character as a most serious matter. Although the wound inflicted by him on Shamacharan was not in a vital spot, it brought Shamacharan to the ground and may have been the indirect cause of his death as it led to his receiving injuries from which he might otherwise have escaped. Organized fights with each side armed with *lathis* are gave infractions of the law and frequently result in the death of one or more combatants. In this case the introduction of the pistol was an added aggravation and we are of opinion that transportation for life is the only appropriate sentence in Jangi's case.

We now come to group B. The position has been taken as regards group B quite boldly, that the whole of these men are entitled to acquittal on the ground that they acted in self-defence only. In the lower Court they gave no hint of any such defence but they are entitled to have it examined and if it is proved to us that that was the attitude of Hardwari and his adherents they are entitled to claim their right to act in the way they did. We must summarize what we have previously said. We have already expressed our belief that the origin of this *marpit* on the 10th of April was due to the beating which group B had given to Jagannath on the 8th. With the rights and wrongs of that beating we are not in any way concerned here at all. But in our belief that brought about in the minds of the A group a determination for revenge and that when they gathered together at Dwarka's sitting-room about midday or a little after that on the 10th they meant to take that revenge and meant to beat Hardwari and his brothers. We accept the evidence of the boy Bhudar who says that he went and told Hardwari what was happening as regards the gathering of men at Dwarka's sitting-room and we have very little doubt that Hardwari on receiving this information collected his forces. The Judge also seems to have thought that Hardwari did this but that Hardwari was doing what was wrong. That in our view is not entirely a correct view. If Hardwari knew that he could have escaped from these people and if his brother and adherents were aware that they could escape also there would have been a duty on them to get out of the way until the anger and resentment had lessened. But if they had a reasonable belief that if they separated they would be pursued and individually beaten they had every right to keep together and that seems to be the view that they took and in the circumstances of the feeling as between these two factions they seemed to have felt it safer for them not to be separated. We have already said that we believe that the attack proceeded from group A and we are confirmed in that view by the undoubted circumstance that the fight took place very much nearer to the threshing-floor of Hardwari than the sitting-room of Dwarka. In other words group A advanced upon group B. We have no doubt that Jangi fired the first shot and we believe that Hardwari had not then at the moment a pistol in his hand, but he went back and took one from the threshing-floor. We think that it is a very unfortunate circumstance that fire-arms were used in this village fight, but we are of opinion that when Jangi had fired at some one in group A and in fact did wound Shamacharan, Hardwari had a right in law to fire back and did fire back and did wound the right man Jangi. Having decided that important point it follows, that if Hardwari had a right to repel the attack of Jangi by pistol the rest of his party had a right to repel by *lathis* the attacks

made upon them by *lathis*. That being so, although the defence of self-protection was not raised at all in the lower Court, we believe on a very careful perusal of the evidence that we have come to what is the right and the proper conclusion in this matter. This case has occupied a full day's hearing and we have endeavoured to dissect the evidence and to arrive at what we think to be the just and proper conclusion. We have already dealt with group A. As regards group B, the order is that the sentences passed on Hardwari, Lal Bahadur, Bhagwan Din, Gokul and Tika Ram must be set aside and those five persons released unless it should happen that they are being detained in connection with any other criminal charge. Turning now to group A, as regards Misri Lal, Chet Ram and Jwala Singh the convictions against them are also set aside and they must be released subject to their being detained in respect of any other charge. The appeal of Ajudhia Prasad is dismissed and his sentence confirmed and the sentence passed upon Jangi Lal is enhanced to transportation for life.

1925 ALLAHABAD 667

DANIELS, J.

Gulab—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 761 of 1924, Decided on 25th November 1924, from an order of the S. J. Farrukhabad.

Criminal P. C., S. 476-A—Invalid complaint by Mag.—Appeal to S. J.—S. J. can make complaint.

Where a complaint which is made by a Deputy Magistrate is invalid and *ultra vires* and the matter goes up in appeal before the Sessions Judge, the latter can himself make a complaint under S. 476-A. [P. 667 C. 2, 668 C. 1.]

Peary Lal Banerji—for Appellant.

Daniels, J.—This is an appeal against an order passed under S. 476-A. of the Code of Criminal Procedure by the learned Sessions Judge of Farrukhabad, directing the prosecution of the appellant Gulab for an offence under S. 211 of the Indian Penal Code. The facts are as follows :

On 28th November 1923, Gulab filed a complaint against a Sub-Inspector under Ss. 165, 504 and 506 of the Indian Penal Code. His case was that he possessed a very fine pair of bullocks, that the Sub-Inspector had tried to get these bullocks from him, and that as he would not give them to the Sub-Inspector the Sub-Inspector had caused his house to be searched and instituted various proceedings against him. The Deputy Magistrate before whom the complaint was filed, after recording evidence under S. 202 of the Code of Criminal Procedure, dismissed it under S. 203. His order clearly shows that he considered the complaint to be false and got up. He did not, however, at that time take any steps to prosecute the complainant. On the case being brought to the notice of the District Magistrate, he considered that a prosecution under S. 211 should have been instituted immediately after the case was finished, and should be commenced even now, and sent instructions to this effect to the Deputy Magistrate. The Deputy Magistrate thereupon passed on order: "Gulab to be prosecuted under S. 211 of the Indian Penal Code." Gulab appealed to the Sessions Judge. The Sessions Judge held that the order for prosecution was really passed by the District Magistrate who had no jurisdiction to pass it, not being the superior Court of the Deputy Magistrate within the meaning of S. 195 of the Code of Criminal Procedure. The Deputy Magistrate merely acted under the order of his superior. As, however, he was clearly of opinion that Gulab ought to be prosecuted he himself made a complaint under the powers conferred on him by S. 476-A

Section 476-A. appears on the face of it to confer full powers on the Appellate Court in cases of this sort. It is conceded on behalf of the appellant that if the Deputy Magistrate made no complaint at all the Sessions Judge had power under S. 476-A. to make the complaint which the Deputy Magistrate refused to make. His argument is that as a complaint was made by the Deputy Magistrate, although that complaint might be altogether illegal and void, the hands of Sessions Judge are tied. It appears to me that the case can be put very simply. If the complaint made by the Deputy Magistrate was a valid complaint in law it should have been and would have been upheld by the learned Sessions Judge. If it was invalid and *ultra vires*, as the Sessions Judge found,

then the position is that no complaint, that is to say no complaint recognizable by the law, had been made by the Court below, and as the matter had come before the Sessions Judge in appeal it was within his jurisdiction to make a complaint himself under S. 476-A. In my opinion the order passed by the Sessions Judge is a perfectly legal order and I therefore dismiss this appeal.

Appeal dismissed.

★ 1925 ALLAHABAD 668

MUKERJI, J.

Gajraj Singh and others—Plaintiffs — Appellants.

v.

Ram Anjore Singh and others — Defendants—Respondents.

Second Appeal No. 94 of 1923, Decided on 20th June 1924, against the decree of the Sub.-J., Jaunpur, D/- 27th October 1922.

★ *Co-sharers—Suit for joint possession — Defendants in peaceful possession of lands as khudkasht—Joint possession need not be decreed.*

Where a party is entitled to joint possession, he should be granted the relief, and, to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. (34 *All.* 150 *Foll.*) But in certain cases a Court would be entitled to refuse a decree for joint possession. 18 *Cal.* 10 and (1894) *A. W. N.* 127 *Foll.* [P 669 C 1]

Where the defendants had been in peaceful possession of the lands as their khudkasht for well nigh twelve years before the suit for joint possession was instituted,

Held, that a decree for joint possession need not be granted.

Held, further that having regard to the peculiar nature of the people of the District concerned, a decree for joint possession would be inexpedient. 8 *A. L. J.* 312 *Dist.*

It is no doubt the case that the Code of Civil Procedure as it was enacted in 1882 did not provide for the execution of a decree for joint possession and the Code of 1908 does provide a mode as to how a decree for joint possession is to be executed. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession.

[P 669, C 1,2]

A. Sanyal—for Appellants.

Iqbal Ahmad—for Respondents.

Judgment.—This appeal is connected with S. A. No. 95 of 1923. The facts of the two cases out of which these connected appeals have arisen are practically the same.

An occupancy tenant Bagwanta Singh died before the year 1884. On his death, Bhagwan Singh, the predecessor-in-title of the respondents, took possession of the holding. There was a litigation between him and the widow of Bhagwanta, Mt. Newasi, which ended in a compromise effected on the 17th of June 1884. By that compromise the widow really handed over the entire holding to Bhagwan Singh. Later on, the daughter of Bhagwanta Singh brought a suit of her own, but it was held that the compromise held good during the lifetime of her mother. Mt. Newasi died in April 1910. Some time after, her daughter brought another suit to recover the holding, but she was again unsuccessful. After that suit had been dismissed, the two suits out of which these appeals have arisen were brought by co-sharers of the mahal against the descendants of Bhagwan Singh for obtaining joint possession over the holding. Let it be mentioned here that Bhagwan Singh was and the respondents are also co-sharers in the village. The defence was that the respondents were co-sharers in the village and were in peaceful possession, and the plaintiffs, whose title to the land was not denied, were not entitled to obtain joint possession, though they might sue for partition, or for profits.

The Court of first instance gave a decree for joint possession, but it made it clear that that decree did not entitle the plaintiffs to obtain physical possession by ousting the respondents from any portion of the plaint land. Both the plaintiffs filed appeals. The learned Subordinate Judge who heard them found no reason to grant a decree for joint possession. He held that, although the learned Munsif had pointed out that the decree for joint possession did not really mean anything but a declaratory decree, yet, having regard to the peculiar features of the people of the district, it would be in the interest of the parties themselves not to grant an ambiguous decree but a pure declaratory decree. Evidently the learned Subordinate Judge means that as soon as the plaintiffs come to know that they have got a decree for joint possession, they would ignore the word "joint" and understand that they have been awarded possession to the extent of their share and

would then use force to obtain actual physical possession on the spot.

In this Court it has been urged that the learned Subordinate Judge was wrong, and the appellants are entitled to a joint decree.

Reliance has been placed on behalf of the appellants on the case of *Jagan Nath Ojha* v. *Ram Phal* (1). In this case it was held that, where a party is entitled to joint possession, he should be granted the relief, and, to entitle him to it, it is not necessary that he should have been in possession before and should have been dispossessed later on. This remark was made in view of the fact that for some time it was thought improper to grant decrees for joint possession unless a party had been in such possession and had been ousted. In the case before their Lordships, a lady, who was the owner of a certain zamindari share, died and the parties to the suit became entitled to that share. The defendants alone were in possession, and the plaintiffs, who were as much entitled to the share as the defendants, asked for joint possession. The learned Judges held that, in the circumstances, joint possession might be decreed. They, however, did recognize the fact that in certain cases a Court would be entitled to refuse a decree for joint possession, and they cited the cases of *Watson and Company* v. *Ramchund Dutt* (2) and *Bhola Nath* v. *M. Buskin* (3) as instances, in which the prayer for joint possession had been properly refused. The learned Judges expressed their dissent from the case quoted by the learned Subordinate Judge, namely, *Phani Singh* v. *Nawab Singh* (4).

There cannot be the least doubt that the ruling in 8 A. L. J. 1312, still holds good and is binding on me. But the question is whether, in the circumstances of this particular case, I should grant a decree for joint possession or should content myself with the decree for declaration which the lower Court has granted. Apart from the fact that, in my opinion, too, the learned Subordinate Judge was right in his remark that, having regard to the nature of the population of the district of Jaunpur, it was expedient that there should not be given any ambiguous decree, I am clearly of opinion that this particular case is covered by the cases which were distinguished by the learned Judges in the case in 8 A. L. J. 1312. I have already pointed out that the case before their Lordships was that of a *share in a zamindari*. Possession over such a property does not necessarily mean physical possession over all the lands comprised in the share. In this particular case the subject-matter of dispute consists of a few particular plots of land. These lands are in the actual cultivation of the defendants-respondents. They have been in possession thereof as tenants till the widow of Bhagwanta Singh died. They obtained possession to start with as relations of Bhagwanta Singh, the original tenant. But since the death of the widow of Bhagwanta Singh, they have been in possession as zamindars, and they resisted the suit of Bhagwanta Singh's daughter as such. Thus the defendants had been in peaceful possession of the lands as their *khudkasht* for well nigh twelve years before the present suit was instituted. As co-sharers jointly owning the lands the defendants are as much entitled to cultivate these particular plots as the plaintiffs themselves. The case is, therefore, parallel to the cases of *Watson and Company* v. *Ramchund Dutt* (2) and *Bhola Nath* v. *M. Buskin* (3) quoted above. In the former case the defendants were peacefully cultivating the lands in respect of which the relief was asked for. In the latter case certain co-sharers had granted a lease without the consent of the plaintiff co-sharer, and the lessee was in peaceful physical possession of the lands in respect of which the lease had been granted. Their Lordships of the Privy Council and this Court refused to grant a decree for joint possession.

It is no doubt the case that the Code of Civil Procedure as it was enacted in 1882 did not provide for the execution of a decree for joint possession and the Code of 1908 does provide a mode as to how a decree for joint possession is to be executed. But from this it does not follow that in every case where there are joint claimants and joint owners it is the duty of the Court to grant a decree for joint possession.

In my opinion, the decree of the Court below is not only expedient but right in

(1) [1912] 34 All. 150=13 I. C. 79=8 A. L. J. 1312.
(2) [1891] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P.C.).
(3) [1894] A. W. N. 127.
(4) [1905] 28 All. 161=(1905) A. W. N. 243

law. I dismiss the appeals with costs which will include Counsel's fees in this Court on the higher scale.

Appeals dismissed.

★ 1925 ALLAHABAD 670

SULAIMAN AND DANIELS, JJ.

Akbar Ali—Applicant.

v.

Raja Bahadur and others—Opposite Parties

Criminal Revision No. 320 of 1925, Decided on 23rd July 1925, against the order of the S. J., of Shahjahanpur, D/- 18th April 1925.

★ *Criminal P. C., Ss. 213 (2) and 209—Words "not sufficient grounds for c mmitting the accused" do not mean "c ise not proved"—Discretion should be carefully exercised in finding out whether there are not sufficient grounds—In case of doubt commitment should be ordered.*

Section 213 uses the expression "not sufficient grounds for committing the accused". This expression is quite different from such expressions as "the case not proved" or "the accused are innocent". If a Magistrate hearing a charge triable by the Court of Sessions comes to the conclusion that the evidence before him is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled and it is, indeed, his duty, to discharge the accused under S. 209, Criminal Procedure Code. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under S. 213 (2). Of course this discretion is to be carefully exercised, and wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to decide. 40 *All.* 615, *Not Foll.*; 1922 *All.* 168, *Foll.* [P. 670, C. 2, P 671, C. 1, 2.]

S. Raza Ali—for Applicant.

Saila Nath Mukerji—for Opposite Parties.

Daniels, J.—This is an application in revision against an order discharging three persons Raja Bahadur, Raj Narain and Murari Lal who were prosecuted on a charge under S. 302 of the Indian Penal Code of murdering Asghar Ali. There is no doubt that Asghar Ali was murdered on the 23rd of September 1924 at Shahjahanpur. A severe religious riot took place on that date, and it is said that a number of other persons were killed. So far as the evidence in this case goes it appears that one Munna Lal, a Hindu, was seriously injured shortly after 10 o'clock and died between 10 and 11. The first report in regard to the attack on him was made at the Kotwali at 10-45 A. M., and he died before he could be conveyed to hospital. The report of Asghar Ali's murder is said to have been made at the Kotwali at 12 o'clock, the time of the occurrence being given as about 11. A special Sub-Inspector, S. Masum Ali, was sent from Budaun a few days later to investigate this case. He had two other similar cases to investigate, and he did not commence the investigation till October 8th. He concluded his nquiry on October 19th and sent in Form B finding that the charge against the accused was not established. A complaint was filed in Court by the deceased man's brother Akbar Ali, and a Special Magistrate, Mr. C. H. Cooke, was deputed to hear the case. After hearing a number of witnessss for the prosecution he framed a charge on February 10th, 1925. He then proceeded to record the evidence of certain witnesses for the defence, and under S. 540, Criminal Procedure Code, of M. Ali Husain, Deputy Magistrate, who had been on duty patrolling the city just after Asghar Ali was killed. After considering this evidence, and, as he says in his order, on a more careful consideration of the prosecution evidence at leisure, he decided that the prosecution evidence was wholly untrustworthy and that no reliance whatever could be placed upon it. Under these circumstances he cancelled the charge against the accused.

Some argument has been addressed to us as to the duty of a committing Magistrate in cases of this kind, and we have been referred to a number of cases bearing on the subject. It is, in our opinion, well established that if a Magistrate hearing a charge triable by the Court of Sessions comes to the conclusion that the evidence before him is totally untrustworthy and that there is no reasonable possibility of the case resulting in a conviction, he is entitled, and it is, indeed, his duty, to discharge the accused under S. 209, Criminal Procedure Code. The same result follows if he comes to a similar conclusion after framing a charge and hearing witnesses for the defence under S. 213 (2). Of course this discretion is to be carefully exercised,

and wherever there is a possibility that different Courts might take different views of the evidence, the Magistrate, even though he may himself not think the evidence sufficient for a conviction, should leave it to the Sessions Court to decide. Knox, J., in *Het Ram* v. *Ganga Sahai* (1), has too narrowly restricted the functions of a committing Magistrate. We agree with the view of the law stated by Lindsay, J., in *Muhammad Abdul Hadi* v. *Baldeo Sahai* (2), which is, so far as we are aware, the only reported case of this Court dealing with an order of discharge passed under S. 213.

We have, therefore, to see whether in this case the Magistrate's order of discharge was justified according to the above tests: in other words, was the Magistrate justified in coming to the conclusion that no Court could possibly convict the accused on the evidence before him? The Magistrate has allowed the witnesses to be cross-examined with reference to contradictory statements which they made in the police enquiry. The result of that cross-examination was extremely damaging to the witnesses. In fact if their statements in the police enquiry have been correctly recorded they deprived their evidence in Court of any value. The deceased's brother Akbar Ali, for instance, having named four witnesses as eye-witnesses in the first report, stated in the police enquiry that these were not the eye-witnesses and that he wanted to call different witnesses as having seen the occurrence. Before the committing Magistrate the complainant's Counsel took the line that he did not ask the Magistrate to rely on the witnesses named in the first report, but wished to rest his case mainly on the evidence of Farzand Ali and Sultan Husain. In this Court we have been asked to ignore the police enquiry altogether and to rely on the statements of Khuda Baksh Nurul Hasan, Ahmadullah and Akbar Ali. This we are not prepared to do. Ahmadullah, we may note, was not examined by the police at all. The complainant gave as a reason for not calling him the fact that he was away from home, but the witness himself in his evidence stated that he was at his house during the whole time the police enquiry lasted. Another point which has impressed the committing Magistrate is that there is considerable doubt as to whether the scene of the occurrence has been correctly placed by the prosecution witnesses. They all with one exception state that Asghar Ali was killed just outside the northern gate of the Jama Masjid. The one remaining witness states that he was killed under a *pakar* tree only about ten paces to the east of the gate. The Deputy Magistrate, M. Ali Husain, who was patrolling the neighbourhood just afterwards states in his evidence that he found no blood outside the mosque, but he found blood at some distance along the road to the east, and he estimates the distance at 25 yards, though, as he made no note at the time and his evidence was not given till five months later, his estimate of the distance can only be a very rough one. Having regard to the very destructive criticism of the prosecution witnesses contained in the Magistrate's order we are satisfied that if we directed this case to be committed to Sessions, there is not the least likelihood that it would result in conviction. We accordingly uphold the order of the Court below and dismiss this application.

Sulaiman, J.—I concur. Having regard to all the circumstances of this case it is not a fit one in which we should interfere. I, however, wish to guard myself against being understood to dissent entirely from the view expressed by Knox, J., in *Fattu* v. *Fattu* (3), and *Het Ram* v. *Ganga Sahai* (1). Perhaps the learned Judge expressed himself too strongly, but the principle underlying his pronouncements seems to be sound. S. 213 uses the expression "not sufficient grounds for committing the accused". This expression is quite different from such expressions as "the case not proved" or "the accused are innocent". I agree with the view of Lindsay, J., that when after hearing the evidence for the defence the Magistrate comes to the conclusion that their evidence rebuts that produced for the prosecution, or renders it so incredible or unreliable that a conviction will not follow, he may pass an order of discharge, as expressed by him in *Muhammad Abdul Hadi* v. *Baldeo Sahai* (2). I also fully accept the statement of

(1) [1918] 40 All. 615=19 Cr. L. J. 706=46 I. C. 290=16 A. L. J. 486.
(2) 1922 All. 168=44 All. 57=19 A. L. J. 831=22 Cr. L. J. 703.
(3) [1904] 26 All. 564=11 A. L. J. 292=(1904) A. W. N. 125.

the law laid down by my learned colleague in the case of *Emperor* v. *Ganpat Lal* (4), that if the Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused person for trial, he is entitled, and, indeed, it is the duty, to discharge him. This, however, does not mean that the Magistrate is to arrogate to himself the functions of the Sessions Court and try the case as if he were that Court himself. The policy of the legislature seems to be that serious offences should be tried by Sessions Judges, who are ordinarily more experienced. They are the proper Courts for pronouncing an opinion as to the guilt or innocence of the accused in cases triable exclusively by the Sessions Court. Where, however, the evidence is wholly untrustworthy and the Magistrate is satisfied that it cannot lead to a conviction, he would be perfectly justified in discharging the accused, even though he has already framed his charge. The Magistrate has to see whether there are sufficient grounds of commitment or not. If he is satisfied that the evidence is altogether untrustworthy and not fit to be acted upon, he may discharge the accused. He should not, however, try to weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has or has not been conclusively proved.

Application dismissed.

(4) 1924 All. 664=46 All. 537=22 A. L. J. 411=5 L. R. A. Cr. 174=25 Cr. L. J. 795.

1925 ALLAHABAD 672

MUKERJI AND BOYS, JJ.

Shiam Lal and others—Appellants.

v.

Mool Chand—Respndent.

Second Appeal No. 378 of 1923, Decided on 19th February 1925, from a decree of the Dt. J., Agra.

Limitation Act, S. 7—Hindu joint family—Elder brother can give discharge.

A joint elder brother in a Hindu family represents the entire family and can therefore give a discharge within the meaning of S. 7 of the Limitation Act, on behalf of his minor brother. 41 *All.* 435, *Foll.* [P 673 C 1]

Narayana Prasad Asthana—for Appellants.

Kailas Nata Katju—for Respondent.

Mukerji, J. The plaintiffs' suit has failed in the Courts below *inter alia* on the ground of limitation.

It appears that a decree was obtained against the plaintiff-appellants' father by one Ram Prasad. In execution of that decree the property in suit was attached and sold. Before the attachment the father had died and his sons, the appellants, were brought on the record with the Nazir as their guardian for the suit. Over 12 years after the sale of the property, and just within 12 years of the delivery of possession, the appellants brought the suit out of which this appeal has arisen to have the sale set aside and to recover possession, on the ground that they were not properly represented in the execution proceedings, and that the property could not be sold because the father having died as a joint member of a Hindu family it had become the sole property of the appellants.

The Court of first instance found that the debt was one which was binding on the plaintiffs. It found that there was no proper representation of the plaintiffs in the execution department, but it found that the suit was barred by limitation.

On appeal the learned Judge found that there was a proper representation of the appellants in the execution department, and he also found that the suit was barred by 12 years limitation.

On the question of limitation we are clear that the decree of the Court below was right and we do not propose to consider the question of the proper representation by the Nazir. In this case, at the date of suit all the plaintiffs were majors; two were more than 21 and the youngest of them was found to have been just over 18 years of age when the suit was filed. It is urged on behalf of the plaintiffs that the youngest of the appellants could maintain his suit because he had three years from his attaining majority and as he could maintain the suit, the suits of his elder brothers would also be within time, the family being joint. This argument, however, is concluded by the recent case of *Rati Ram* v. *Niadar* (1). It was held that where there was an adult brother who could execute a decree on behalf of himself and the minor brother, it must be assumed that the former could give a discharge within the meaning of S. 7 of

(1) [1919] 41 All. 435=49 I.C. 990=17 A.L.J. 649.

the Limitation Act, and that younger brother could not execute the decree more than three years after the application of the elder brother. In other words, it was held that a joint elder brother in a Hindu family represented the entire family and could therefore give a discharge within the meaning of S. 7 of the Limitation Act on behalf of his minor brother. This case, in our opinion, is on all fours with the case before us and the appeal fails and is hereby dismissed with costs which will include Counsel's fee in this Court on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 673

KANHAIYA LAL, J.

Daud Khan and another—Applicants.

v.

King Emperor—Opposite Party.

Criminal Revision No. 381 of 1925, Decided on 7th August 1925, from an order of the S. J., Bulandshahr, D/- 4th June 1925.

★ *Penal Code, S. 404—"Property" is not expressly limited to "moveable property"—Parts of immovable property when severed may also become property under the section.*

Section 404 is not expressly limited to moveable property alone and criminal misappropriation or conversion is easily possible of immovable property where the materials have been severed from the building and removed. *6 B. H. C. Cr. 33, Diss.*

Where the property removed by the accused consisted of the rafters used in the house left by the deceased,

Held: the rafters were immovable property so long as they were attached to the house, but became moveable property when they were severed from the house and as the accused had no title to the house and the house was not in the possession of any person legally entitled to its possession, S. 404 applied, if, after severing the rafters from the house, they dishonestly removed them and misappropriated or converted them to their own use. [P. 673, C. 2]

Nehal Chand—for Applicants.

Assistant Govt. Advocate — for the Crown.

Judgment.—The accused Daud Khan and Sharf Uddin have been convicted of an offence under S. 404 of the Indian Penal Code and sentenced to rigorous imprisonment for four months and a fine of Rs. 100 each. It appears that one Musammat Aziman was indebted to Nanhu Khan and that when she died Nanhu Khan brought a suit against Daud Khan, alleging that he was the successor of the deceased and claiming the money due by her from the assets left by her at the time of her death, which were stated to be in his possession. The assets consisted of a house situated in the village Jagatpur. In that suit Daud Khan pleaded that Alauddin was the heir of Musammat Aziman and that he had been unnecessarily impleaded. It was ascertained on enquiry that Alauddin was missing from about eight years and the suit was decreed against the assets of Musammat Aziman in the hands of Daud Khan.

Nanhu Khan subsequently sold his decree to Mahoob Khan who found that Daud Khan and his son Sharf Uddin had removed some materials from the house left by Musammat Aziman. On his complaint Daud Khan and Sharf Uddin have been convicted, and the only question for consideration is whether that section of the Indian Penal Code is applicable to the case.

Section 404 lays down that a person who dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be liable to punishment under that section. The property removed by the accused in this case consisted of the rafters used in the house left by Musammat Aziman. They were immovable property so long as they were attached to the house, but became moveable property when they were severed from the house; and as the two accused had on their own showing no title to the house and the house was not in the possession of any person legally entitled to its possession, S. 404 of the Indian Penal Code applies if after severing the rafters from the house, they dishonestly removed them and misappropriated or converted them to their own use. The word "property," is not defined anywhere in the Indian Penal Code, but the word "moveable property" is defined by S. 22 as intended to include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth. In their severed state the

rafters were moveable property. The person entitled to the house was Alauddin Khan, and, failing him, any other nearest heir of the deceased or the zamindar, as the case may be. The accused do not claim any title to the house. They removed the rafters in order to obtain a wrongful gain to the prejudice of the decree-holder whose decree was still outstanding. In other words they dishonestly misappropriated property which was in the possession of a deceased person at the time of her death and has not since been in the possession of any person legally entitled to it.

Like S. 378, S. 403 refers to moveable property. S. 404 and some of the other sections following it refer to property without any such qualifying description; and in each case the context must determine whether the property there referred to is intended to be property moveable or immovable. In *Ram Manick Shaha* v. *Brindabun* (1), Norman. J. observed that where a person was entrusted with the dominion over property and wilfully omitted to pay revenue and caused the same to be sold at a revenue sale for the purpose of defrauding the mortgagee and purchased it himself in the name of some other person, he could be treated as having dishonestly misappropriated the same and converted it to his own use in violation of the legal contract which had been made affecting it. In *Queen-Empress* v. *Abdul Ahad* (2), where a certain person who, personating a Court peon, proclaimed by beat of drum that a tenant had been ordered by the Court, of which he personated himself to be the peon, to be ousted from a holding, it was held that S. 420 of the Indian Penal Code could have no application to the delivery of immovable property or to the surrender of the cultivatory holding. In *Jugdown Sinha* v. *Queen Empress* (3) the word property referred to in S. 405 of the Indian Penal Code was treated as meaning moveable property as in S. 403, and it was laid down that an offence of criminal breach of trust could not be committed in respect of immovable property. In *Reg* v. *Girdhar* (4) it was held that S. 404 of the Indian Penal Code did not apply to immovable property left by a deceased person. S. 404 contains no such express limitation; and criminal misappropriation or conversion is easily possible of immovable property, whereas in this case the materials have been severed from the building and removed. The appellants have been rightly convicted and there is no sufficient reason for interference in revision. As the materials were not of very great value, and there was no lawful claimant existing, the sentence need not be stringent. The application is dismissed except in so far that substantive sentence of rigorous imprisonment passed on each of the applicants will be reduced to the period they have already undergone. The sentence of fine will be maintained. The bail bonds will be cancelled.

Sentence reduced.

(1) 5 W. R. 230.
(2) [1882] A. W. N. 6.
(3) [1896] 23 Cal. 372.
(4) 6 B. H. C. Cr. 33.

1925 ALLAHABAD 674

NEAVE, J.

Debi Charan—Defendant—Appellant.

v.

Raghubir and others—Plaintiffs—Respondents.

Second Appeal No. 185 of 1923, Decided on 26th June 1924, from a decree of the Judge of the Court of Small Causes, Allahabad.

U. P. Land Revenue Act (3 *of* 1901), *S.* 126—*Partition*—Sir *land of one co-sharer allotted to another*—*Former not continuing to cultivate it does not become ex-proprietary tenant.*

Section 126 provides that when land held as *Sir* by any co-sharer is included at partition in the portion allotted to another co-sharer it is only when the former continues to cultivate it after partition that he becomes its ex-proprietary tenant. In other cases he is deemed to have surrendered it. [P. 675, C. 1.]

Kumuda Prasad—for Appellant.

Jang Bahadur Lal and *Shiva Prasad Sinha*—for Respondent.

Neave, J.—This is a defendant's appeal arising out of a suit for possession of two plots. These belonged originally to Mahadev and Ram Gharib as *sir*. They mortgaged them in 1303 *Fasli* to the defendant's father. In 1326 *Fasli* partition took place and the plots in suit were transferred to the plaintiffs. In the partition proceedings one Shiv Murat was recorded as the tenant in-chief.

The plaintiff came into Court on the allegation that he had Shiv Murat ejected by a Revenue Court and that the defendant has since taken possession of the plots. Both the Courts have decreed the suit. In appeal it is contended that when the plots, which admittedly before partition were the *sir* of the mortgagor, were transferred to the share of another co-sharer the mortgagor at once became their ex-proprietary tenant and that he and his mortgagee were entitled to remain in cultivating possession, and that this was what actually happened.

Section 126 of the Land Revenue Act provides that when land held as *sir* by any co-sharer is included at partition in the portion allotted to another co-sharer it is only when the former continues to cultivate it after partition that he becomes its ex-proprietary tenant. It is clear from the partition record that in the present case the former proprietor did not continue to cultivate the land. He never attempted to assert his ex-proprietary rights and must, therefore, be taken to have surrendered them. The defendant had no right to take possession of the plots. The appeal fails and is dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 675

SULAIMAN AND DANIELS, JJ.

East Indian Railway— Defendants—Applicants.

v.

Brij Kishore — Plaintiff — Opposite Party.

Civil Rev. No. 144 of 1923, Decided on 25th May 1925, against an order of the Small Cause Court Judge, Bareilly, D/- 23rd June 1923.

(a) *Railways Act, S. 72—Risk note signed by deliverer is enough.*

According to S. 72, sub.-S. 2, the risk note should be signed by or on behalf of the person sending or delivering goods to the railway administration. Therefore the signature of the person who delivers the goods to Railway would be quite sufficient. (1924 *All.* 621, *Rel. on.*) A signature of the consignor or his authorized agent is not in that case necessary. [P. 675, C. 2]

(b) *Railways Act, S. 72—Railway claiming exemption must prove loss to Company.*

The Railway Company cannot claim exemption under the risk note unless it establishes that the goods have actually been lost to the Company. 1923 *All.* 126 and 1924 *All.* 7 *Rel. on.* [P. 675, C. 1]

Ludli Prasad Zutshi—for Applicant.

U. S. Bajpai—for Opposite Party.

Judgment.—This is a revision by the East Indian Railway Company from a decree for damages passed by the Court of Small Causes at Bareilly. The learned Judge has overruled the objection of the Railway Company that they were protected by the risk note, Form "B" on the ground that person who delivered the goods to the Company and signed the risk note was neither a consignor nor his authorized agent. There was a further defence by the Railway Company that the goods were lost in a running train robbery. The learned Judge has decided that issue in the negative.

It is impossible to uphold the view of the Court below that the risk note is not binding on the consignor merely because it was not signed by him or his authorized agent. Section 72, Sub-s. (2), of the Indian Railways Act provides that such agreement should be in writing signed by or on behalf of the person sending *or delivering* to the Railway Administration. It is, therefore, clear on the language of the section that the signature of the person who delivers the goods would be quite sufficient. This was the view held by a Bench of this Court of which one of us was a member in the case of *Firm Gopal Rai-Phul Chand* v. *Great Indian Peninsula Railway* (1) and subsequently followed by this very Bench in S. A. No. 1145 of 1924, decided on the 5th of November 1924.

We, however, feel that it is impossible to interfere in revision in face of the finding that the defendant has failed to lead any evidence which would show that the consignment in question was contained in the wagon of which the seal was found broken. The learned Judge has commented on the paucity of the evidence and has finally remarked that if the defendant wanted to prove it, it should have taken necessary steps to have the original report filed and to prove that the consignment belonging to the plaintiff was in the wagon which was broken open by thieves.

The plaint was framed as one for recovery of damages for short delivery. There was no admission in the plaint that loss

(1) 1924 **All. 621=46** All. 837=5 L. K. A. Civ. 575.

to the Company had occurred. The loss referred to there clearly meant the loss to the plaintiff. It has been held in several cases, *e. g.*, *Secretary of State for India* v. *Firm Jiwan and Abdullah* (2), and *East Indian Railway Company* v. *Firm Kishan Lal Tirkha Mal* (3), that the Company cannot claim exemption under the risk note unless it establishes that the goods have actually been lost to the Company. The revision is accordingly dismissed with costs.

Revision dismissed.

(2) 1923 All. 426=45 All. 380=4 L. R. A. Civ. 166=21 A. L. J. 220.
(3) 1924 All. 7=45 All. 530=21 A. L. J. 438=4 L. R. A. Civ. 249.

1925 ALLAHABAD 676

SULAIMAN AND DANIELS, JJ.

Sukhai—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 319 of 1925, Decided on the 19th May 1925, against the order of the Second Addl. S. J., Gorakhpur, D/- 16th February 1925.

(*a*) *Penal Code, S. 300 Except. 1, Ss. 302 and 304—Deceased, accused's wife, leading immoral life—Accused remonstrating—Wife insisting on same life—Accused beating, wife not repentant but biting accused's fingers—Accused giving several injuries resulting in her death—Offence is culpable homicide and not murder.*

The deceased (the wife of the accused) led an immoral life and on the accused's upbraiding the deceased, his wife, with her misconduct, instead of being repentant said that she would again do such acts upon his head. Thereupon he became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. He then lost control of himself and took out a knife and stabbed her with several injuries which resulted in her death.

Held, that the immediate provocation was sufficient to bring the offence within Exception 1 to S. 300 and to reduce it from murder to culpable homicide. [P 677 C 1]

K. Verma—for Appellant.

Asstt. Govt. Advocate—for the Crown.

Judgment.—The accused Sukhai has been convicted under S. 302 of the Indian Penal Code of murdering his wife Mussammat Sukhia and sentenced to transportation for life. The commission of the offence is admitted, and the question is whether the offence is one under S. 302 or S. 304. On 29th November 1924 Dharam Raj, headman of mouza Deopar, found the dead body of a woman with a number of wounds on it in his grove through which he was passing. He informed the chaukidar who made a report. The body still had ornaments on it and some pieces of glass bangles were picked up near where the body had been lying. It was not known at first who the woman was but she was identified through one Musammat Jagrani who had known her as Musammat Sukhia the wife of the accused. The Sub-Inspector then proceeded, on 30th November, to the house of the accused. He found the house shut up. The accused had shifted to another house. The Sub-Inspector went there and found him. Eventually the accused gave up some ornaments to the Sub-Inspector, and a kurta and dhoti bearing stains of blood were found in his house. In the pocket of the kurta was a knife. The accused was sent before a Magistrate and made a confession under S. 164 of the Code of Criminal Procedure to which he has adhered both before the committing Magistrate and at his trial.

There is no doubt that the deceased woman was grossly immoral. The accused has told a long story of her repeated misbehaviour and how, in order to look after her, he had to give up going out to other villages for work—he is a goldsmith—and do his work at home. Eventually he left home with her with intent to go to Bengal; but in spite of repeated promises she did not reform. On the day of the murder they were intending to return together, along with their little girl aged seven, to their village Madhwapur. They arrived at Bhatni station in the afternoon and had to wait for a train till about 10 p. m. While they were there the accused says that he found his wife just outside the station having intercourse with a man. He threw a brick at the man who went away. This story sounds incredible, but it is corroborated by the evidence of the accused's little girl Mt. Nanki and the learned Judge appears to have accepted it. At any rate they travelled together to Salimpur and

there alighted and proceeded to the grove at Deopar where the body was found. The accused's account of what followed is that after the girl had gone to sleep he upbraided his wife with her misconduct. Instead of being repentant she said that she would again do such acts upon his head. Thereupon he became enraged and struck her with a stick. She struggled with him and got hold of his fingers and bit them. He then lost control of himself and took out a knife and began to stab her with it. He does not know how many blows he inflicted. The medical evidence shows that he went on stabbing her repeatedly. The Civil Surgeon has detailed a list of fifty-three different injuries on the body. Many of these were minor injuries, and, as the learned Judge says, the medical evidence shows that there were not less than a hundred injuries on the body altogether. The account of what happened at the grove receives corroboration from the fact that the accused was medically examined when he was admitted to jail and there were marks on his fingers which might have been the marks of teeth.

The Judge has believed the accused's story to be the substantial truth and we must accept it as such. We think that the immediate provocation at the grove coming on top of all that had gone before was sufficient to come within Exception 1 to S. 300 of the Indian Penal Code and to reduce the offence from murder to culpable homicide. We are prepared to make some reduction of offence and sentence, but we cannot leave out of account altogether the very savage nature of the attack which was made on the deceased and the large number of injuries which were inflicted by the accused. We alter the conviction to one under S. 301 of the Indian Penal Code and reduce the sentence to one of ten year's rigorous imprisonment.

Sentence reduced.

1925 ALLAHABAD 677

SULAIMAN AND DANIELS, JJ.

Kulsum Bibi—Defendant—Appellant.

v.

Muhammad Ismail and others—Plaintiffs—Respondents.

First Appeal No. 145 of 1924. Decided on 11th May 1925, from an order of the D. J., Ghazipur.

Civil P. C., S. 10—U. P. Land Revenue Act (3 of 1901), S. 118—Suit for partition pending in Revenue Court—Suit in Civil Court for partition of house is not barred.

The Revenue Court has no jurisdiction to partition a house, *i. e.*, partition the buildings, at all. It can partition the site occupied by a house along with other land in a village. If in making a partition it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in possession of another co-sharer, the latter can, under S. 118 of the Land Revenue Act, be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co-sharer in whose portion it may be included. Hence the pendency of a suit for perfect partition in a Revenue Court is no bar to a suit in a Civil Court for possession of a certain share of a house by partition thereof. If a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. 1924 *All.* 854, *Foll.* [P 678 C 1]

Kamla Kant Verma—for Appellant.

Uma Shankar Bajpai—for Respondents.

Daniels, J.—This is a defendant's appeal arising out of a suit for possession of a certain share by partition of the house in dispute. At the time when the suit was instituted, proceedings in the Revenue Court for a perfect partition of the village were pending. One of the pleas taken in the written statement was that the suit, in view of the Revenue Court's partition proceedings, was not maintainable. The learned Munsif dismissed the suit on the preliminary ground that it was not maintainable. On appeal the learned District Judge has taken a contrary view and has remanded the case.

In our opinion the view taken by the lower Appellate Court is perfectly correct. The subject-matter of dispute in the civil suit is a residential house which is said to have belonged to the ancestor of the parties and in which the plaintiff claimed a defined share. The Revenue Court has

no jurisdiction to partition a house, that is to say, partition the buildings at all. It can partition the site occupied by a house along with other land in a village. Of course, if in making a partition it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in possession of another co-sharer, the latter can, under S. 118 of the Land Revenue Act, be allowed to retain it (the land) with the buildings thereon on condition of his paying a reasonable ground rent to the co sharer in whose portion it may be included. It is, therefore, clear that the Revenue Court could not have partitioned the building itself and allotted the house to any particular co-sharer. All that can be done by the Revenue Court in partition proceedings is that if a house is in the occupation of one co-sharer and the site is allotted to another, it would be retained by the occupier of the house on payment of a rent to be fixed. This view is supported by the case of *Multan Singh* v. *Budhan Mun Singh* (1), decided by a Bench of which one of us was a member.

The learned vakil for the appellant has contended before us that there was an agreement between the parties that the revenue Court would allot to each co-sharer the house belonging to that co-sharer. There is, however, nothing on the record which supports this contention. There does appear, however, from the partition proceedings that there was an agreement that the sites of houses belonging to co-sharers would be allotted to the persons in whose possession they were. That, however, is quite a different thing from saying that there was an agreement that the buildings also would be partitioned by the Revenue Court. The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 1924 All. 854=22 A. L. J. 744.

1925 ALLAHABAD 678

MUKERJI, J.

Haji Ali—Applicant.

v.

Emperor through Ali Asghar—Opposite Party.

Criminal Reference No. 581 of 1924, Decided on 5th November 1924, made by the Sessions Judge of Benares, D/- 30th September 1924.

Criminal P. C., S. 144—Other means to avert danger being available, proceedings should not be taken under S. 144.

An action should be taken under S. 144 only in urgent cases of nuisance or apprehended danger. It is not proper that Criminal Courts should take upon themselves a jurisdiction to decide what are really civil disputes. [P 679, C 1]

Where the complaint was that a person by closing a drain and obstructing the flow of the rain water of another house endangered the safety of the house but where its owner could drain off the water in some other way.

Held, that the proper remedy was in the Civil Court. [P 679 C 1]

M. Waliullah—for Applicant.

M. A. Aziz—for Opposite Party.

Judgment.—It is a Reference by the learned Sessions Judge of Benares recommending that certain orders passed by two successive Magistrates may be set aside.

It appears that the parties to this Reference, *viz.*, Haji Ali, the applicant and Ali Asghar, the opposite party, are close neighbours. Ali Asghar went before the Joint Magistrate of Benares with the complaint that the rainwater of his house used to flow through the house of Haji Ali, that Haji Ali had closed the drainage and that this (Ali Asghar's house) was in danger. He wanted the Magistrate to take action under S. 144 of the Cr. P. C. and order Haji Ali to remove the obstruction. The learned Joint Magistrate called for a police report and on receipt of it passed an *ex parte* order on the 29th of August 1924, ordering Haji Ali to open the drain. Haji Ali took exception to this order and appeared before another Magistrate, the learned Joint Magistrate being absent from the station. At Haji Ali's request Mr. J. N. Singh, a Magistrate, ordered the Naib Tahsildar to put up a report. The Naib Tahsildar on inspection came to the conclusion that it was impossible for him to say definitely how the water flowed. He, however, discovered that from the remaining portions of the house of Ali Asghar the water found its way out towards the south where there was a main drain and he thought and reported that Ali Asghar could take the same measure with the water of that portion of the house about which the controversy was. Mr. Singh was of opinion that there was no reason to interfere with his predecessor's order and refused to amend it. Thereupon Haji Ali went before the learned Sessions Judge.

The learned Sessions Judge has stated the facts in a slightly different manner, but that does not really affect the merits of his recommendation. It appears to me that any urgency in the affair is wanting. An action should be taken under S. 144 only in urgent cases of nuisance or apprehended danger. It is not proper that Criminal Courts should take upon themselves a jurisdiction to decide what are really civil disputes. The Naib Tahsildar's report shows that it was open to Ali Asghar to take measure with the excess water accumulating in his Court-yard by draining it off towards the south. He had his remedy open in the Civil Court and that was his proper remedy. If it had been the case that water could not find its egress by any means within the disposal of Ali Asghar, the matter would have been different.

In the circumstances of the case I accept the recommendation of the learned Sessions Judge and set aside the orders of the learned Magistrates, dated, respectively, 29th August 1924 and 11th September 1924.

Order set aside.

1925 ALLAHABAD 679

MUKERJI, J.

Jhabba Lal—Plaintiff—Appellant.

v.

Debi Ram and others—Defendants—Respondents.

Second Appeal No. 658 of 1923, Decided on 20th November 1924, against the decree of the Dt. J. Bulandshahr, D/- 6th April 1923.

N. W. P. Tenancy Act, Ss. 57 (c) and 58 (b)—Condition relating to evacuation of land leased—S. 58 (b) and not S. 57 (c) applies.

Section 57 (c) contemplates an independent covenant, the breach of which would entail a forfeiture of the lease. For example, if it were a condition that on the planting of trees the lease would come to an end, on the lessee planting trees it would be said that he had committed a breach of condition and thereby forfeited the lease. But the clause does not apply where the condition relates to the evacuation of the lands leased.

One of the conditions of the lease was that whenever the plaintiff required the lands either for his *khud kasht* or for the purpose of planting trees, the defendants would vacate the lands without waiting for the expiry of the full term of the lease. The plaintiff alleged that he wanted the lands for his *khud kasht* and on the lessees not complying with his notice to them to vacate the land, instituted a suit.

Held: that Cl. (c), S. 57, had no application as the condition, a breach of which was alleged to have been committed, was the condition relating to evacuation of the lands themselves. [P 679 C 2, P 680 C 1]

Held: further that the case fell under Cl. (*b*), S. 58, of the Tenancy Act. [P 680 C 1]

K. N. Katju—for Appellant.

Benoy Kumar Mukerji—for Respondents.

Judgment.—The appellant was the plaintiff in the Court of first instance. The defendants-respondents held certain lands from the plaintiff under a lease for 7 years, *viz.*, 1323 to 1329. One of the conditions of the lease was that whenever the plaintiff required the lands either for his *khud kasht* or for the purpose of planting trees, the defendants would vacate the lands without waiting for the expiry of the full term of the lease. The plaintiff came to Court with the allegation that he, having wanted the lands for being used as *khud kasht*, verbally asked the defendants in September 1921 (during the currency of the *fasli* year 1329) to vacate the lands and thereafter sent a written requisition dated 29th October 1921 asking the defendants to vacate the lands by 16th November 1921. The defendants not having complied with the notice the suit was instituted. The suit succeeded in the Court of first instance but was dismissed on appeal by the learned District Judge. That learned officer was of opinion that the defendants had conclusively proved that the plaintiff had no necessity for the lands in question, it having been established that the plaintiff had ample lands of his own which he could not cultivate himself but had to let out to tenants. In view of this fact and being also of opinion that the lease contemplated the evacuation of the lands only at the end of an agricultural year, the suit was dismissed.

In this Court, it has been contended that the suit was based on a breach of condition and was, therefore, maintainable under Cl. (c), S. 57 of the N. W. P. Tenancy Act. In my opinion Cl. (c) S. 57, has no application. The condition, a breach of which is alleged to have been committed, is the condition relating

to evacuation of the lands themselves. This is not clearly the meaning of the clause The clause contemplates an independent covenant, the breach of which would entail a forfeiture of the lease. For example, if it were a condition that on the planting of trees the lease would come to an end, on the lessee planting trees it would be said that he had committed a breach of condition and thereby forfeited the lease. In my opinion Cl. (*c*) S 57 has no application.

The case really falls under Cl. (*b*), S. 58, of the Tenancy Act. The defendants would be non-occupancy tenants under the lease, and according to the allegations made in the plaint the term of the lease expired on the plaintiff giving a notice to the defendants to vacate. If that be the case, the suit could be instituted only within 30th of June and 1st October 1921, and not later than that. The suit was actually filed on 29th November 1921. Even if the suit had been instituted within the period limited by S. 63 of the Tenancy Act, the tenants could not be ejected till the expiry of the current agricultural year and, therefore, not before 30th June 1922, *vide* S. 73 of the Tenancy Act

There is no substance in the appeal and it is hereby dismissed with costs which will include Counsel's fees in this Court on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 680

SULAIMAN, J.

Bhakta Shiromani alias Bachcha—Defendant—Applicant.

v.

Seetal Nath—Plaintiff—Opposite Party.

Civil Revision No. 43 of 1925, Decided on 29th May 1925, from an order of the Small Cause Court Judge, Allahabad, D/- 5th March 1925.

★ *Master and Servant—Servant justifiably dismissed without notice, for misconduct, is not entitled to wages for the period from last due date of payment.*

When a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. [P. 681, C. 1.]

Bhagwati Shanker—for Applicant.

Judgment.—This is a revision from a decree of a Court of Small Causes. The plaintiff came to Court on the allegation that he was employed as a compositor in the defendant's press at a salary of Rs. 17 per month and that he was dismissed on the 20th of January 1925 without notice. He claimed the pay for the 20 days he served and an additional pay for 15 days as he was dismissed without previous notice. The suit was contested by the defendant and all liability was denied. The learned Judge of the Court of Small Causes has granted the plaintiff a decree for his pay for twenty days and dismissed the rest of the claim.

The findings which I must accept are as follows: The plaintiff worked in the defendant's press up to the 20th of January, on which date at about 12 o'clock, he, having got fever, disappeared from the press without applying for leave. He did not turn up for 5 or 6 days, and as he had disappeared without leave or sanction, and had left the work, the defendant was much irritated and dismissed him. The Court below finds that the plaintiff committed default and the defendant was justified in dismissing him. In spite of this finding it has granted the plaintiff a decree for his wages for 20 days.

As I have said, it was admitted by the plaintiff in the plaint that he was engaged on a monthly salary of Rs. 17. On the findings he left the work without leave and without sanction of the defendant and did not turn up for 5 or 6 days. The defendant was justified in dismissing him. If the conduct of the plaintiff was such that it justified the defendant in dismissing him before the expiry of the month the plaintiff, in my opinion, was not entitled to his salary for even the broken period for which he had served.

In the case of *Raghoonath Doss* v. *Mr. T. Ealle* (1), although the claim of the servant for wages for the broken period during which he had served was allowed it was pointed out that he would not have got it if the master could prove that the dismissal was justifiable.

In the case of *Ralli Brothers* v. *Ambika Prasad* (2), Tudball, J., held that an office clerk engaged on a monthly salary was not entitled to any salary for the broken portion of a month in the course of which

(1) 16 W. R., 60.
(2) [1913] 35 All., 132=18 I. C. 699=11 A. L. J. 104.

he left the service without the consent of his employer.

The present case is certainly distinguishable inasmuch as the plaintiff here did not actually leave the service, but left the work, which justified the master in dismissing him. But the English Law governing the rights and liabilities of master and servant is to be found in Smith's Law of Master and Servant, sixth edition, pages 169-172. In the absence of any statutory provisions in India the Common Law of England would prevail. It is there laid down that "when a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, he is not entitled to be paid any wages for that portion of time during which he has served since the last payment of wages. That is to say, if a servant, whose wages are only due yearly, abscond from his master, or is rightfully discharged before the expiration of the year, he could recover nothing for services rendered previous to such departure or discharge. And the same principle would apply to the case of a quarterly, monthly or weekly hiring." The governing principle seems to be that the contract is that the servant should perform his part of the contract for the whole period for which wages are paid, and that if he fails to perform his part of the contract, or is rightfully discharged at any intervening period between the dates when his wages are due, he can recover nothing for the broken period of service. The learned author cites several English cases where it was held that servants who have been rightly discharged and have afterwards sued their late masters for wages have failed to recover anything.

I am, therefore, of opinion that in view of the findings of the Court below that the default was committed by the plaintiff and that his master was justified in dismissing him the plaintiff was not entitled to recover the wages for even twenty days during which he had served. The judgment of the Court below therefore is not according to law. I allow the revision and set aside the decree of the Court below and dismiss the suit. As the applicant professes to have contested the suit mainly on principle, I direct that the parties should bear their own costs of this application and in the Court below.

Decree set aside.

1925 ALLAHABAD 681

RYVES AND MUKERJI, JJ.

Surja—Appellant.

v.

Joti Prasad—Respondent.

Second Appeal No. 285 of 1923, Decided on 2nd February 1925, against the decree of the Addl. Dt J., Saharanpur.

Evidence Act, S. 101—Suit on bond—Defendant pleading minority at the date of execution—Onus is on defendant.

In a suit to recover money on a bond executed by defendant who pleads minority at the time of execution of the bond, the burden of proving minority is on defendant. 1924 *All* 730, *Foll.* [P 681 C 2]

Kailas Chandra Mital—for Appellant.

Aga Haidar—for Respondent.

Mukerji, J.—This is a defendant's appeal in a suit for sale to recover money on a bond executed by him. The main ground is that at the time of the execution of the deed he was a minor.

Both the Courts below have placed the burden of proof that he was a major on the date of the execution of the deed on the plaintiff. Even in this view of the case the lower Appellate Court found that the defendant had made certain admissions which were enough to shift the burden on to the defendant and that the defendant's evidence had failed to rebut the case made by the plaintiff and, therefore, decreed the plaintiff's suit. The defendant appeals.

The matter is now set at rest by the decision of a Bench of this Court in *Narain Singh* v. *Chiranji Lal* (1) in which it was pointed out that in a case like the present the burden of proof lies on the person who says that the defendant was a minor at the time of the execution of the document. It is admitted that if the burden of proof lay on the defendant, he has entirely failed.

The result is that the appeal fails and is dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

(1) 1924 All. 730=46 All. 568=22 A. L. J. 461=5 L. R. A. Civ. 353.

1925 ALLAHABAD 682

MUKERJI, J.

Mahadeo Prasad and another—Plaintiffs Appellants.

v.

Sooraj Prasaad — Defendant — Respondent.

Second Appeal No. 725 of 1923, Decided on 25th November 1924, against the decree of the Dt. J., Jhansi, D/- 13th January 1923.

Provincial Small Cause Courts Act (1887), *Sch. II, Art.* : *uit for accounts by successor-in-interest of the principal—Suit is not cognizable by Small Cause Court—Limitation Act, Art.* 89.

The plaintiffs' father purchased certain property and entrusted the management of the same to the defendant, the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September 1918. The defendant refused to render an account of the monies that he received and realised sometime in 1921. Plaintiffs then filed the suit.

Held: the suit was one for accounts and was, therefore, exempted from the coguizance of the Small Cause Court by Art. 31 of the Provincial Small Cause Courts Act, and that Art. 89 of the Limitation Act applied. [P. 682, C. 2]

Janaki Prasad—for Appellants.

Vishnu Nath—for Respondent.

Judgment.—A preliminary objection has been taken that no second appeal is competent. In order to answer this plea it will be necessary to see what was the nature of the suit.

Briefly, the plaintiffs' case was this. They are minors. Their father purchased certain property and entrusted the management of the same to the defendant who is the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September 1918. The defendant refused to render an account of the moneys that he received and realised, sometime in 1921, hence the suit.

It appears to me that on the allegations made in the plaint the suit was one for accounts and was, therefore, exempted from the cognizance of the Small Cause Court by Art. 31 of the Provincial Small Cause Courts Act. It is clear that, if the defendant can satisfactorily explain what he did with the money there will be no decree. All that was necessary for the plaintiffs to prove was what amount of money the defendant realised and what sums he otherwise got from the plaintiffs' father or from the plaintiffs themselves in order that the money might be lent out to advantage. I overrule the preliminary objection.

The Court of first instance decreed the suit, but the lower Appellate Court dismissed it. It divided the claim into two portions, *viz.*, what was due to the father during his lifetime and what was handed over to the defendant after the death of the father. As to the latter item, the learned Judge was of opinion, on evidence that the claim had not been established. As to the rest he was of opinion that Art. 89 of the Limitation Act did not apply, as agency terminated on the death of the father. It appears that the learned Judge was of opinion that for the application of Art. 89 of the Limitation Act it was necessary that the suit should be by the principal himself and not by any successor-in-title of the principal. This would be reading Art. 89 in a very restricted sense. If the argument should hold good any suit by the *quondam* principal on the termination of the agency would not be a suit by the principal. Because, *ex-hypothesi*, the agency has ceased. In my opinion, Art. 89 does apply and as the plaintiffs were minors when the father died they were entitled to maintain the suit without regard to the period of limitation. If any authority were needed for the proposition set forth above one would be found in the *dicta* of their Lordships of the Privy Council in the case of *Nabin Chandra Barna* v. *Chandra Modhab Barna*(1).

I allow the appeal in part, set aside the decree of the Court below so far as it does not relate to the item of Rs. 27 and remand the appeal to it with the direction that it be restored to its original number in the register and be disposed of according to law. Costs here and hitherto will abide the result. Costs in this Court will include Counsel's fees on the higher scale.

Case remanded.

---

(1) [1916] 44 Cal. 1=20 M. L. T. 430=21 C. W. N. 97=24 A. L. J. 1199=18 Bom. L. R. 1022=31 M. L. J. 836=24 C. L. J. 509=(1916) 2 M. W. N. 565=36 I. C. 1.=5 L. W. 452 (P. C.).

★ 1925 ALLAHABAD 683

SULAIMAN AND BOYS, JJ.

(*Acharya Guru Mahant*) *Ramrup Goshain and others* — Plaintiffs—Appellants.

v.

Mahant Ramdhari Bhagat and others—Defendants—Respondents.

First Appeal No. 231 of 1923, Decided on 20th April 1925, from an order of the D. J., Ghazipur.

(*a*) *Civil P. C., O. 7, R. 10 and S. 92—Suit under S. 92—Claim for possession included—Plaint should not be returned.*

Where a suit under S. 92 includes a claim for possession, though no relief for recovery of possession can be granted in a suit under S. 92, the Court will not be justified in returning the plaint altogether. The Court may call upon the plaintiffs to amend the plaint by striking off the claim for possession or it may wait till it pronounces its judgment and may dismiss the claim with regard to that particular relief. [P 684 C 1]

★ (*b*) *Civil P. C., S. 92 (h)—Cl. (h) refers to reliefs* ejusdem generis *with the ones actually mentioned in S. 92—Actual possession cannot be decreed against transferees.*

In a suit under S. 92 a decree for actual possession against transferees from the trustee cannot be properly passed. The words 'granting such further or other relief as the nature of the case may require' refer to reliefs *ejusdem generis* and not to every possible relief which a civil Court may grant. 24 *Cal.* 418 *Diss.*, 28 *All.* 112, 35 *Bom.* 470 *and* 27 *M. L. J.* 266 *Foll.* 2 *C. L. J.* 431 *Ref.* [P 684 C 1]

(*c*) *Civil P. C., S. 92—Scope.*

A declaration that the properties specified are *waqf* properties is clearly within S. 92. 28 *All.* 112. *Foll.* [P 685 C 1]

(*d*) *Civil P. C., S. 92—Suit under—Transferees of trust property can be impleaded.*

Third party transferees of trust property can be impleaded in a suit under S. 92. 24 *Cal.* 418, *and* 28 *All.* 112 *Foll.* [P 685 C 1]

(*e*) *Civil P. C., S. 92—Declaring alienations invalid comes under S. 92.*

A relief which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in the suit may be declared void comes under S. 92. [P 685 C 1]

(*f*) *Trusts—Breach of trust—Neglect by trustee to take steps to save property from consequences of breach of trust by predecessor is breach of trust.*

Per Boys J.—Breaches of trust by the predecessor of the existing trustee cannot in themselves be regarded as breaches of trust by the present trustee, but if the present trustee could have taken steps to save the property from the consequences of the breach of trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust. 33 *Cal.* 789 *Foll.* [P 685 C 2]

M. L. Agarwala—for Appellants.

Uma Shankar Bajpai, Kamla Kant Verma and *Ambika Prasad Pandey*—for Respondents.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit which was brought professedly under S. 92 of the Code of Civil Procedure after the plaintiffs had obtained sanction of the Legal Remembrancer. The plaintiffs alleged that they had an interest in the properties in dispute which were dedicated properties, that the deceased trustee as well as the present trustee had committed various breaches of trust and that the present trustee was liable to be removed. They impleaded a number of other defendants alleged to be transferees of the trust property. There were six reliefs claimed in the plaint: (*a*) a declaration that the properties in dispute were *waqf* properties; (*b*) that the present trustee Defendant No. 1 be removed and in his place a new trustee be appointed; (*c*) that the properties of Schedules 1 and 2 be vested in the new trustee; (*d*) that the transfers be declared to be null and void and the newly appointed mahanth may be put in possession of the said properties (*e*) a scheme be prepared for the upkeep of the math and its properties; and (*f*) any other relief that may be fit and proper.

The learned District Judge came to the conclusion that the suit, so far as it was one for recovery of possession against the defendants second party, was not properly brought under S. 92 of the Code of Civil Procedure. He was of opinion that the proper forum in which to institute a suit to recover possession was the Court of the Subordinate Judge, being the Court of the lowest grade having jurisdiction to try such suits. He accordingly thought that it would avoid a multiplicity of litigation in having the matter fought out in two Courts, and he, therefore, thought fit to order that the plaint be returned for presentation to the Court of the Subordinate Judge. It is against this order that the present appeal has been filed.

It cannot be disputed for a moment that the order of the learned District Judge cannot be upheld in its entirety. Some of the reliefs claimed in the suit

were reliefs which expressly and clearly came under S. 92 of the Code of Civil Procedure and therefore under sub-clause (2) of that section were excluded from any regular suit brought not in conformity with the provisions of that section. If the suit were filed in the Court of the Subordinate Judge that officer would have no jurisdiction to order the removal of the present trustee nor would have any power to appoint a new trustee. He may also find it difficult to grant many of the other reliefs claimed in the suit.

It is obvious, therefore, that even if the learned Judge was right in holding that no relief for recovery of possession could be granted in a suit under S. 92 he was not justified in returning the plaint altogether. He might have called upon the plaintiffs to amend the plaint by striking off the relief which he considered could not be properly granted in the suit or he might have waited till he came to pronounce his judgment and might have dismissed the claim with regard to that particular relief. I, however, agree with the learned Judge that in a suit under S. 92 a decree for actual possession against transferees from the trustee cannot be properly passed and so the last portion of relief (*d*) cannot be granted. It may be that the language of sub-clause (*h*) of the section is very wide, but it must be understood that the words 'granting such futher or other relief as the nature of the case may require' refer to reliefs *ejusdem generis* and not to every possible relief which a civil Court may grant.

In a case of this Court, *Ghazaffar Husain Khan* v. *Yawar Husain* (1) a Bench came to the conclusion that there was no objection to impleading transferees of the trust property in a suit under S. 539 of the old Code corresponding to S. 92 of the present Code, or to declaring in that suit that the property in dispute was trust property. Stanley, C. J., however, did not express any definite opinion as to whether a Court could direct the trustee to be put in possession of the properties in the hands of the trespassers. Burkitt, J., was clearly of opinion that such a relief could not be granted in a suit of that nature. He was of opinion that if the transferees surrendered possession of the property on demand by the new trustee, well and good; but if they refused, then the trustee could not recover possession otherwise than in execution of a decree for recovery of possession passed in a suit instituted by him before a Court competent to hear such suits. His opinion clearly was that no decree for actual possession could be granted by the District Judge under S.539 of the old Code, but that armed with a declaration the trustee would be entitled to dispossess the trespasser in a subsequent regular suit. This opinion has found favour with other High Courts also. In *Budh Singh* v. *Niradbaran Roy* (2) the case in *Sajdur Raja Chowdhury* v. *Gour Mohan Das Baishanav* (3) was dissented from. The Bombay High Court has expressly held so in the case of the *Collector of Poona* v. *Bai Chanchal Bai* (4). The Madras High Court has inclined the same way *vide Raghavalu Chetty* v. *Pellati Sitamma* (5).

The learned advocate for the appellants has not been able to lay before us any case other than that in *Sajedur Raja Choudhury* v. *Gour Mohan Das Baishnav* (3) where a decree for actual possession against trespassers who are transferees from the trustee has been passed in a suit brought under S. 539 of the old Code or S. 92 of the new Code. The reason for not granting such a decree is that the wording of sub-clause (*h*) cannot be taken in its most general sense. It must be read with the preceding sub-clauses and the relief granted under it must be of a similar character. A relief for actual dispossession of trespassers is wholly outside the scope of S. 92.

But I have already said that this defect did not entitle the learned Judge to throw out the whole plaint and return it for presentation to another Court. No other matter has been considered or decided by the Judge nor has he yet considered the question as to whether a previous decision between the present trustee and some of the transferees operates as *res judicata*. I would, therefore, allow the appeal and remand the case.

Boys, J.—The circumstances in which this appeal comes before us have already been fully set out by my learned brother.

(1) [1905] 28 All. 112=2 A. L. J. 591=(1905) A. W. N. 208.

(2) [1905] 2 C. L. J. 431.
(3) [1887] 24 Cal. 418.
(4) [1911] 35 Bom. 470=12 I. C. 30=13 Bom. L. R. 690.
(5) [1914] 27 M. L. J. 266=(1914) M. W. N. 692=25 I. C. 794=16 M. L. T. 178.

The question for decision is whether the learned District Judge was right in returning the plaint or whether he could and should have tried the right of the plaintiffs to some or all of the reliefs claimed by them and, if so, which. There is no need to deal specifically with the relief (*a*) asking for a declaration that the properties specified be declared to be *Waqf* properties. This relief is clearly within S. 92 of the Civil Procedure Code—see *Ghazafjar Husan Khan* v. *Yawar Husain* (1). Similarly the reliefs (*b*), (*c*) and (*e*) for the removal of a Mahanth, the appointment of a new Mahanth, the vesting of the properties in the new Mahanth and the preparation of a scheme are declaredly within S 92 of the Civil Procedure Code. Relief (*d*) really contains two reliefs : (*a*) that the transfers complained of be declared null and void and of no effect ; and (*b*) a prayer for recovery of possession by delivery to the new trustee.

At the hearing a question was raised in connection with this issue as to whether the third party transferees could be impleaded in a suit under S. 92, Civil Procedure Code. It has been held that they can be so impleaded—see *Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3) and *Ghazaffar Husain Khan* v. *Yawar Husain* (1)—and I agree. It is clearly necessary for the purposes of an enquiry into the propriety of transfers by the trustee that the Court should have before it the transferees themselves.

To consider then the first portion of the relief (*d*) which prays for a declaration that the alienations made by the trustee, whose removal is prayed for in relief (*b*) may be declared void. As the removal of trustee is to be based on breach of trust clearly the acts of the trustee must be examined and if those acts prove to be the breaches of the trustee's duty, clearly the Court must say so and this is equivalent to declaring the acts to be invalid and the alienations to be void—see also *Ghazaffar Husain Khan* v. *Yawar Husain* (1).

Before passing to consider the second portion of the relief (*d*) asking for delivery of possession to the new trustee, it may be noted that the plaint alleges certain acts of the predecessor of the existing trustee to have been breaches of trust. Such acts cannot in themselves be regarded as breaches of trust by the present trustee—compare *Budree Das Mukim* v. *Chooni Lal Johurry* (6), but if the present trustee could have taken steps to save the property from the consequences of the breach of trust committed by his predecessor, his neglect to do so might in given circumstances constitute a breach of trust by him himself and naturally this would be still more so, if he continued to reap personally the benefit of his predecessor's breach of trust and the allegations should be enquired into.

I will now consider the prayer in the second portion of relief (*d*) asking as against the third party transferees for delivery of possession to the new trustee. It might seem at first sight that if, as already held, the alienations can, in a suit under S. 92 be declared void, because it is a natural corollary, that a decree for recovery of possession should follow, but the two reliefs are not on the same footing. A declaration as to the legality of the alienation is within S. 92 because it is a necessary foundation for the finding that there has been a breach of trust and that declaration involves and is equivalent to a declaration that the alienation is void and such latter declaration is, therefore, within S. 92. But the recovery of possession by the new trustee is not necessary to complete the finding that there has been a breach of trust nor is it necessary for the purpose of any direction as to how the trust is to be administered.

The only cases directly apposite are *Sajedur Raja Choudhury* v. *Gour Mohun Das Baishnav* (3) and *Ghazaffar Husain Khan* v. *Yawar Husain* (1). In *Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3), Banerji and Rampini, JJ. held at page 429 in a suit under S. 539 (corresponding generally to the present S. 92) that there can be a decree for the return of the property by the transferees. In *Ghazaffar Husain Khan* v. *Yawar Husain* (1), the decree appealed against, was not a decree for delivery of possession, but only directed the trustee "to bring into his possession" the property improperly alienated (page 116). Both Stanley, C. J., and Burkitt, J. held that this latter direction was a valid direction. The question whether there could be a decree for actual delivery of possession, therefore, did not actually arise, and any dicta in regard to the possibility of such a decree were, therefore, *obiter*. Both Judges, however, dis-

(6) [1906] 33 Cal. 789=10 C. W. N. 581.

cussed the question. Burkitt, J., held (1) that a decree that the new trustee should "bring into his possession" the property improperly alienated was within the power of a District Judge in a suit under S. 539 (now S. 92), but it did not amount to a decree "for recovery of possession" and could not be executed as such; that if the transferees surrendered possession, well and good; but that, if they refused to surrender, the new trustee must bring a separate suit in the competent civil Court and get a decree for recovery: (2) that a District Judge could not in a suit under S. 539 (now S. 92) pass a decree for recovery of possession against third party transferees; unless, of course, a suit to obtain such a decree had been instituted in the ordinary competent civil Court and he had called it up for trial before himself; in which case it would not of course be a suit under S. 539 at all. He did not refer to *Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3) in which Banerji and Rampini, JJ. held that such a decree for recovery of possession against the transferees was within S. 539, but the case had been quoted in argument. Stanley, C. J., held that it was clear that the Court may in a suit under S. 539 direct a trustee who is being removed to make over the trust property to the new trustee. As to whether it could direct a transferee of property held to have been improperly alienated to make over the property to the new trustee, he said that he would have had difficulty in following Burkitt, J. in the difficulties which the latter found in the way of accepting *Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3); but he did not consider it necessary to decide the point.

These two cases are, so far as appears to me, the only cases which appear to be directly apposite to the one before us. We have, therefore, a decision of two Judges of the Calcutta High Court that such a decree is within S. 539 (now S. 92); the *obiter dictum* of one Judge Burkitt, J., of a Bench of this High Court that such a decree is not within S. 92 and the *obiter dictum* of the other Judge, Stanley, C. J. of the Bench that if he had to decide the point he could not accept the arguments which had influenced his brother Judge. The question arises directly in the present case before us. S. 92 by its terms applies only where there has been an alleged breach of trust or where a direction of the Court is necessary for the administration of the trust, and if either of those conditions is satisfied, and, in addition, the proper consent has been obtained to the institution of the suit, the section then proceeds to declare (*a*) to (*h*) what decree may be passed.

The object of the section has been declared to be—*vide Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3)—and this interpretation has not, so far as I am aware, ever been qualified or challenged, "to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust." This object is in no way furthered by holding that in a suit by a person interested for the removal of a trustee and the appointment of a new trustee, a relief may be added against a third party transferee that he be ordered to deliver up possession.

Again, a consideration of the matters set out in clauses (*a*) to (*h*) in S. 92 strongly suggests that those clauses are only concerned with either (1) the direct consequences of the breach of trust which is one of the alternative conditions precedent to the applicability of S. 92, *e. g.*, clauses (*a*), (*b*), (*c*) and (*d*) or (2) directions for the administration of the trust which is the other of the alternative conditions precedent to the applicability of S. 92, *e. g.*, clauses (*c*) and (*g*).

To neither of these purposes is a decree for recovery from a third party of property improperly alienated in any real sense akin. A decree for delivery of possession by the trustee who has been removed to the new trustee may be held to be within S. 92 as being a necessary consequence of his removal for breach of trust but that is not the case before us and is on quite a a different footing from the case of the third party transferee.

It is urged that clause (*h*) is wide enough to include a decree against a third party transferee for delivery of possession. It is admitted, and it has been more than once pointed out—*vide Jamalluddin* v. *Mujtaba Hussain* (7); *Ghazaffar Husain Khan* v. *Yawar Husain* (1); *Budree Das Mukim* v. *Chooni Lal Johurry* (6),—that to clause (*h*) must be applied the ordinary test generally applicable to such clauses, that it can only be applied to

(7) [1903] 25 All. 631=(1903) A. W. N. 120.

matters *ejusdem generis* with the preceding matters, but, admitting this, it is further urged that a decree for recovery of possession is *ejusdem generis* with the power given by clause (*c*) to vest any property in a trustee. That clause is clearly only intended to cover such cases as where a new trustee is appointed.

There is nothing else in clauses (*a*) to (*g*) which can remotely suggest that the relief which we are considering can be included in clause (*h*).

The passing of a decree for possession is properly the duty of the ordinary Court possessing jurisdiction in the particular case. The jurisdiction given by S. 92 to the principal civil Court of original jurisdiction is a special jurisdiction given for a particular purpose and where the purpose of the section would not be furthered by the inclusion of the relief in the section, it would require strong grounds to justify holding that the relief is within the section. Such grounds do not appear. I concur, therefore, in the order proposed by my learned brother.

By the Court.—We accordingly allow this appeal and, setting aside the order of the learned District Judge, remand the case to his Court in order that it may be restored on its pending file and disposed of according to law. The costs in the Court below and in this Court will abide the event. The costs in this Court will include fees.

Appeal allowed.

1925 ALLAHABAD 687

PIGGOTT AND MUKERJI, JJ.

Mahomed Hashim and another—Appellants.

v.

Radha Kishun—Respondent.

Second Appeal No. 418 of 1923. Decided on 4th February 1925, against the decree of the Dt. J., Mainpuri.

Civil P. C., O. 21, R. 1—Court closed on the day fixed for payment—Payment made on re-opening day is valid—Limitation Act S. 4.

Where a decree is passed conditional on payment of money it is open to the party to deposit the money after the re-opening of the Court, if the Court was closed on the last date on which the money could be deposited. 1924 *All.* 218 (*F. B.*) *Foll.* [P 687 C 2]

Iqbal Ahmad—for Appellants.

Kailash Nath Katju—for Respondents.

Piggott, J.—This appeal arises under the following circumstances. A decree was passed by this Court in second appeal on the 4th of April 1922 in favour of the appellants Sheik Muhammad Hashim and Baldeo Singh against the respondent Radha Kishun, conditional on payment of the sum of Rs. 1,910 within two months. The amount thus ordered to be paid was not paid into Court until the 21st of June 1922. The Courts below were closed for the vacation between the 20th May 1922 and the 20th of June 1922. On the re-opening of the Court the deposit was made. The question between the parties arose whether in the circumstances the decree in favour of the appellants stood or vacated itself. The Courts below came to the conclusion, following two cases decided by this Court, that the appellants were bound to deposit the money in terms of the decree, and the fact that the Courts were closed was of no help to them.

It has since been held by a full Bench of three learned Judges of this Court that where a conditional decree is passed on payment of money it is open to the decree-holder to deposit the money after the re-opening of the Court, if the Court was closed on the last date on which the money could be deposited. See *Mohammad Jan* v. *Shiam Lal* (1).

In view of the authoritative pronouncement the decision of the Court must be in favour of the appellants, and it must be held that the deposit was within time.

That being so, the present appeal is allowed with costs in all the three Courts including fees in this Court on the higher scale.

The result is that the application of the respondent to be restored into possession will stand dismissed. If under that application the respondent has been put into posession, the appellant will recover possession under the present order.

Appeal allowed.

---

(1) 1924 All. 218=46 All. 328=22 A. L. J. 110 =4 L. R. A. Civ. 88 (F. B.)

1925 ALLAHABAD 688

LINDSAY AND KANHAIYA LAL, JJ.

Makkhan Lal and another—Plaintiffs—Appellants.

v.

Kanhaiya Lal (minor through Mt. Anand Kishori) and others—Defendants—Respondents.

First Appeal No. 383 of 1921, Decided on 17th November, 1924, from the decision of the Sub.-J., Budaun, D/- 4th July, 1921.

Hindu Law—Adoption—Custom—Sarin Khatris settled in United Provinces—Adoption of sister's son is valid.

The *Sarin Khatris* settled in the United Provinces came originally from the Punjab. In the Punjab among *Khatris* of all sub-divisions the rules of the Hindu Law relating to adoption are not strictly observed and a custom exists among them by which the adoption of a daughter's son or sister's son is recognized. The adoption of a sister's son is also recognized among the *Sarin Khatris* settled in the United Provinces.

[P. 690, C. 1, 2]

Judgment.—The dispute in this appeal relates to certain *zemindari* and house property situated in the Budaun and Moradabad districts. The allegation of the plaintiffs was that the said property belonged to Rai Baijnath, their maternal grandfather. The plaintiffs are the sons of *Mt.* Kashmiro, the sole surviving daughter of Rai Baijnath.

Rai Baijnath died on the 13th February 1912. He had a son, Ram Sarup, and two daughters: *Mt.* Kashmiro and *Mt.* Nannhi. Ram Sarup died in the lifetime of his father on the 18th July 1910, leaving a widow *Mt.* Bhagwandei. *Mt.* Nannhi died some time in 1889. She was married to Chandu Lal, by whom she had a son Rajbahadur. At the time of the death of Baijnath, *Mt.* Kashmiro, his daughter, and Rajbahadur, the son of his other daughter *Mt.* Nannhi, were the only persons alive. Rajbahadur died on the 6th June 1912, leaving a widow *Mt.* Anand Kishori and two minor sons, Kanhaiya Lal and Jagmohan Lal. In the mutation proceedings, which followed the death of Bajinath an application was filed by *Mt.* Kashmiro, *Mt.* Bhagwandei and *Mt.* Anand Kishori, the last-named acting as the guardian of her two sons, Kanhaiya Lal and Jagmohan Lal, agreeing that half of the property left by Baijnath might be entered in the name of *Mt.* Kashmiro and the other half in the names of Kanhaiya Lal and Jagmohan Lal.

Another village Gadhaul which stood recorded in the name of Ram Sarup was on the death of Ram Sarup entered in the names of his widow *Mt.* Bhagwandei and Rajbahadur jointly.

The present suit was filed by the plaintiffs on the allegation that the property which stood recorded in the name of Baijnath along with the village Gadhauli, which is stated to have been purchased by Baijnath in the fictitious name of his son, devolved on his death on his sole surviving daughter, *Mt.* Kashmiro, and that the compromise filed in the mutation proceeding was not binding on them. The plaintiffs accordingly claimed a declaration that as the sons of the sole surviving daughter of Baijnath they were his next reversionary heirs, and that the order passed in the mutation proceedings, including the entry of the names of Kanhaiya Lal and Jagmohan Lal, did not affect their rights.

The defence of *Mt.* Bhagwandei, Kanhaiy Lal, and Jagmohan Lal was that Rajbahadur had been adopted by Ram Sarup in the lifetime of Baijnath, that the village Gadhauli was the self-acquired property of Ram Sarup and that Baijnath had executed a will by which he had allotted one house and a cash allowance of Rs. 5 per mensem to *Mt.* Kashmiro and the whole of the remaining property to Rajbahadur.

The case was first tried by Khawaja Abdul Ali, then the Subordinate Judge of Moradabad, who came to the conclusion that the will, set up by the defendants, was not proved; that the village Gadhauli belonged to Ram Sarup; and that the alleged adoption of Rajbahadur was not proved. An application for review was subsequently made by *Mt.* Anand Kishori on behalf of her minor sons, Kanhaiya Lal and Jagmohan Lal, on the ground that certain additional documentary evidence had been discovered, the existence of which she had been unable to ascertain during the hearing of the suit. There was a further allegation that a certain witness produced by the plaintiffs had fraudulently impersonated a man, who had died many years earlier. The application for review was granted; and the order granting it was upheld by this Court. The case was thereupon re-heard and some addi-

tional evidence taken. Another Subordinate Judge had meanwhile succeeded in the office ; and the conclusion at which he arrived was that, though the will alleged to have been executed by Baijnath on the 29th January 1912 was not proved, the adoption of Rajbahadur by Ram Sarup was satisfactorily established; and that the said adoption was valid according to the custom observed by the tribe to which Baijnath belonged.

We have thus in the case two judgments dealing with the question of adoption, one delivered by the former Subordinate Judge based on the evidence then adduced before him, and another delivered by his successor, which rests very largely on the documentary evidence which was adduced after the application for review was granted. We are concerned in the present appeal only with the latter.

[After discussing evidence, the judgment proceeded :—]

We agree with the learned Subordinate Judge that on the whole there can be no doubt about the adoption of Rajbahadur by Ram Sarup.

The next question for consideration is whether there was a tribal or other custom in the caste, to which Ram Sarup and Rajbahadur belonged, recognizing the adoption of a sister's son. Under the Hindu Law the adoption by a person of a boy whose mother he could not have lawfully married in her maiden state is not permissible. The contention of the defendants is that their ancestors came from the Punjab where the adoption of a daughter's son or a sister's son was recognized by custom and that they brought that custom with them when they settled in these Provinces. The parties are *Khatris* belonging to the *Sarin* sub-division. The *Khatris* are divided into two main branches (1), *Purabiya* or eastern *Khatris* and (2) *Panchainva* or western *Khatris*. The *Purabiyas* are said to have come long ago from the Punjab and to have settled in the eastern Provinces of India. The *Panchainva Khatris*, are said to have come later to these Provinces and are subdivided into various sub-tribes, each of which embraces a number of clans. The *Sarin Khatris* belong to one of the sub-tribes of the *panchainvas* or western sub-division (Sherring on Castes and Tribes, Vol. II, page 76). According to one tradition the *Sarin Khatris* are so-called, because they hesitated to offer opposition to the mandate of Alauldin Khilji, who wanted to impose widow re-marriage among the *Khatris* a large number of whom had been slain in one of the wars at Ajmer, but to which the main body of the *Khatris*, who were unwilling to follow the "*Shara Ain*" or Muhammadan Law, were bitterly opposed (Crooke on Tribes and Castes, Vol. III. page 272). According to another legend the same event is said to have taken place during the reign of Aurengzeb in connection with his wars in the Deccan. Whatever truth there may be in those legends, which the similarity or affinity between the words "*Surin*" and "*Sharai Ain*" seems to have fostered, there can be no doubt that the *Sarin Khatris* are *Khatris* from the Punjab who had settled in these provinces some centuries back. Several witnessses belonging to the caste, who have been examined in the case have given evidence of a tradition to that effect existing among them; and one of the plaintiff's own witnesses, Bhawani Prasad, has deposed that they did come from the Punjab. The number of *Sarin Khatris* who have settled in these provinces is not very large. They comprise about 60 or 70 families altogether ; and inter-marriages among relations, between whom marriages would otherwise be considered reprehensible. are allowed among them.

There is evidence to show that the *Sarin Khatris* have been following the custom prevalent in the Punjab in the matter of adoption. Sheo Dial Singh, a Sub-Inspector at Mainpuri, who is himself a *Sarin Khatri*, states that Ishri Prasad, a resident of Delhi adopted Basant Singh, who was his own sister's son, and that after the death of the former, the latter became the owner of his estate and was still in possession of it. Another instance to which he has referred is that of Rai Parduman Kishun, who was adopted by his maternal uncle, Ram Dayal, and became the owner of his estate, comprising numerous villages in the Bijnor and Moradabad districts. That instance is also referred to in a Will, executed by Raja Kishun Kumar, a *Sarin Khatri*, on the 11th May 1910, wherein he mentioned that his father, Parduman Kishun, had been adopted by his maternal uncle, and that his family appellation (*al*) was consequently changed from *wangi*, that is, the appellation of the sub-section to

which Baijnath belonged, into *khosla* that is the appellation of the sub-section to which Ram Dayal belonged. Both *khoslas* and *wangis* represent some of the different clans or sub tribes into which the *Sarins* are sub-divided. A reference to that adoption is also to be found in the family history of Raja Kishun Kumar given in the Moradabad Gazetteer. It is there stated that Parduman Kishun was adopted by his maternal uncle, Ram Dayal, and that Ram Dayal was the grandson of Dharam Chand, a *Khatri* of Nurmahal, near Jullunder City, who had settled at Moradabad and acquired wealth as a contractor there (Moradabad Gazetteer, page 89). Another instance referred to by Sheo Dial Singh is that of Rajbahadur, who was adopted by his maternal grandfather, Rai Panna Lal. Sheo Dial admits that these adoptions did not take place in his presence, but he has testified to the family represented by the adopted sons being in possession of the estates of their adoptive fathers ; and no serious attempt has been made on behalf of the plaintiffs to controvert the accuracy of his statement either by cross-examination or by the production of other evidence to the contrary. Ramchandra, the *ziladar* of the Sahaspur estate, states that among the *Sarin Khatris* a sister's son can be adopted. He mentions that such a custom existed in the Punjab and that among the *Sarin Khatris*, who have come from the Punjab and settled in these Provinces, the same custom was prevalent. Kali Charan, another *Sarin khatri*, gives evidence to the same effect. He deposes that the *Sarin khatris* originally came from the Punjao, that the ceremonies observed in the Punjab were also observed by them, and that among other things there was a custom recognizing the adoption of sister's son among them. An instance of an adoption of a daughter's son is afforded by a judgment of the Subordinate Judge of Bareilly, dated the 27th June 1908, in another case. It was there held that there was a custom among the *Khatris* of the Punjab recognizing the adoption of a daughter's son, and that the *Khatri* families, who came from the Punjab and settled in these provinces observed the same custom (Ex. 5). Considering the small number of *Sarin Khatris* settled in these Provinces it would be difficult to expect a larger number of instances of that character.

It is generally recognized that in the Punjab among *Khatris* of all sub-divisions the rules of the Hindu Law relating to adoption are not strictly observed and that a custom exists among the *Khatris* by which the adoption of a daughter's son or sister's son is recognized. In *Sohna Mal* v. *Nanak Chand* (1), it was held that non-agriculturist Hindu *Khatris* did not follow the strict Hindu Law in matters of adoption and that among them the adoption of a sister's son was generally allowed.

In *Taba* v. *Shibcharan* (2), it was similarly held that there was no special custom among the *Khatris* of Nurmahal in the Jullunder district contrary to the general custom of *Khatris* in the Punjab to render invalid the adoption of the only son of a daughter. The same rule was recognized in *Nikki* v. *Gujarmal* (3).

It is argued by the learned Counsel for the appellants that these customs got statutory recognition when the Punjab Laws Act of 1872 was enacted, But before that year enquiries had been made into customs in almost all the districts of the Punjab ; and the general trend of the result, as recorded in the Settlement records, was that the rules of Hindu Law relating to adoption were not strictly in force (Tupper's Punjab Customary Law, Volume III, page 78). The instances proved in this case, and the general evidence of the custom given by the witnesses for the defence, go to show that the same custom is observed by the *Sarin Khatris* of the Punjab who have come and settled in these provinces. We, therefore, agree with the learned Subordinate Judge in holding that the adoption is valid according to the custom of the tribe to which Ram Sarup and Rajbahadur belonged.

The plaintiffs-appellants have taken exception to the inclusion of certain documents in evidence and the exclusion of a sale-deed which was tendered by them in evidence and rejected by the Court below. We have already indicated the documentary evidence which has been proved and can be admitted, and eliminated those which were, in our opinion, not properly proved. In regard to the sale-deed, to which the learned Counsel for the plaintiffs-appellants has referred, we need only

(1) [1911] 4 P.W.R. 1911=9 I. C. 36=16 P.L.R 1911.
(2) [1883] 162 P.R. 1883.
(3) [1916] 152 P.W.R. 1916=34 I. C. 478.

point out that the suit was instituted some time in 1918 and first decreed on the 4th September 1919, and that after the application for review was granted, it was re-heard and not decided till the 4th July 1921. The sale-deed in question was produced on the 11th June 1921 after the evidence for both the parties was closed. The plaintiffs had ample opportunities of producing any evidence on which they wanted to rely at the earlier stages of the hearing, and the Subordinate Judge was right in refusing to accept fresh evidence at that late stage. The defendants have asked for leave to produce certain rebutting evidence in case that sale-deed is admitted in evidence, but as we have not admitted that sale-deed in evidence and have upheld the order passed by the Subordinate Judge relating thereto, the application of the defendants will be rejected.

The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 691

SULAIMAN AND BOYS, JJ.

Tula Ram—Judgment-debtor — Appellant.

v.

Bhup Singh—Decree-holder — Respondent.

Second Appeal No. 571 of 1921, Decided on 8th May 1925, from a decree of the Dist. J., of Aligarh.

★ *Limitation Act, Sch. I, Art.* 181 — *Mortgage decree—Limitation for an application for final decree starts from the date of appellate decree.*

Against a preliminary decree for sale in a mortgage suit against the executant and his sons, an appeal had been preferred by the sons only, on behalf of and in the interest of the whole family on the ground that the entire family property was to be exempted from the decree. An application for making the decree final was made within three years from the date of the appellate decree.

Held, that the appeal was preferred on behalf of the whole family though in the name of the sons only and the decree passed in appeal was a decree in which the first Court's decree merged and that limitation for the application for making the decree final, would run from the date of such decree and the application was within time. 39 *All.* 641, *Relied on.* [P 691 C 2 & P 692 C 1]

N. C. Vaish—for Appellant.

Sulaiman, J.—This is a judgment-debtor's appeal arising out of an application for a decree absolute in which the main plea is that the application is barred by time. It is surprising to find that both the Courts below call the proceeding an execution of the decree which of course it is not. It appears that the plaintiff instituted a suit for sale on the basis of a mortgage-deed executed by Tula Ram, the appellant himself, impleading his sons, Jugal Kishore and Ratan Lal. A preliminary decree for sale was passed on the 16th of April 1918 against all the three defendants and the time fixed for payment was the 17th of October 1918. The sons had contested the suit on the ground that there was no legal necessity for borrowing the amount. They had preferred an appeal to the District Judge in July 1918 which was dismissed on the 2nd of November 1918 and a second appeal to the High Court by them was also dismissed on the 31st of March 1921. It is to be noted that neither in their appeal before the District Judge nor in their appeal to the High Court did the sons implead their father, Tula Ram, but they opened up the whole decree and urged that no portion of the joint family property was at all liable to be sold.

The decree-holder claims that he is entitled to calculate the time for making the application for the final decree from the date of the Appellate Court's decree. If time is to be counted from that date, the application is within time. If not, then it was presented more than three years after the preliminary decree by the first Court was prepared. The Court below has held that in this case the application is not barred by time and has relied on the Full Bench case of *Gajadhar Singh* v. *Rishen Jiwan Lal* (1).

The present case is different from cases where a number of defendants who hold portions of property independently and who were parties to the original suit are not made parties in appeal. In the present case the appeal had been preferred by the sons on behalf of and in the interest of the whole family. The point raised was that the entire family property was to be exempted from the decree. The success of the appeal would have enured for the benefit of the whole family including Tula Ram, the executant. It must,

(1) [1917] 39 All. 641 = 42 I. C. 93 = 15 A. L. J. 734.

therefore, be assumed that the appeal was preferred on behalf of the whole family, but of course in the name of the sons only, who were not disqualified from challenging the validity of the loan advanced. The whole case was re-opened and the appellate Court, if it had allowed the appeal, would have had to dismiss the entire suit not only as against the sons but even as against Tula Ram. Under these circumstances the view taken by the learned Subordinate Judge that it was the decree passed in appeal in which the first Court's decree merged, and from which date time would be counted seems to be correct. We accordingly dismiss the appeal but without any order as to costs as no one appears for the respondent.

Appeal dismissed.

★ 1925 ALLAHABAD 692

RYVES AND MUKERJI, JJ.

Anantoo and another—Appellants.

v.

Ramrup Tiwari and others — Respondents.

Second Appeal No 347 of 1923, Decided on 12th February 1925, from a decree of the Dt. J., Benares.

★ (a) *Limitation Act, Ss. 6 and 8 — Minor dying during minority—Representative can sue within three years or within original period whichever is greater.*

In a suit for possession, where a minor dies before attaining majority his representative would have either the total period of 12 years from the date of accrual of the cause of action or three years from the date of the minor's death, whichever is greater. [P 693, C 1]

★ (b) *Hindu Law—Alienation by widow—Attestation by reversioner does not always imply consent—Court can draw proper inference from attending circumstances.*

Although mere attestation of a sale-deed by a reversioner is not by itself conclusive of the fact that he was aware of the nature of the transaction or that he was a consenting party to an alienation by a Hindu widow, the Court can draw proper inference from this as well as other circumstance attending the transaction. [P 694, C 1]

Ram Nama Prasad—for Appellants.

Kumuda Prasad and *Gadadhar Prasad* —for Respondents.

Mukerji, J. — To understand the points raised in this appeal it will be necessary to examine the pedigree to be found at p. II of the printed paper-book. The Court of first instance found that the brothers Jageshwar and Mohar were joint, and Ganesh, the son of Jageshwar was the last surviving male member of the family consisting of the two brothers and a son and nephew Ganesh. It appears that three sale-deeds were executed by two ladies. Mt. Bhagirathi, widow of Mohar, executed sale-deed No. 1 on the 4th of January 1909 for a sum of Rs 399; on the 20th of September 1910, Mt. Upman, the widow of Jageshwar, and Mt. Bhagirathi executed the second sale-deed for the sum of Rs. 1,250: and on the 17th of June 1913 the same two ladies executed the third sale-deed for the sum of Rs. 299.

The first four plaintiffs are the sons respectively of Jagat and Sahdeo. Ganesh died in February 1910 and his mother, Mt. Upman died about two years before the institution of the suit. The plaintiffs Nos. 1 and 2 have transferred a portion of their interest in the property to the plaintiffs Nos. 5 and 6. Thus all the six plaintiffs instituted the suit out of which this appeal has arisen for recovery of possession of the property sold under the three deeds of sale. Their case, so far as Mt. Bhagirathi's sale-deed was concerned, was that Mt. Bhagirathi executed the sale-deed without any title.

The defence was that so far as the deed by Mt. Bhagirathi was concerned the suit was time-barred. The defendants further pleaded that the sales were supported by legal necessity and the plaintiffs were also estopped from maintaining the suit.

The Court of first instance decreed the suit on condition of payment of those portions of the sale considerations which it found to have been supported by legal necessity. In appeal the learned District Judge dismissed the suit with respect to the second sale-deed, he having held that it was supported by legal necessity.

The defendants have appealed with respect to the first and third sale-deeds while the plaintiffs have filed a cross-objection with respect to the second sale-deed.

The first point that has been urged is the question of limitation and relates to the sale-deed executed by Mt. Bhagirathi.

It will be noticed that the suit was filed on the 21st of April 1921, that is to say more than 12 years after the execu-

tion of the sale-deed by Mt. Bhagirathi, it being the finding of the Court of first instance, a finding which was not challenged in the Court of first appeal, that the brothers, Jageshwar and Mohar were joint and Mohar predeceased Ganesh. It is clear that Mt. Bhagirathi had no title whatsoever to the property. On the execution of the sale-deed by her the transferees obtained possession over the property sold. The transferees therefore had already been in possession of the property sold by Mt. Bhagirathi for more than 12 years at the date of the institution of the suit. The defendant's contention in this Court is, as it was in the Courts below, that they had completed a title for themselves by 12 years adverse possession and the suit ought to have been dismissed.

The lower appellate Court has not discussed the question of limitation, but the Court of first instance has. It got over the plea of limitation by coming to the conclusion that the plaintiffs could bring their suit within the same period of limitation as would have been allowed to Ganesh if he had been alive.

The correctness of this conclusion has been challenged in this Court.

It appears to us that the correct conclusion has to be arrived at on a correct reading of Ss. 6 and 8 of the Limitation Act. S. 6 (1) allows, in the case of a minor an extended period of limitation, and lays down that the same period of limitation as would ordinarily be allowed to an adult would be allowed to a minor from the date on which he ceases to be a minor. By S. 8 it is however laid down that in no case the extended period would be more than three years. Cl. 3 of S. 6 deals with the case like the one before us. It lays down that where a person afflicted with a disability dies, his representative will have the same period of limitation as is allowed for ordinary suits from the date of death of the person suffering from disability. Again S. 8 comes in and limits the extended period to three years. By reading the two sections together the conclusion is that in a suit for possession, where a minor dies before attaining majority his representative would have either the total period of 12 years from the date of accrual of the cause of action or three years from the date of the minor's death whichever is greater. The point is clearly illustrated in illustration (c) under S. 8 of the Limitation Act. The illustration runs thus :

"A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death, A's representative in interest has, under the ordinary law nine years from the date of A's death within which to bring a suit. S. 6 read with this section does not extend that time except where the representative is himself under disability when the representation devolves upon him."

It will be noticed that in this illustration A is an idiot. He dies three years after the accrual of the cause of action. After his death nine years remained to his legal representative to file the suit. The latter must bring his suit within those nine years and he does not get any extension because, in any case he could not get more than three years time under S. 8, after the death of his predecessor-in-title A. He has got 9 years and this is deemed to be sufficient.

Applying this rule of law therefore to the case before us Ganesh died in 1910. The cause of action accrued on the 4th of January, 1909, and 12 years period from this date expired on the 4th of January, 1921. This period between 1910 and 4th January 1921 being more than three years, the legal representative would not have a day beyond the 4th of January 1921.

It is clear, therefore, that in the case of every one of the plaintiffs reversioners who was more than 21 at the date of the suit the suit must be regarded as time-barred.

It is, however, pointed out that the plaintiff Lalji was 12 at the date of the institution of the suit. He was, therefore, a minor when Ganesh died. Under sub-S. 4, S. 6 of the Limitation Act where a representative is at the date of the death affected by disability the rules contained in sub-Ss 1 and 2 shall apply. Such being the case Lalji's suit must be regarded as within time.

The result is that as regards ¼th share in the property dealt with by the sale-deed No. 1 the suit of Lalji alone is within time and the rest of the suit is barred by limitation.

Now we come to the third sale-deed. We think that the finding of the Court below is conclusive on the point. The

learned Judge has discussed the evidence and has shown that the sale-deed is supported to the extent of the sum of Rs. 144-9-6 only by legal necessity.

Coming to the question of estoppel, we do not think that any case has been made out. It appears that the plaintiffs obtained a lease from the vendees of a portion of the property sold. The lease has ceased to exist and possession has been recovered from the vendees by the plaintiffs. In respect of the third sale-deed the appeal must be dismissed.

Coming to the question of the second sale-deed the learned Counsel for the respondents has relied on the Privy Council case of *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). It appears that the learned District Judge has taken into consideration the fact that the second sale-deed executed by the two ladies was attested by Sahdeo, the next reversioner living at the time. Taking this fact into consideration and taking all the evidence on the point the learned Judge came to the conclusion that he wasentitled to draw from the fact that Sahdeo had attested the sale-deed, that the sale-deed itself was supported by legal necessity. The Privy Council lays down simply this that mere attestation of a sale-deed by a reversioner is not by itself conclusive of the fact that he was aware of the nature of the transaction or that he was a consenting party to it. Their Lordships say :

"Such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied in this case."

In our opinion the learned District Judge was entitled to consider the fact that two ladies of the house were entering into a transaction and their close and very close relation, Sahdeo, was present at the transaction. Coupled with this circumstance the learned Judge was entitled to examine the remaining evidence and to draw his own inference. We are not prepared to say that his inference under the circumstances was wrongly drawn.

The cross-objection therefore must fail.

We allow the appeal in part and dismiss the claim of all the plaintiffs except Lalji Tiwari with respect to 3-4th of the property transferred by the sale-deed, dated the 4th of January, 1909. The rest of the appeal is dismissed. The cross-objection is also dismissed. Parties to receive and pay costs in proportion to their respective success and failure and in this Court they will be entitled to fees on the higher scale. The condition as to payment of purchase money will stand and Lalji Tiwari will have to pay a fourth share of the purchase money found payable.

Appeal dismissed.

(1) [1915] 42 Cal. 876=42 I. A. 64=17 M.L.T. 115=19 C. W. N. 370=13 A. L. J. 223=2 L. W. 219=21 C. L. J. 225=28 M. L. J. 585=27 I. C. 674=(1915) M. W. N. 11=17 Bom. L. R. 426 (P. C.)

1925 ALLAHABAD 694

BOYS AND BANERJI, JJ.

Budhan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 141 of 1925, Decided on 14th April 1925, from an order of the S. J. Bulandshahr.

(a) *Criminal P. C. Ss.* 112 *and* 110—*Order under S.* 112 *should conform to terms of S.* 110.

An order under S. 112 is illegal, in so far as it travels beyond the terms of S. 110.

(b) *Criminal P. C., S.* 110—*Evidence of substantive offence is not necessarily inadmissible.*

Evidence going to show that a substantive offence had been committed, or evidence which might possibly form the basis of a charge of a substantive offence need not necessarily be excluded in proceedings under S. 110 and can form the basis of an order under S. 112 and a finding under S. 118. 1925 *All.* 250 *Explained.* [P 695, C 1]

(c) *Criminal P. C., S.* 110—*Charge of being habitual robber—Accused gathering bad characters in his house is not in itself relevant.*

When the charge against the accused is that of being a habitual robber, the facts that the accused gathered bad characters at his house does not go far enough to be in itself relevant. It would be necessary to show that these bad characters were robbers, or were gathered there for the purpose of robbery or theft. [P 696, C 1]

(d) *Criminal P. C., S.* 110—*Evidence of allegations against accused made in case in which he was acquitted is admissible.*

The fact that the accused person has been acquitted of a particular charge may diminish in many cases ,and may even destroy wholly, the value of the evidence as to the allegations made against the accused in the case in which he was acquitted, but does not render it inadmissible. [P 696, C 2]

M. L. Agarwala—for Applicant.

M Waliullah—for Opposite Party.

Boys, J.—This is a case in which security has been taken from three persons under S. 110 of the Code of Criminal Procedure. One of them, Budhan, has applied to this Court in revision. He, together with the others, received a copy of an order under S. 112 of which the following are the material terms : "are members of a common gang of dacoits, and that you are dacoits, and house-breakers and thieves by habit and you jointly commit offences." The Magistrate found in following terms at the end of his judgment : " I, therefore, confirm the notice given to the accused and order them each to execute a bond, etc., etc." As he took security for three years, the case went up to the Sessions Judge who confirmed his order. The application for revision made by Budhan in this Court came before Mr. Justice Stuart. In the first of the grounds reliance was placed upon a ruling of this Court in the case of *Ram Prasad* v. *Emperor* (1). Mr. Justice Stuart referred the case to a Bench because he did not agree with the proposition laid down in that case. The argument before us has been directed to two points : (1) that in view of the ruling to which we have just referred, the order of the Magistrate could not be sustained, and (2) that eliminating the evidence of association as a member of a gang of dacoits, there was no sufficient evidence remaining to support the order of the Magistrate. Much of public time and money would be saved in these cases if the Magistrate who issues an order under S. 112 were to be careful to see first that the order that he is issuing is in the terms of the section which he proposes to apply. We have quoted above the order under S. 112 which the Magistrate issued. He there gives the accused notice that they are charged with being members of a common gang of dacoits. A reference to S. 110 of the Code will show that no such phrase occurs in it from beginning to end. He goes on to say "and that you are dacoits." The word " dacoit " similarly does not occur anywhere in the section. The second error is, however, of less importance than the first, but it would have been desirable to avoid both. Finally we note that the Sessions Judge, in his order of the 31st of January 1925, says : "Apart from this positive evidence, there is general evidence of his (Budhan's) being a habitual robber and that bad characters assemble at his house." S. 110 does, of course, make mention of a habitual robber, but there is no such charge permitted by S. 110 as that based on 'bad characters assemble at your house,' and evidence, whether there be much or little, to that effect is absolutely irrelevant unless it is evidence, and is found to be evidence, showing that the bad characters were robbers, or that the assembly was for the purpose of of robbery, and not, *e. g.*, merely for the purpose of gambling. We find, therefore, that we must eliminate entirely from the notice to the accused, and from the findings of the Magistrate and the Judge against him, the irrelevant matter to which we have referred. Before leaving this question, we may refer to the judgment of Mr. Justice Mukerji, in the case of *Ram Prasad* v. *Emperor* (1), to which reference has already been made. That case is entirely distinguishable from the present. In that case the notice to the accused was, as it is set forth on page 18 of the judgment: "to show cause why they should not be bound over on the ground that they were habitual dacoits and belonged to the dangerous gang of Dhani and Ram Kishen, dacoits." The charge of being habitual dacoits was clearly part and parcel of the charge that they belonged to the dangerous gang of Dhani and Ram Kishen, dacoits. We have already adverted to the fact that no such charge comes within the terms of S. 110, and we should, therefore, have been entirely in agreement with the learned Judge in setting aside the order for security in that case. That case has, however, been pressed upon us, and we have little doubt that it was so pressed upon Mr. Justice Stuart who referred this case to a Bench as authority for a much wider proposition, namely, that evidence indicating the commission of a substantive offence punishable under the Indian Penal Code or other Act dealing with substantive offences is inadmissible in proceedings under S. 110. We do not think that such a proposition can possibly be supported. The case which we have just mentioned does not even purport to go so far. It dealt with a

(1) 1925 All. 250=23 A. L. J. 18=6 L. R. A. Cr. 45=26 C. R. L. J. 746.

state of facts which did not come within S. 110 of the Code of Criminal Procedure and did fall within S. 400 of the Indian Penal Code. It is true that Mr. Justice Mukerji used the words "being a member of a gang of dacoits is a definite offence defined and punishable under the Indian Penal Code, and it was for that reason that under the preventive section action could not be taken for having committed a specific offence ;" but it is clear from his preceding remarks that he was only suggesting an explanation, a suggestion with which we agree, of why the legislature had thought it unnecessary to insert in S. 110 any provision relating to association with a gang of dacoits, and was very far from holding that the fact that evidence points to the commission of a substantive offence punishable as such renders it inadmissible in a case under S. 110 of the Code of Criminal Precedure. The latter proposition is on a wholly different footing from that which Mr. Justice Mukerji was approving. It is quite impossible to hold, and there is no justification in the terms of S. 110 for holding, that because there is some evidence that a substantive offence has been committed, that evidence cannot form part of the evidence upon which an order under Ss. 110 and 118 can be based. We need only take a particular case. If a witness comes into Court and says that the general repute of A is that he is a habitual thief, that evidence is clearly admissible. Is the evidence of the witness to be ruled out because in cross-examination he says : "My reason for saying this is, amongst other things, that I am certain that he is the man I saw stealing my property, and I have heard from many persons that he is believed to be the man who stole the property of B, C, D and E on various dates." His evidence is clearly directed to a specific substantive offence punishable as such, but if it is quite clear that if he has no other evidence to support him, it would be futile to institute a substantive case. Yet there could hardly be better evidence to show the real reason why the accused had earned the general reputation of being a habitual thief We hold, therefore, that it is impossible to accept the proposition that evidence going to show that a substantive offence had been committed, or, in other words, evidence which might possibly form the basis of a charge of a substantive offence, is necessarily to be excluded in proceedings under S. 110, and cannot form the basis of an order under S. 112 and a finding under S. 118.

After eliminating, then, that portion of the notice which charges the accused with being a member of a gang of dacoits, we have remaining a notice which charged him with being a habitual thief and robber, and we have to consider whether there is any evidence on the record, which could reasonably and properly in the exercise of judicial discretion be believed by the Magistrate and Judge as establishing that charge. Without weighing ourselves the exact value of the evidence, which we think we are not entitled to do in revision except in exceptional cases, we find that there is ample evidence upon which the lower Courts could, in the exercise of their judicial discretion, come to the opinion that the accused was a habitual robber and thief. It is unnecessary for us to detail all the evidence to which the Magistrate and the Sessions Judge referred There is some of it which is clearly wholly irrelevant to the charge either as it was made in the order under S. 112, or in the form to which we have amended it. It is quite irrelevant that the accused was a gambler. The fact that he gathered bad characters at his house does not go far enough to be in itself relevant. It would have been necessary to show that these bad characters were robbers, or were gathered there for the purpose of robbery or theft. In the absence of such evidence, they might very well have been gathered there for the purpose of gambling. After eliminating this and other evidence which is wholly irrelevant to the charge, we think there is ample ground to justify the order. The only further criticism as to the admissibility of some of this evidence, which we need particularly note, is the suggestion that because the accused had been acquitted in two of the numerous cases put in evidence against him no evidence of the allegations made in those cases against him was admissible. We cannot agree to the general proposition that the fact that he has been acquitted entitled the accused to have all evidence excluded of the incident which formed the subject of his trial It is entirely a question of the value of that acquittal. It is perfectly certain that

if he was acquitted on the ground that the case was totally false against him no Magistrate or Judge would think of taking it into consideration against him. On the other hand, if he was only given the benefit of the doubt, there is no reason why the incident should not be put in evidence and given whatever value it might be worth. As this argument was pressed upon us, we may give a simple illustration. A is charged with having committed dacoity. The evidence against him is based on that of two approvers with a certain amount of corroboration. The accused or his friends bribe the approvers to resile from their statements. The result is that the balance of the evidence is sufficient to raise a suspicion against him, but not sufficient to justify finding him guilty. Subsequently the approvers are put on their trial, and at that trial conclusive evidence is forthcoming that the accused and his friends bribed them to resile. Could anybody reasonably say that the evidence of the fact that he had been suspected and charged with having committed a dacoity ought to be excluded in proceedings under S 110? We hold, therefore, that the fact that an accused person has been acquitted of a particular charge may diminish,—will diminish—in many cases and may even destroy wholly, the value of the evidence, but does not render it inadmissible. We may add that Mr. Justice Mukerji has since seen the view that we have expressed above in regard to the case of *Ram Prasad* v. *Emperor* (1), and entirely concurs in our interpretation of his judgment therein. For the reasons we have given, we see no reason to interfere with the order of the Magistrate, and the application is dismissed.

Application dismissed.

1925 ALLAHABAD 697

MUKERJI, J.

Munshi Ram and another—Defendants—Appellants.

v.

Bhagwant and others—Plaintiffs—Respondents.

Second Appeal No. 828 of 1923, Decided on 2nd January 1925, against a decree of the A. D. J., Aligarh, D/- 23rd February 1923.

Agra Tenancy Act, S. 32—One sharer kept out of possession by co-tenants—Suit by him for profits or damages is not barred.

Section 32 bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co-tenants. 31 *All.* 348 (*F. B.*), *Appl.*

(P 697 C 2)

C. Thompson—for Appellants.

Durga Charan Banerji—for Respondents.

Judgment.—This appeal involves a very short point and it is one of law. On the death of one Charan who was recorded as an ex-proprietary tenant of 21 and odd *bighas* of land, his brother's sons and his son's sons had a dispute about the division of the tenancy. They went to the Revenue Court and ultimately came to an agreement which took the shape of a document in writing registered. By this document plaintiffs, who are respondents in this Court, were allowed 7 *bighas* 1 *biswa* of land. They came to Court with the allegation that the defendants kept them out of possession of this 7 *bighas* and odd area and were liable to pay damages. The plaintiffs accordingly sued for recovery of possession and for recovery of Rs. 70 as damages.

The Court of first instance dismissed the suit *in toto*. One of the plaintiffs, Chet Ram, appealed, and he asked for damages only. The first ground of appeal was that the suit could not fail in its entirety.

The learned District Judge was of opinion that the suit could not fail *in toto*. He found that the plaintiffs were at least entitled to joint possession, if they were not entitled to separate physical possession. He accordingly assessed the damages and decreed the claim for a small amount, *viz*, Rs. 17-8-0.

In this Court the learned counsel for the defendants-appellants contended that the entire suit was unmaintainable having regard to the provision of S. 32 of the Tenancy Act.

I cannot agree with this contention. Section 32 of the Tenancy Act bars a suit for partition of a holding. It does not bar the maintenance of a suit for damages or profits where one of the parties entitled to a holding is kept out of possession by his co tenants. The principle of the Full-Bench case of *Najibulla* v. *Gulsher Khan* (1) applies. I need not express any

(1) (1909) 31 All. 348=1 I. C. 594=6 A. L. J. 343 (F. B.).

opinion as to whether a suit for recovery of possession over 7 *bighas* of land could have been maintained in spite of S. 32 of the Tenancy Act, because that question does not arise in this case.

In my opinion there is no force in the appeal and it is hereby dismissed with costs.

Appeal dismissed.

1925 ALLAHABAD 698

MUKERJI, J.

(Chaudhuri) Dalmir Singh and others—Defendants—Appellants.

v.

Joti Prasad and another—Plaintiffs—Respondents.

Second Appeal No. 654 of 1923, Decided on 19th November 1924, against the decree of the Dt. J., Saharanpur, D/- 20th February 1923.

(a) *Limitation Act, Arts.* 139 *and* 144—*Tenant holding on after expiry of term—Art.* 139 *and not Art.* 144 *applies.*

A tenant who holds on to the land after the expiry of term of the lease cannot be said to be holding 'adversely' to the landlord. So long as he is in possession, he cannot deny that it was from the lessor that he got the land. But where the tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease, under Art. 139 of the Limitation Act. After the expiry of 12 years, the title of the landlord must cease by the application of S. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Art. 144 of the Limitation Act has nothing to do with the case. 1922 *All.* 318, *Ref.* [P 699 C 1]

(b) *Adverse Possession—Co-sharers—One co-sharer taking lease from others—Remaining in possession even after expiry of term—Rent not paid—Possession is adverse.*

Where a co-sharer obtains a lease of the land from the other co-sharers and continues in possession of the land for a long time, even after the expiration of the period of the lease, and does not pay any rent or share of profits to the other co-sharers, the only inference possible under the circumstances is that he held the land adversely and not as co-sharer. [P 699 C 2]

Bhagwati Shankar and *Durga Prasad*—for Appellants.

Baleshwari Prasad for *K. N. Katju*—for Respondents.

Judgment.—This appeal must succeed. The plaintiff in the Court of first instance is the respondent No. 1 here. He purchased from the respondent No. 2, Mt. Kartari, and his sister Mt. Jeoni a half-share in what was once their father Kalyan Singh's property. The appellants, who were the defendants Nos. 1 to 4 in the Court of first instance, are admittedly in possession of this property The other half was sold by Kalyan Singh himself. There was a litigation relating to that half, between the purchasers and the present appellants, and in that litigation the present appellants were successful. We have, however, nothing to do with that case. The plaintiff said in the plaint that there was an arrangement made between Kalyan Singh and the defendants, who also had shares in the same *khewats*, that the defendants should manage the property and pay Kalyan Singh a certain amount of profits year by year. He further alleged that this arrangement continued up to 1911. It was clearly the idea to show that the plaintiffs' predecessors-in interest and the plaintiff had been in possession within 12 years of the suit. The claim was for recovery of possession.

The defendants pleaded that they had been in adverse proprietary possession for more than 12 years and the title of the plaintiff's predecessors was extinguished.

The learned Subordinate Judge found that in 1860 there was a lease granted by Kalyan Singh in favour of the predecessors-in-title of the appellants, and the term of the lease was for 15 years. The rent fixed was Rs. 30 per annum. Since the expiry of the lease no rent was paid. In the view of the learned Subordinate Judge, on these facts, the suit was time barred. The learned Subordinate Judge also considered the question whether the fact that the defendants were co-sharers of Kalyan Singh in any way favoured the plaintiffs' case. He found that even if the defendants' position be considered as co-sharers, they had definitely proved an ouster by the fact that they had never paid any rent or profit since 1870. On these facts the suit was dismissed.

The learned District Judge took the facts as found by the learned Subordinate Judge. He said that the facts were tolerably clear and that the only question was the legal inference to be drawn from them. He held that the mere fact

that after the expiry of the lease the defendants' predecessor-in-interest did not pay any rent, did not make their possession adverse to Kalyan Singh or his estate. He relied on the case of *Jai Chand Bahadur* v. *Girwar Singh* (1) and decreed the suit.

Two points have been urged on behalf of the respondents. First, the learned counsel appearing for the respondents has tried to support the judgment as it stands. He has further urged that the fact that the parties were co-sharers has not been considered adequately by the learned District Judge. He argued that the suit could not be time barred, being as between co-sharers.

On the question of adverse possession, there can be no doubt that a tenant who holds on to the land after the expiry of the term of the lease, cannot be said to be holding "adversely" to the landlord. Indeed, so long as he is in possession, he cannot deny that it was from the lessor that he got the land. But this is not conclusive of the matter. Where the tenant holds on after the expiry of the lease, whatever name may be given to him, whether we may call him a 'tenant' by sufferance or not, time begins to run against the landlord from the date of the expiry of the lease under Art. 139 of the Limitation Act. After the expiry of 12 years the title of the landlord must cease by the application of S. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Thus, whether the possession of the appellant's pedecessors was adverse or not, in the strict sense of the word, is immaterial. Article 144 of the Limitation Act has nothing to do with the case. On this point I may mention the case of *Bisheshar Nath* v. *Kundan* (2). The learned Judge's opinion cannot be upheld.

Coming to the question of the plaintiffs' position as a co-sharer, the matter seems to stand thus. In the plaint the plaintiff, no doubt, alleged that the present appellants were his co-sharers in the mahal. He ignored the fact that a lease had been granted by Kalyan Singh. He made the wrong allegation that the appellants had been paying the share in the profit, harvest by harvest, up to June 1911. The learned Subordinate Judge considered the abstract question as to whether from the fact that the appellants were co sharers of the plaintiff, the plaintiff could derive any benefit. The definite finding is that the appellants paid nothing to the plaintiffs' predecessors-in-title in 1870 and onwards. The learned Judge drew the inference that in the circumstances there was a complete ouster of the plaintiffs' predecessors by the appellants. This position has not been considered by the learned District Judge. But from the fact that he has mentioned that he accepts the finding of the learned Subordinate Judge as correct, I will take it that he was also of opinion that originally the appellants were co-sharers of Kalyan Singh. Now, the question is whether, in spite of the expiry of the lease, and in spite of the fact that after 1870 the appellants or their ancestors never paid any rent or share in profit, it can be said that their possession continued as co-sharers. There can be only one inference possible in the circumstances, *viz.*, they held adversely and not as co-sharers.

The appeal succeeds. The decree of the Court below is set aside and the decree of the Court of first instance is restored. The appellants will have their costs throughout and the costs in this Court will include counsel's fees on the higher scale.

Appeal allowed.

(1) [1919] 41 All. 669=52 I. C. 336=17 A. L. J. 814.

(2) 1922 All. 318=44 All. 583=20 A. L. J. 593.

1925 ALLAHABAD 699

SULAIMAN, J.

Dhunde Chaudhri —Plaintiff —Appellant.

v.

The Municipal Board and others—Defendants—Respondents.

Second Appeal No. 1138 of 1923, Decided on 30th April 1925, against the decree of the Dt. J., Jhansi, D/- 12th April 1923.

U. P. Municipalities Act (2 *of* 1916) *Ss.* 321, 180, 318 *and* 178—*Municipality refusing to sanction erection of building—Remedy of aggrieved party—Suit for injunction against Municipality is incompetent.*

A refusal to sanction the erection or re-erection of a building is not *ultra vires* of a Municipal Board. Where notice under S. 178 having been given, the Municipal Board exercises its discretion under S. 189 in refusing to sanction

the building, the plaintiff's only remedy, if he feels aggrieved by that order, is to appeal to the District Magistrate under S. 318. If the order of the Municipal Board is illegal he may ask the Dt. Magistrate to refer the point to the High Court. Where this has not been done and the District Magistrate has confirmed the order of the Board, that order is final and cannot be questioned in any other manner or by any other authority. Hence, under such circumstances, the plaintiff cannot bring a suit in a civil Court asking for an injunction restraining the Municipal Board from interfering with his construction. [P. 700, C. 2]

N. C. Vaish—for Appellant.

K. Verma—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for an injunction restraining the Municipal Board of Kunch from interfering with the plaintiff's construction on a certain piece of land. The plaintiff had given notice under S. 178 of the Municipalities Act to the Municipal Board for sanction to build upon it.

The Municipal Board, for reasons which are not material to consider, refused to grant sanction to build upon this piece of land. The plaintiff feeling himself aggrieved by that order appealed to the District Magistrate who confirmed it.

He then instituted the present suit and alleged that the land on which he wanted to build being his own land and not a street, the Municipal Board had no right to refuse permission or prevent him from building upon it. The Municipal Board took up the position that the land was in fact a street within the meaning of the Act and also that they had full power to refuse the sanction and therefore the claim was barred under S. 321 of the Municipalities Act.

The Court of first instance dismissed the suit on the ground that the land is a street within the meaning of the definition of that word given in the Act, and also that in view of S. 321 of the Act the claim was not maintainable. The lower appellate Court has confirmed that decree on the ground that the land in dispute is a street within the meaning of the Act. It seems to me that it was quite immaterial to consider whether the land belonged to the plaintiff or not and whether it was a street within the meaning of the Act. Under S. 87 of Act No. 1 of 1900 there was a proviso which limited the power of the Board to refuse to sanction the erection or re-erection of a building. That proviso has been cut out from S. 180 of the new Act which corresponds with the old S. 87. A refusal to sanction therefore cannot now be said to be *ultra vires*. A notice under S. 178 had been given by the plaintiff. It was nowhere suggested that such a notice was not necessary. Notice under S. 178 having been given, the Municipal Board exercised its discretion under S. 180 of the Municipalities Act of 1916 in refusing to sanction the building. The plaintiff's only remedy, if he felt aggrieved by that order, was to appeal to the District Magistrate under S. 318. If the order of the Municipal Board was illegal he might have asked the District Magistrate to refer the point to the High Court. This was not done. The District Magistrate has confirmed the order of the Board. That order is now final and cannot be questioned in any other manner or by any other authority. S. 321 is quite clear on this point. The only relief which the plaintiff claimed is a relief for an injunction restraining the Municipal Board from interfering with his construction. It is obvious that in substance he wants the refusal to grant the sanction to be set aside by a civil Court. A suit of this nature is not maintainable.

I may mention that there was no relief claimed as regards the title to the land or the character of the plaintiff's possession over it. As the suit fails on the preliminary point, all questions of title will of course remain open.

The appeal is accordingly dismissed with costs including fees on the higher sale.

Appeal dismissed.

1925 ALLAHABAD 700

MUKERJI, J.

Ram Lal and another—Defendants—Appellants.

v.

Muhammad Amir Mustafa Khan and others—Plaintiffs and Defendants—Respondents.

Second Appeal No. 667 of 1923, Decided on 20th November 1924, against the decree of the Addl. Judge, Aligarh, D/- 2nd February 1923.

Co-sharers—One co-sharer building on join land without other's consent—Others can sue for demolition of building and joint possession of site.

One co-sharer out of many has no right to build on what is joint land without the consent of the others, and if he does so, the others can sue for demolition of the building and for joint possession of the land. 9 *All.* 651, *Diss.*

[P 701 C 2]

Brij Behari Lal—for Appellants.

Mukhtar Ahmad—for Respondents.

Mukerji, J.— The parties are co-sharers in the village. The suit out of which this appeal has arisen was originally instituted by the respondent No. 1, Muhammad Amir, who happens to be a co-sharer to a large extent in the village and also the lambardar of it. The main defendants in the case were defendants Nos. 1 and 2. The other defendants were impleaded as being co-sharers in the village, who did not join the plaintiff in the institution of the suit. Some of these defendants were later on, it appears, made plaintiffs.

The suit was launched with the allegation that, on a portion of the village site, stood the house of one Khushla Chamar, a tenant, who died about 20 years ago. Since his death the house was occupied by two other tenants, *viz.*, Rajna and Zaharya. Rajna and Zaharya left the village about two years before the institution of the suit and the defendants Nos. 1 and 2 removed the materials, took possession of the site and started constructing a building of their own. The suit was, therefore, instituted for recovery of joint possession and for recovery of damages.

The Court of first instance decreed the claim for joint possession and for the demolition of the building erected by the defendants Nos. 1 and 2, but dismissed the suit so far as it asked for recovery of damages. This judgment was upheld by the lower appellate Court.

The finding of the lower appellate Court is in substance the same as was the plaintiffs' case except as to damages.

Two points have been urged before me. One is that the finding of fact is more or less of a speculative character. It is possible to characterize thus one or two remarks to be found in the judgment of the Court below. But they really deal with the circumstances of the case. It cannot be denied that there was evidence on the record from which the learned Judge could come to the conclusion that Zaharya and Rajna were occupying the house and the site within two years of the suit and the defendants' case, *viz.*, they had been in occupation of the site for 20 years, was false. In the circumstances, the defendants Nos. 1 and 2 had no right to take possession of what was the joint property of the parties in the teeth of opposition.

The second question is whether the plaintiffs could, on their own behalf and on behalf of the pro-forma defendants, claim the demolition of the building on the site and for joint possession of the latter. The case of *Paras Ram* v. *Sherjit* (1) was cited by the learned counsel for the appellants. He urged on the basis of that authority that so long as the plaintiffs did not prove special damage they were not entitled to succeed. But this case has not been followed in later years in this High Court. The law, as it at present stands, is that one co-sharer out of many had no right to build on what is joint land without the consent of the others. The latest case of this High Court is reported as *Ghasita* v. *Sodhan Singh* (2). It followed an earlier case of *Nujju Khan* v. *Imtiaz-ud din* (3). Indeed, there are good many other cases in which the law as laid down in *Paras Ram* v. *Sherjit* (1) has been dissented from. [See for example the case of *Ram Bahadur Pal* v. *Ram Shankar Prasad Pal* (4).]

As the possession of the defendants Nos. 1 and 2, who are appellants in this Court, was in opposition to, and not with the consent of, the co-sharers, a decree for joint possession was properly awarded.

The appeal fails and it is hereby dismissed with costs.

Appeal dismissed.

(1) [1887] 9 All. 651=(1887) A. W. N. 253.
(2) [1915] 32 I. C. 690.
(3) [1895] 18 All. 115=(1895) A. W. N. 243.
(4) [1905] 27 All. 688=(1905) A. W. N. 158=2 A. L. J. 455.

1925 ALLAHABAD 701

NEAVE, J.

Puran—Defendant—Appellant.

v.

Khiali Ram—Plaintiff—Respondent.

Second Appeal No. 1593 of 1922, Decided on 11th April 1924, against an order of the D. J., Aligarh.

Agra Tenancy Act, (2 *of* 1901) *S.* 165—*Suit under S.* 165—*Person allowed by lambardar to make collections cannot be made defendant.*

A person who has been allowed by the lambardar to make collections is not a co-sharer or a legal representative or assignee of the co-sharers and therefore no suit under S. 165 can lie against chim. So, such a person cannot be impleaded as a defendant to a suit for profits under S. 165. [P 702, C 2]

Neave, J.—This is a second appeal against an order of the District Judge of Aligarh, upholding a decree of an Assistant Collector of that district. The suit was one for profits for the years 1325, 1326 and 1327 Fasli, brought by two co-sharers under S. 165 of the Tenancy Act against the lambardar and other co-sharers. The defendant-appellant Puran was also impleaded on the allegation that he has been a thekadar from the lambardar and had been making collections. Both the Courts below have granted joint and separate decrees against him as well as against the other defendants.

It is common ground to both parties that the defendant-appellant Purna's theka was cancelled before the year in suit. The case against him, as set out in the plaint, was (1) that he was in possession of a small part of land as khudkasht, and (2) that he had been making collections. Both Courts have found in the negative on the first point and in the affirmative on the second. In appeal it is argued that, even if Puran had been a thekadar since 1325 Fasli, a suit would not lie against him under S. 165, as the thekadar is not a co-sharer and as his lease had previously been terminated, he is no more than a stranger who has been allowed by the lambardar to make collections. The learned District Judge has held, evidently with some hesitation, that the plaintiffs were justified in making him a party to the suit as a debtor of the lambardar or co-sharer, who had farmed out the zemindari to him, and the learned advocate for the respondents has contended that, even if the suit against him should have been brought in the Civil Court, the provisions of Ss. 196 and 197 of the Tenancy Act cover the case. This argument is obviously unsound. There is no question that this suit, which was one for profits under S. 165, was properly brought in the revenue Court; the only question is whether the defendant-appellant was properly impleaded, and with this matter Ss. 196 and 197 have no concern.

The defendant-appellant was not a co-sharer or a legal representative or assignee of the co-sharers and, therefore, no suit under S. 165 could lie against him. The appeal is allowed and the suit as against the defendant-appellant will stand dismissed with costs on the higher scale in all Courts.

Appeal allowed.

1925 ALLAHABAD 702

DANIELS, J.

Hazari—Defendant—Appellant.

v.

Ram Dular and others—Plaintiffs—Respondents.

Second Appeal No. 1518 of 1922, Decided on 2nd April 1924, against a decree of the Dt. J., Benares.

(*a*) *Landlord and Tenant*—Sir *land*—*Occupancy rights cannot be acquired in* sir *land.*

If the land is *sir* land occupancy rights cannot be acquired in it. [P 702, C 2]

(*b*) *Landlord and Tenant*—"*Grove*"—*Trees planted by non-occupancy tenant without zamindar's consent though such consent legally enjoined—Presence of trees not interfering with agricultural nature of land—No "grove" is formed.*

Guava trees planted by a non-occupancy tenant on his holding without the zamindar's consent, though such consent is legally enjoined, and scattered over a large area without interfering with the agricultural nature of the land cannot constitute a grove or make the tenant a grove holder. [P 703, C 1]

(*c*) *Agra Tenancy Act*, (2 *of* 1901), *S.* 88—*Non-occupancy tenant.*

A non-occupancy tenant is not entitled to plant trees without the consent of the zamindar in writing. [P 703, C 1]

Judgment.—This case is a somewhat extreme instance of the Law's delays. The suit was filed in the year 1917, but owing to various appeals and remands by this Court it is only now coming up for final decision in the year 1924. The suit is one for ejectment of sub-tenant of *sir* land. The points in dispute are quite simple. The memorandum of appeal consists of five paragraphs, but the points urged in appeal are only two. The first is that the defendant-appellant has acquired occupancy rights. If the land is *sir* land occupancy rights cannot be acquired in it, and there is a finding of fac

of the Court below based on the Settlement records that this land is *sir*. The finding disposes of the first plea.

The second plea is that the defendant has acquired the status of a grove-holder by reason of his planting a number of guava trees on the land. The learned District Judge may be wrong in saying that guava trees cannot constitute a grove, but his substantial finding is that in the current case they do not. He finds that they are scattered over a large area and do not in any way interfere with the agricultural nature of the land. The Assistant Collector's finding was to the same effect. Indeed the Assistant Collector inspected the spot and found that the trees could only have been planted a very short time before the institution of the original suit in 1917, and were planted without the permission of the zamindar. This last finding has not been specifically referred to by the learned District Judge, but if it was necessary to do so in order to save a remand I should be prepared to affirm it. It was not alleged in the written statement that the trees were planted with the zamindar's consent, and indeed the proviso to S. 88 of the Tenancy Act declares that no non-occupancy tenant is entitled to plant trees without the zamindar's written consent which, in this case, has certainly not been alleged. On the facts as found the land in suit was an agricultural holding at the time this suit was instituted and the defendant had not acquired the character of a grove-holder. The decree of the Court below is, therefore, correct, and I dismiss this appeal with costs.

Appeal dismissed.

1925 ALLAHABAD 703

MUKERJI, J.

Jai Singh—Appellant.

v.

Chiranji Lal—Respondent.

Second Appeal No. 970 of 1923, Decided on 5th February 1925, against the decree of the Judge, Small Cause Court, Agra.

Civil P. C., S. 47—Dispute between decree-holder, auction purchaser and judgment-debtor—Separate suit lies.

When a question arises between auction purchaser, decree-holder and judgment-debtor as to what was the property that was sold, the matter is one to be investigated by a separate suit and not by an application to the execution Court. 1923 *All.* 470, *Foll.* [P. 704, C. 1.]

Akhil Nath Sanyal—for Appellants.

Narayan Prasad Asthana—for Respondents.

Judgment.—The only question for decision in this appeal is whether the suit was maintainable or whether the plaintiffs-appellants' remedy lay in an application under S. 47 of the Civil Procedure Code to the executing Court.

The facts of the case are given in the judgment of the Court below and are briefly these for the purposes of this judgment. The respondent No. 1 had a mortgage from one Har Prasad. This was dated 9th of August 1897. Har Prasad sold his share, which was four annas, to appellant No. 1 and the predecessor-in-title of the remaining appellants. There was a pre-emption suit by Mt. Akbari Begam, the predecessor-in-title of the respondents other than the respondent No. 1, with respect to the four annas share sold by Har Prasad. Mt. Akbari Begum's suit was compromised and by that compromise Mt. Akbari Begam obtained two annas share out of four annas and the plaintiffs retained the remaining two annas. The plaintiffs or their predecessor-in-title also held a mortgage from one Har Prasad, but nothing turns on that for the present. Chiranji Lal brought a suit for sale of Har Prasad's four annas property, but omitted to make Mt. Akbari Begam or her representative parties to it. He made the present appellants or their predecessors-in-title parties with the allegation that they had purchased the entire property sold. The suit was not defended and was decreed *ex parte*. In the execution proceedings the decree holder described the property as property in the possession of the appellants That is a description which finds place in the sale certificate and also in the *dakhalnama* or acknowledgment of delivery of possession executed by the auction purchaser. Chiranji Lal himself purchased in execution of his decree. The appellants now come and say that they held only two annas share in the property of Har Prasad, that the remaining two annas share was in the possession of the respondents other than Chiranji Lal, and that therefore Chiranji Lal should give

back possession over two annas. It seems to be the case that by several purchases the appellants own 12 annas share in the mahal, while the respondents other than Chiranji Lal own the remaining four annas share. It was because the plaintiffs owned more than two annas share that Chiranji Lal found it convenient to obtain possession over four annas share and also a mutation of names in his own favour in the revenue Court.

The Courts below have dismissed the suit on the ground that a suit would not lie, and the remedy of the appellants lay by an application to the executing Court.

The question seems to be concluded by a recent judgment of this Court, *viz.*, *Munna Lal* v. *the Collector of Shahjahanpur* (1). That case is very similar to the facts of this case. In that case also the purchaser was originally the decree-holder and their Lordships held that when a question arose between auction purchaser and the judgment-debtor, as to what was the property that was sold, the matter was one to be investigated by a separate suit and not by an application in the execution Court. This ruling follows the Full Bench case of *Bhagwali* v. *Banwari Lal* (2). I may point out that the opinion that the position of a decree-holder is changed by his purchasing by auction is also supported by a recent Full Bench case of Bombay in *Hargovind Pulchand* v. *Bhudar Raoji* (3).

If such be the case, *viz.*, if Chiranji Lal's position of a decree-holder has been altered by his auction purchase the question raised is no longer one between a decree-holder and a judgment-debtor. In this view the suit was maintainable.

For the respondent No. 1 it was argued that the question of fact in issue is really concluded by the judgment in the case. This point was not decided by the Courts below and I have not got enough material before me to decide it.

I allow the appeal, set side the decree of the Courts below and remand the suit to the Court of first instance through the lower appellate Court with the direction that it be restored to its original number and disposed of according to law.

(1) 1923 All. 470=45 All. 96.
(2) (1909) 31 All. 82=6 A. L. J. 71=1 I. C. 416=5 M. L. T. 185.
(3) 1924 Bom. 429=48 Bom. 550=26 Bom. L. R. 601 (F. B.).

Costs here and hitherto will abide the result. The costs in this Court will include counsel's fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 704

MUKERJI, J.

Mt. Kaniz Fatma—Applicant.

v.

Imamuddin—Opposite Party.

Civil Revision No. 205 of 1924, Decided on 16th February 1925, against an order of the Judge of the Small Cause Court, Aligarh.

T. P. Act, S. 55 (g)—Express stipulation as to encumbrances does not exclude vendor's liability to discharge an undisclosed encumbrance for which no provision has been made.

At the time of the sale of a certain immovable property, the vendor assured the vendee that there was only one encumbrance on the property. There were also two stipulations relating to warranty of title and warranty of possession, but not going any further. There was no stipulation as to what was going to happen in case a previous encumbrance, not contemplated by the parties, happened to exist. Subsequent to the sale, the property was brought to sale in execution of a decree obtained by the holder of a simple mortgage which was not the encumbrance admitted by the vendor. The vendee bought the property at the auction sale in order to save the property.

Held: that the vendee was entitled to recover from the vendor the amount which the vendee had to pay for buying the property at the auction sale. 1924 *All.* 937, *Dist* [P. 705 C. 1.]

M. A. Aziz—for Applicant.

Panna Lal—for Opposite Party.

Mukerji, J.—This is an application to revise a judgment of a learned Judge of the Small Cause Court.

It appears that the applicant who was the plaintiff in the Court below purchased a house from the respondent. The respondent assured the applicant that there was but only one encumbrance over the property. It, however, turned out that one Hazari Lal also held a simple mortgage over the property. Hazari Lal brought a suit on the mortgage and obtained a decree for sale. The applicant, as the purchaser of the property, to save it, had to pay a sum of Rs. 170 and she sued the respondent to make her good this amount.

The learned Judge of the Court below dismissed the suit on the ground that the parties had express stipulations for compensation, and as the case did not fall within those express stipulations the suit could not be maintained.

I am afraid the learned Judge has entirely misread and misunderstood the ruling he purported to follow. The ruling is the case of *Ram Chander* v. *Bhagwati* (1). It was held that, where in the place of a particular statutory contract parties substitute a contract of their own, they must be guided by their own contract and a party to it cannot rely on the statutory one. In that case, as in this, there was a previous encumbrance which had not been disclosed. But in the case of *Ram Chander* v. *Bhagwati* (1) the parties had stipulated for the express case in which a prior encumbrance might turn out to exist. In the case before me there was no stipulation whatsoever as to what was going to happen in case a previous encumbrance not contemplated by the parties, happened to exist. The two stipulations relied upon by the respondent relate to warranty of title and warranty of possession and nothing beyond that. In the circumstances, the plaintiff ought to have succeeded.

I allow the application, set aside the decree of the Court below, and remand it for disposal of the remaining issue. The costs here and hitherto will abide the result.

Appeal allowed.

(1) 1924 All. 937=22 A. L. J. 576=5 L. R. A. Civ. 382.

1925 ALLAHABAD 705

SULAIMAN AND MUKERJI, JJ.

(*Munshi*) *Shib Ram*—Plaintiff—Appellant.

v.

Faqira and *another*—Defendant and Plaintiff—Respondents.

Second Appeal No. 1060 of 1923, Decided on the 6th April 1925, from a decree of the Dt. J., Saharanpur.

Civil P. C., O. 6, R. 17—Suit on allegation of tenancy failing—Plaintiff was not allowed to succeed on title.

The plaintiffs brought a suit on the footing that the defendants were their tenants. The defendants pleaded that they were not tenants under plaintiffs. The defendants proved their case. The third party whose title was set up by the defendants was not a party to the case. That party was in possession.

Held: that it was not open to the plaintiffs to shift their ground and claim to eject the defendants as trespassers and that the plaintiffs should not be allowed to amend or implead the said third party. [P. 706 C 2]

Durga Prasad—for Appellant.

Nehal Chand—for Respondents.

[Reference to a Bench of two Judges by Mukerji, J.].—This is a case involving a very important point of principle and should be decided by a Bench of two Judges at least.

One of the plaintiffs is the appellant in this Court. The plaintiffs brought the suit, out of which this appeal has arisen, on the allegation that they were the owners of a certain house and its appurtenant buildings, that they let out a portion of that house and building to the respondent, the defendant in the case, on a rent of Rs. 5 per mensem, that the defendant paid only a part of the rent due, that a notice to quit was served on the defendant and that he had failed to vacate the portion occupied by him. The plaintiffs accordingly sued to recover the arrears of rent and a small amount as damages or mesne profits. The plaintiffs brought their suit on a Court-fee, calculated on Rs. 60, *viz.*, a year's rent, under the provisions of sub-clause (*cc*), clause 11 of section 7 of the Court-fees Act. They valued their suit at Rs. 60 so far as the claim for possession went.

The defence was that the defendant did not hold the property under the plaintiffs; but he held it from one Mt. Durgi. He stated in his written statement that Mt. Durgi was a necessary party to the suit.

The learned Subordinate Judge framed four issues and the first one of these was whether the plaintiffs or Mt. Durgi owned the house. The second issue was whether the defendant rented the house from the plaintiffs or Mt. Durgi. If so, at what rate of rent?

The learned Subordinate Judge did not decide issue No. 1 and on issue No. 2 he held that the letting alleged by the plaintiffs had not been proved. On the question whether Mt. Durgi should be impleaded the learned Judge was of opinion that it was not necessary to

implead her. On these findings the learned Subordinate Judge dismisssd the suit.

On appeal the learned District Judge upheld the findings of the Court of first instance and dismissed the suit. He considered the question whether it was open to the plaintiffs to say that they had a title to the house, and although the alleged tenancy was not proved, they were entitled to recover possession on foot of their title. The learned Judge came to the conclusion that it was not open to the plaintiffs to shift their ground and to eject the defendant as a trespasser.

In this Court it has been urged that there was nothing in law to debar the plaintiffs from proving their title and getting a decree for ejectment all the same. It is pointed out that there was an issue on the question of title, *viz.*, whether the plaintiffs or Mt. Durgi owned the house. It is urged for the appellant that this issue should have been tried. As regards the fact that the suit was brought as a suit between landlord and tenant on a small Court-fee it is pointed out that the Court-fees Act is a purely fiscal enactment and it cannot take away the right of a party to the relief to which he might be otherwise entitled.

On the other hand, it is urged that the plaintiffs have paid a small Court-fee, that they did not make Mt. Durgi a party, that they deliberately chose to frame their suit as one between a landlord and a tenant and that these considerations were sufficient for the dismissal of the suit on the simple ground that the tenancy had not been proved.

It will be noticed that the point raised is one of general importance. Every day suits are brought on the allegation that a certain person occupying a certain property is a tenant of the plaintiff and has refused to quit in spite of the tenancy having come to an end. So far as I am aware the decisions are not at all uniform as to whether a decree should be granted to the plaintiff on foot of his title on his failure to prove the tenancy set up by him.

It is not clear whether, if a plaintiff who brings his suit on an allegation of tenancy fails in it he will be allowed to maintain a fresh suit for ejectment without an allegation of tenancy. There does not appear to be any rule of law which can permit the filing of a second suit. So far as I can see at present the Courts which will have jurisdiction in both the cases will be the same and the same Courts of appeal up to the highest in the land would be open in both cases. If then a second suit without an allegation of tenancy be barred, it would be unfair to the Courts to stop the plaintiff from succeeding simply because he had failed to prove an allegation of tenancy. The question of Court-fee can easily be settled by giving the plaintiff an opportunity to pay the proper amount.

In this particular case, as I have already mentioned, there was a distinct issue on title and that has not been decided.

The question, as already stated, is one of great importance to house owners, and so far as I am aware there is no clear authority on either side. This case is sure to go before two Judges on a Letters Patent appeal. It would save trouble and expense if it be heard by two Judges at once.

Mukerji, J.—The fact of the case will sufficiently appear from the referring order of one of us. The question raised and to be discussed was whether the plaintiffs' suit, it having failed on the allegation of tenancy, could succeed on title. This question was decided in the affirmative in the particular circumstances of that case in *Balmakund* v. *Dalu* (1). This case, however, is slightly different from that case. Further, it appears that after the decision of this case an amending Act was passed by which a landlord was allowed to sue for ejectment of an alleged tenant on payment of a smaller Court-fee than would be required to eject the defendant as a mere trespasser.

This case is further differentiated by the fact that the defendant in this case pleaded that he was holding as a tenant not from the plaintiffs but from one Mt. Durgi. The Court of first instance distinctly held that the defendant had proved his case. The lower appellate Court, as we understand its judgment, is also of the same opinion. Mt. Durgi is not a party to this litigation. It has been further found that Mt. Durgi is in possession. It follows that in this suit the plaintiffs cannot get a decree for ejectment without impleading

(1) [1903] 25 All. 498=1903 A. W. N. 112 (F. B.

Mt. Durgi and seeking to eject her. She is not a party and the plaintiffs will have to bring a suit against Mt. Durgi in all circumstances. The fear that was expressed in the referring order was that a second suit might be barred as *res judicata*. But the second suit in the present case will very likely be against Mt. Durgi as the defendant claims under her on the findings of the Courts below.

In our opinion there is no reason to allow the plaintiff either to amend the plaint or to implead Mt. Durgi.

We dismiss the appeal with costs.

Appeal dismissed.

★ 1925 ALLAHABAD 707

LINDSAY AND KANHAIYA LAL, JJ.

Naunihal Singh and others—Defendants—Appellants.

v.

Alice Georgina Skinner and another—Plaintiffs—Respondents.

First Appeals Nos. 86 and 494 of 1922, Decided on 27th March 1925, from a decision of the Sub. J., Muzaffarnagar.

★ (a) *Civil P. C., O. 34, R. 7—In redemption suits no decree for accounts can be passed previous to preliminary decree—But interlocutory order for accounts can be passed—Civil P. C., O. 20, R,* 13.

To pass first a decree for taking accounts and then a preliminary decree for redemption in a suit for redemption is an irregularity. The Court can pass an interlocutory order for accounts but not a decree for accounts. In the present case where two decrees were passed like this and the High Court decided that they should be treated as if they constituted one decree only, viz., as a preliminary decree for redemption, a later Bench of the High Court regarded the appeals from the two decrees as an appeal from a preliminary decree for redemption. [P 708 C 2]

(b) *Adverse Possession — Adverse possession against life-tenant is not adverse possession against reversioner or remainderman—Limitation Act, Art.* 140.

No adverse possession can run against a person till he becomes entitled to the possession of the property. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. [P 710 C 1]

★ (c) *Limitation Act, Art.* 134—(Per Lindsay, J.) *Transfer need not be by mortgagee with possession — Mortgagee transferor must be in possession (not necessarily by virtue of mortgage) at time of transfer—Transferee need not enquire how the possession was got*—(Per Kanhaiya Lal, J.) *Mortgagee's possession must be attributable to mortgage.*

Per Lindsay, J.—The suits referred to in the article being suits for possession, it must be assumed that when such a suit is brought the defendant-transferee is in possession. The transfer which he has taken must have been one which placed the transferee in possession. The transferor-mortgagee must have been in possession of the mortgaged property at the time he made the transfer. But the possession which the transferor has at the time of the transfer need not necessarily be acquired under the mortgage originally made in his favour. Even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgage property otherwise, as for example, by purchase in execution of a simple money decree obtained by another creditor, the article will still apply if it is established that at the time the transfer is made the mortgagee was in possession no matter under what title. The article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title. The transferee is not bound to enquire how possession was obtained by the transferor for under the law as it now stands the transferee is not required to show *bona fides* which was necessary under the law as it was when the case in 14 *M. I. A.* 1 (*P. C.*) was decided. [P 712 C 1]

Per Kanhaiya Lal, J.—Art. 134 applies to cases where the mortgagee purports to transfer what he is not competent to alienate, that is, an interest greater than that of a mortgagee, and it presupposes a mortgage with possession or followed by possession as a necessary incident or ingredient of it because a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. If the mortgagee acquires possession in some other capacity the transfer of possession will be deemed to have been made in the capacity in which it was (rightly or wrongly) acquired and such acquisition cannot be attributed to the mortgage, where the mortgage itself is a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms. [P 716 C 2, P 717 C 1]

(d) *Limitation Act, Arts.* 134, 140 *and* 148—*Scope.*

Art. 134 controls both Arts. 140 and 148. [P 717 C 2]

Girdhari Lal Agarwala and *Bhagwati Shankar*—for Appellants.

B. E. O'Connor, Nehal Chand, Lalit Mohan Banerjee and *Narmadeshwar Prasad Upadhiya*—for Respondents.

Lindsay, J.—Both these appeals arise out of a suit for redemption brought by Alice Georgina Skinner in the Court of the Subordinate Judge. This lady died after the decision in the Court below and is now represented by her executor, Mr. J. R. R. Skinner.

The suit was filed on the 11th May, 1920 and the mortgage of which redemp-

tion was sought was executed by the plaintiff's father, Thomas Skinner, on the 1st September 1863, to secure a loan of Rs. 50,000 which he took from a firm of money-lenders, Lakhmi Chand and Gobind Das who were popularly known as the Seths of Muttra. Since the date of the mortgage the mortgaged property has passed into the hands of many persons, the result being that the plaintiff found it necessary to implead over 80 defendants. The learned Subordinate Judge has passed a preliminary decree for redemption, dated the 31st January 1923, by which he directs the plaintiff to pay a sum of Rs. 1,09,641-11-8.

The suit was not decreed in full, for the Subordinate Judge was of opinion that the plaintiff was not entitled to recover possession of Tilhegampur, one of the items of property mortgaged. And as regards another item named Daula Rajpura which at the time the suit was brought was in the possession of the Nawab of Pahasu, the Subordinate Judge declared that the suit had abated. The Nawab died during the pendency of the suit and the plaintiff failed to make his legal representative a party to the suit within the time limited by law.

In the Appeal No. 86 of 1924 the memorandum of appeal contains the names of 34 appellants but at the hearing only two of these have been represented before us, namely, Kunwar Naunihal Singh and Nawab Mukarram Ali Khan who is the successor-in-interest of the Nawab of Pahasu above mentioned. Mr. Girdhari Lal Agarwala has filed vakalatnamas which authorize him to appear on behalf of these two appellants, he has no authority to act for the other appellants and so in disposing of F. A. No. 86 of 1924 it is necessary to consider only the cases of these two persons.

Mr. Girdhari Lal also represents the appellants in F. A. No. 494 of 1922 which has been heard along with F. A. No. 86 of 1924.

It may be mentioned here that the peculiar and irregular procedure adopted by the Subordinate Judge in disposing of the suit has created considerable embarrassment.

On the 23rd of February 1922, after having disposed of the main issues in the case, he passed an order directing accounts to be taken in order to enable him to ascertain the sum payable by the plaintiff for redemption of the mortgage. There could, of course, be no objection to his passing an interlocutory order for the taking of accounts but he embodied this order in the form of a decree which is printed at pp. 35 *et seq* of the record. Subsequently, after taking an account, he passed a preliminary decree for redemption on the 20th January 1923. (See pp. 46 *et seq* of the record.) The law does not contemplate procedure of this sort in a suit for redemption. The learned Subordinate Judge seems to have thought he was dealing with a suit for account in which it was his duty to pass a preliminary decree in accordance with the provisions of O. 20, R. 13 of the Code of Civil Procedure but that was not so.

This irregularity was brought to the notice of another Bench of this Court which decided that the two decrees drawn up in the Court below should be dealt with as if they constituted one decree only, namely, a preliminary decree for redemption, and so we have treated these two appeals accordingly.

I proceed now to mention the questions which arise here for decision in appeal No. 86 of 1924 as between the plaintiff-respondent and the two appellants on whose behalf the appeal has been argued and I take up first the case of Kunwar Naunihal Singh. This defendant, when the suit was brought, was in possession of five items of the mortgaged property which the plaintiff was seeking to recover. They are items 1 to 5 in the Schedule A attached to the plaint and are called Gangola, Salehpur, Neknampur, Ghori Bachhera and Sunpehra.

The defences raised by Naunihal Singh were :

(1) that the plaintiff had no title to maintain the suit for redemption ;

(2) that these five villages had since the year 1872 been in the adverse possession of him and his predecessor-in-title ;

(3) that he had purchased these villages in good faith and for a consideration of Rs. 1,77,000 from the Nawab of Rampur and was protected by S. 41 of the Transfer of Property Act, and, further, that in no case could the plaintiff recover possession without payment of this purchase money ;

(4) that, in any event, the plaintiff was liable to pay the full sum due on the mortgage in suit amounting to about 17 lakhs of rupees, and that the plaintiff

was not entitled to demand any account of the profits for the period during which he (Naunihal Singh) was in possession.

The Subordinate Judge held that the plaintiff had a good title to maintain the redemption suit. He held further that the suit was not barred by limitation as adverse possession could not run against the plaintiff before the 1st December 1919 when the plaintiff's estate in the mortgaged property fell into possession on the death of the previous life-tenant. And, lastly, he found that Naunihal Singh was liable to submit to a decree for redemption after an account had been taken of the profits for the period during which the mortgagees or those who derived title from them had been in possession of the property.

Now in this Appeal No. 86 of 1924 three substantial points have been argued on behalf of the appellant Naunihal Singh. One of these relates to the title of Alice Georgina Skinner and her right to maintain the suit. Another relates to the question of limitation which has been raised here in a new form. The third concerns the mortgage account, the argument being that it has not been properly calculated by the Court below. Before I proceed to discuss these matters it is necessary to say something of the history of the Skinner family and of the Skinner estate which has been the subject of much litigation. A good deal of that history will be found in the report of a case decided by their Lordships of the Privy Council in the year 1913. See *Richard Ross Skinner* v. *Naunihal Singh* (1). Naunihal Singh, who was a party to that litigation, is the same gentleman who is one of the appellants in the present case. Thomas Skinner who was the owner of the mortgaged property now in suit and who made the mortgage of the 1st September 1863, now sought to be redeemed, was the father of Alice Georgina Skinner, the present plaintiff. He died in November 1864, leaving three sons and three daughters. By his will, dated the 22nd October, 1864 he made certain dispositions of his estate which afterwards gave rise to a good deal of controversy. This will was construed in the Privy Council case cited above, and to put the matter briefly, it was held that the effect of the will was to create a succession of life-estates in favour of the testator's three sons, and that in default of lawful male issue born to any of these sons, the estate was to go over to the daughters. The three sons of Thomas Skinner are all dead. The eldest of them, Thomas Brown Skinner, died on the 3rd July 1900, the second, Richard Ross Skinner, who was the plaintiff in the suit which came before the Privy Council in the case mentioned above, died on the 15th August 1913. The third son was George Corbyn Skinner who died on the 1st December, 1919. On this latter date the only surviving daughter of Thomas Skinner was Alice Georgina who was the plaintiff in the present suit. Both the other sisters died in the life time of their brothers. It follows then that on the death of the third son, George Corbyn Skinner, the sole surviving sister, *i. e.*, Alice Georgina, acquired an absolute estate in the property of her father, Thomas Skinner, provided that on that date there were no legitimate male issue of any of the three brothers in existence.

It has not been suggested that either of the two elder brothers left any such issue but it was pleaded by Naunihal Singh and some of the other defendants that George Corbyn Skinner left two legitimate sons still in existence in whose presence Alice Georgina could have no right to the estate. It was further pleaded by these same defendants that Alice Georgina was not the daughter of Thomas Skinner. This latter plea, however, was easily disposed of and the Subordinate Judge had no difficulty in finding that the plaintiff was Thomas Skinner's daughter. This matter has not been argued before us. As regards the other plea it is admittedly the fact that there are in existence two sons of George C. Skinner. The plaintiff's case is that they are illegitimate and the Subordinate Judge found that they were. We have heard arguments here relating to this point and we agree with the Subordinate Judge. Some of the evidence led by the plaintiff upon this issue was of little value but there is the statement of a witness, Christopher, a missionary, who deposed directly that the two sons left by George C. Skinner were born out of wedlock. This witness knew

(1) [1913] 35 All. 211=40 I. A. 105=11 A. L. J. 494=25 M. L. J. 111=(1913) M. W. N. 500=13 M. L. T. 488=17 C. L. J. 555=15 Bom. L. R. 502=19 I. C. 267=17 C. W. N. 853. (P. C.).

George C. Skinner well and lived with him at the time these sons were born. His evidence appears to us to be conclusive of the matter and it has not been rebutted. This part of the case is accordingly at an end and agreeing with the Court below I find that Alice Georgina Skinner was the lawful owner of her father's estate at the time she brought the suit and was entitled to maintain the suit for redemption.

The next question to be discussed is that of limitation. In the 17th ground taken in the memorandum of appeal the plea is raised that the suit is barred under article 134 of the schedule to the Limitation Act (Act IX of 1908) which provides a period of 12 years for a suit brought to recover possession of immovable property which has been mortgaged and afterwards transferred by the mortgagee for valuable consideration. In cases to which the article applies time begins to run from the date of the transfer, that is to say, the transfer by the mortgagee. According to the case for Naunihal Singh he is such a transferee having in the year 1904 purchased the five villages, which he claims, from the Nawab of Rampur for a sum of Rs. 1,77,000. It is stated that in the year previous (1903) the Nawab bought these properties from the Seths of Muttra, the representatives of the mortgagees who advanced the money under the deed of the 1st September 1863, now in suit. It is to be observed here that this article was not pleaded in the Court below. There the defence of limitation was raised upon the ground of adverse possession pure and simple and was rightly overruled by the Subordinate Judge on the ground *inter alia* that no adverse possession could begin to run against the plaintiff who was not entitled to possession before the 1st December, 1919, the date on which her last surviving brother, George C. Skinner, died.

The plaintiff being a remainder man under her father's will was entitled to plead article 140 of the schedule to the Limitation Act and to say that she had the right to sue for recovery of the estate at any time within 12 years from the date it fell into possession. The suit was filed less than six months after that date. The Subordinate Judge was never called upon to consider the terms of article 134 and although it is true that a plea of limitation can be raised at any time it was with some hesitation that I consented to its being raised here on the ground that the appellant Naunihal Singh had not for the purposes of this appeal printed the necessary documents upon which he relies for proof of the facts which he must establish in order to support the plea under article 134. However as there could be no doubt as to those facts and as the necessary documents had been printed before in the case of *R. R. Skinner* v. *Naunihal Singh* (1), which, as has been said, was decided by the Privy Council in the year 1913, we allowed the point to be argued. Those documents or some of them at any rate are referred to in their Lordships' judgment and I shall have occasion later on to draw attention to what was there said concerning them.

I shall now set out the facts and quote from the documents which are translated and printed in the paper-book of First Appeal No. 127 of 1907 (*Naunihal Singh* v. *Richard Ross Skinner*). At page 1A of this book we have the mortgage-deed of the 1st September 1863, executed by Thomas Skinner. This is the mortgage of which redemption is now being sought. The deed is a hypothecation bond which recites that eighteen villages belonging to the mortgagor are being offered as security for a loan of Rs. 50,000. As a matter of fact only seventeen villages are named. The eighteenth which was probably meant to be included in the security was M. Audhel which was subsequently included in a later mortgage-deed presently to be mentioned. By this deed of the 1st September, 1863 the mortgagor undertook to pay the mortgage debt in full, principal and interest, at the end of December 1863, and he covenanted that if he failed to discharge the debt as stipulated, he would put the Seths (the mortgagees) in possession who would then be able to realize and apply the income of the mortgaged estate under their own superintendence and management. Thomas Skinner died towards the end of 1864, and following the narrative of events in the Privy Council judgment above referred to it appears that the Court of Wards took possession of the estate and held it till the year 1867 when possession was handed over to the eldest son, Thomas Brown Skinner, who then proceeded to deal with the estate as if he were the absolute owner which he was not for reasons already stated. On the 10th November 1867. Thomas Brown Skinner executed a mortgage for

Rs. 50,000 in favour of the Seths. Out of this sum Rs. 43,294-14-3 were due on the mortgage of the 1st September 1863 executed by his father. The balance he took cash for the purpose of discharging certain debts which he owed. The same property was mortgaged as was described in the earlier deed—the eighteen villages which were all mentioned by name and included Audhel, the village which had been omitted in the document of 1863.

It is important to notice the conditions of this mortgage, for it was provided that the names of the mortgagees were to be entered in the revenue papers and it was further provided that the entire income of the mortgaged property was to be paid direct into the treasury of the mortgagees. It was declared that the mortgagees were to appoint a treasurer and two peons at the cost of the mortgagor and that the money which was collected from the villages was to be deposited with the treasurer without any diminution. Directions were then given regarding the application of the income after it had been so received in deposit. After payment of Government revenue, patwari's fees and the usual village expenses, the balance was to be applied in payment of the interest on the mortgage money, the salaries of the two peons and the treasurer appointed by the mortgagee and the salaries of the mortgagor's own servants and karindas. If any surplus remained after providing for these charges, it was to be applied in reduction of the principal sum. Another provision was that if any of the karindas of the mortgagor acted against the wishes of the mortgagees, he was to be dismissed on a complaint being made by the treasurer. It is not necessary to refer to any of the other terms of this document, but it will be observed that the result of the arrangement just mentioned was to put the mortgagees in complete control of the revenues of the mortgaged estate as effectively as if they had been put in actul physical possession and it was no doubt for this reason that it was stated in the Privy Council judgment that this mortgage of 1867 executed by Thomas Brown Skinner was a mortgage with possession. What their Lordships say with reference to this transaction is :

"At that time there was due on the mortgage for Rs. 50,000 granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him (Thomas Brown Skinner). Subsequent to this transaction Thomas Brown Skinner borrowed further sums from the mortgagees under two deeds of further charge dated respectively, the 9th October 1869, and the 7th February 1872."

The next thing to be noticed is that on the 20th December 1872, Seth Lachman Das, who was then the representative of the mortgagees, purchased in execution of simple money decrees obtained by other creditors five of the villages which he held in mortgage. The sale certificates are all printed in the paper-book of F. A. No. 127 of 1907, pp. 13 A *et seq.* Those five villages were Neknampur, Ghori Bachhera, Sunpehra, Gangola and Salehpur. In the certificates the property acquired by purchase is the "judgment-debtor's equity of redemption" in all five villages. The judgment-debtor was Thomas Brown Skinner. We hear nothing more of these properties until we come to the 26th December 1898, on which date Seth Lachman Das made a mortgage in favour of the Nawab of Rampur to secure a debt of 15 lakhs of rupees. This was a mortgage with possession, and among the items of property mortgaged were the five villages mentioned above. There can be no doubt that in the mortgage-deed these villages were described by the Seth as being his own property. He distinctly calls them his own and says he is mortgaging them with all the proprietary and zamindari rights, and in the schedule attached to the mortgage he sets out the value of each village and says that all five are worth Rs. 1,78,100. That is obviously a valuation of the proprietary rights. This document of mortgage is to be found at page 17-R. of the paper-book of F. A. No. 127 of 1907.

Then we come to a document, dated the 24th Sebtember 1903, at page 29-R of the same record. This is a conveyance by the Seth of certain of the properties already mortgaged to the Nawab. It seems that the Seth being unable to keep down the interest on the mortgage-debt determined to sell the property or most of it in satisfaction of the debt. The property conveyed included the five villages of which we have been speaking and so they passed to the Nawab of Rampur. On the 11th April 1904 the Nawab conveyed these villages to Naunihal

Singh for a sum of Rs. 1,77,000. The deed is printed at page 35-R of the printed record of F. A. No. 127 of 1907 and in it the Nawab, after reciting the conveyance made to him by the Seth, describes himself as the absolute owner. These then are the facts upon which Naunihal Singh relies in support of his plea of limitation raised under article 134 and the question is whether he is entitled to the benefit of that article. In my opinion he is.

It has been argued before us that article 134 cannot apply because the mortgage of 1863 was not a mortgage with possession and because the mortgagees did not obtain possession under that mortgage but under the later and independent mortgage of 1867 executed by Thomas Brown Skinner. According to this argument article 134 must be so read as to mean that the property which has been mortgaged must have been, in the first instance, mortgaged with possession and that the transfer referred to must be a transfer made by a mortgagee who has acquired possession under the mortgage. I cannot construe the article in this way. It deals with transfers of property which has been mortgaged. The article does not say "mortgaged with possession." I agree, of course, that the suits referred to in the article being suits for possession, it must be assumed that when such a suit is brought the defendant-transferee is in possession. I also think it reasonable to hold that the transfer which he has taken must have been one which placed the transferee in possession and that consequently where the transferor is a mortgagee he must have been in possession of the mortgaged property at the time he made the transfer. But I am not prepared to accept the argument that the possession which the transferor has at the time of the transfer must necessarily have been acquired under the mortgage originally made in his favour. It seems to me that even if the mortgage was a simple mortgage, and if the mortgagee subsequently gets possession of the mortgage property, otherwise, as for example, by purchase in execution of a simple money decree obtained by another creditor, the article will still apply if it is established that at the time the transfer is made the mortgagee was in possession no matter under what title. The article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title. To quote the words of their Lordships of the Privy Council in *Radanath Das* v. *Gisborne* (2). in construing the cognate section under the old Act XIV of 1859 "purchaser must mean some person who purchases that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title."

If that is so, I fail to see why it should make any difference to the purchaser (now the transferee) whether the possession which his transferor has at the time of the transfer arose directly out of the mortgage or was, prior to the date of transfer, acquired in some other way. The possession is there and is the principal factor in determining the belief of the transferee that his transferor is giving him a full proprietory title. The transferor could not very well purport to confer such a title if he were not in actual possession. I do not see why the transferee should be bound to inquire how that possession was obtained, for under the law as it now stands the transferee is not required to show *bona fides* which was necessary under the law as it was when the case of *Radanath Das* v *Gisborne* (2) was decided. The alteration in the law appears to have been made advisedly in order to exclude the notion that absence of notice of the real owner's claim was necessary to enable a purchaser to claim the protection of this article. But I am told that this Court has decided in favour of the interpretation of article 134 relied upon by the learned counsel for the plaintiff-respondent, and I am referred to the Bench decision in the case of *Ram Piare* v. *Budh Sen* (3). I cannot accept the argument. At page 167 of the report after referring to the purpose of article 134, the learned Judges say that the transfer referred to in article 134 is a transfer with possession or followed by possession as a necessary incident or ingredient of it and they cite another judgment of this Court in support of this observation *Husaini Khanam* v. *Husain Khan* (4).

(2) [1871] 14 M. I. A. 1=6 B. L. R. 630=15 W. R. 24=2 Suther 397=2 Sar. 636 (P. C.)
(3) [1921] 43 All. 164=61 I. C. 546=18 A. L. J. 995.
(4) [1907] 29 All. 471=(1907) A. W. N. 133=4 A. L. J. 375.

This observation is in my judgment no authority for the proposition now put forward. The "transfer" to which reference is made is obviously the transfer made by the mortgagee, and, as I have already indicated, I agree that the mortgagee, when he comes to make the transfer, must be is a position to hand over possession which he cannot do unless he has got it himself. But the observation cannot be deemed to embrace the transfer made to the mortgagee in the first instance and to mean that the mortgage must have been a mortgage with possession under which the mortgagee entered either at the time the mortgage was granted or subsequently.

But, apart from this, let us see how the matter stands in this case. How did the mortgagees, whose representative afterwards sold to the Nawab of Rampur, obtain possession of these five villages.

It is said that they acquired it under the mortgage executed by Thomas Brown Skinner in 1867 and also under the purchases in execution made in the year 1872 and not under the mortgage of 1863 made by Thomas Skinner.

I do not think this statement is borne out by the facts. I have already pointed out that in the deed of 1863 the mortgagor covenanted to hand over possession in case he failed to discharge the entire mortgage-debt to the end of December of that year. There can be no doubt that the debt was not so discharged ; for it is proved that in 1867, when Thomas B. Skinner executed his mortgage. there was still outstanding a sum of Rs. 43,000 odd on the earlier mortgage in respect of which the mortgagees were entitled to take possession. Thomas Brown Skinner, to secure this debt and a further loan of Rs. 6,000 odd makes the mortgage of the 10th November 1867 and places the mortgagees in complete control of the income of the mortgaged property and I recall here what their Lordships of the Privy Council said regarding this arrangement. They said that the mortgagees were placed in possession by him (*i. e.*, Thomas Brown Skinner). If this is so, did the mortgagees take possession under the mortgage of 1863 or the mortgage of 1867 ? That they were entitled to have possession under the earlier mortgage is clear. It is to be said then that notwithstanding this the mortgagees' possession was acquired not under the earlier, but under the later mortgage, a transaction quite independent of the first. That was evidently not the opinion of their Lordships of the Privy Council. At page 504 of the report in A. L. J. R., they say;

"But the case, in their Lordships' view, stands in a very different position with regard to the rights of mortgagees and their successors under mortgages granted not by the appellants' brothers but by the appellant's father, Thomas Skinner. With regard to the appellant's brother it is decided by this judgment that the estate which he possessed was that of a tenant for life and that mortgages proceeeding in respect of debts incurred by him could not affect the estate beyond his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession, he granted mortgages in renewal of those granted by his father and the outstanding rights of the mortgagees could not in equity or justice be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply what certainly never was the intention of any of the parties to the transaction that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upon the radical right."

It seems to me, therefore, that the mortgage of 1863 being still alive in 1867 and the mortgagees being under that mortgage entitled to get possession, the possession delivered by Thomas Brown Skinner in 1867 must be referred to that right and the mortgagees were, therefore, in possession of the mortgaged property from that time under Thomas Skinner's mortgage of 1863 and quite apart from such possession as was subsequently gained by the auction purchases in 1872 under the decrees obtained against Thomas Brown Skinner.

In this view, therefore, even if the construction of article 134 propounded by the learned counsel for the plaintiff-respondent be accepted, the conditions necessary to give the purchaser the protection of article 134 are fulfilled. I have referred to the sale of the mortgaged property to the Nawab of Rampur in 1903 and to the sale by him to Naunihal Singh in 1904. When Seth

Lachman Das sold to the Nawab in 1903 he was in possession of these five villages and had been so far over thirty years. He purported to convey an absolute title to the Nawab, and no doubt believed that he had a right to do so on the understanding, mistaken though it was, that he had acquired the proprietary right by the purchase of Thomas Brown Skinner's equity of redemption in the year 1872. That the Nawab gave valuable consideration for the sale is clearly established as is also the fact that in the following year, 1904, Naunihal Singh paid the Nawab Rs. 1,77,000 for the full proprietary interest in these villages. For these reasons I hold that the plea of limitation raised under article 134 must prevail and that Naunihal Singh is not liable to be ejected now in a suit for redemption of the mortgage of 1863.

It may be noted here that this plea of limitation was not available to Naunihal Singh in the suit which Richard Ross Skinner brought against him in 1906 and which was decided by their Lordships in the year 1913. By that time the period of twelve years, reckoning from the date of the sale by the Seth to the Nawab of Rampur (the 24th September 1903) had not expired.

The appeal of Naunihal Singh must, therefore, be allowed and the decree of the lower Court reversed in so far as it awards the possession of the five villages Gangola, Salhpur, Neknampur Ghori Bachhera and Sunpehra to the plaintiff. The decision relieves me from the duty of examining the other question which was argued on behalf of the appellant Naunihal Singh, namely, the question of how the account on the mortgage should be taken. As Naunihal Singh is found to be entitled to retain possession of these five villages, he has no interest in the amount which the plaintiff is liable to pay.

As regards the other appellant Nawab Mukarram Ali Khan, who is represented by Mr. Girdhari Lal Agarwala, all that need be said is that he is entitled to no relief under this appeal. He claims to be entitled to retain possession of one item of the mortgaged property only, *viz.*, M. Daula Rajpura, and as things stand at present, he has got what he wanted, for the suit, in so far as it concerns this village, has been declared by the Subordinate Judge to have abated. I have already mentioned that no other appellants except these two have been represented before us in this appeal (*i. e.*, F. A. No. 86 of 1924).

F. A. No. 494 of 1922

This appeal is without substance and must fail. The appellants are three of the defendants, Gobind Sarup, Naun Sarup and Chand Sarup. They are in possession of a 10 biswa share of M. Mathurapur, one of the mortgaged items which they claim to have acquired as auction purchasers in execution proceedings. To explain the nature of the defence set up by these persons it is necessary to state the following facts: Richard Ross Skinner, who had sued for redemption in 1906, died on the 15th August 1913, a few months after the decision of their Lordships of the Privy Council. Their Lordships had directed the suit of Richard Ross Skinner to be remitted to the High Court to be dealt with upon the footing that the rights under the mortgages granted by Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors. On such payment being made within a time to be fixed, Richard Ross Skinner was to be given a decree for possession; on failure to pay, his suit was to be dismissed. Before the investigation necessary to give effect to these orders could be held, Richard Ross Skinner died and having left no legal representatives who could continue the claim, the suit abated. An attempt was made by his brother, George Corbyn Skinner, to get leave to continue the suit but this failed for the reason that his title as a life tenant was quite independent of that which his brother had held. Having failed in this attempt, George Corbyn Skinner brought in his own right a suit for redemption which never reached the stage of decision owing to his death on the 1st December 1919.

Now in the suit which was brought by George Corbyn Skinner these three appellants in First Appeal No. 494 of 1922 were impleaded as defendants. In the course of that suit a compromise was effected between George C. Skinner and these defendants in accordance with which apparently they were allowed to retain possession of a 10 biswa share in M. Mathurapur, one of the items of pro-

perty mortgaged. In the present suit they set up this compromise as a bar to the claim of the plaintiff in respect of this property. The Subordinate Judge overruled this defence being of opinion that no agreement entered into between George C. Skinner and these defendants could bind the plaintiff in the present action. This was without doubt a correct decision ; for George C. Skinner being only a life-tenant, no act of his could be binding upon the plaintiff in the present suit. She was not claiming under George C. Skinner but under an independent title.

The appellants seek to raise this plea again in appeal, but for the reason just given, it cannot succeed. First Appeal No. 494 of 1922, therefore, fails. The result, therefore, is as follows :

First Appeal No. 86 of 1924 succeeds so far as the claim of Kunwar Naunihal Singh is concerned and the decree of the lower Court is reversed to this extent that it is declared that the suit of the plaintiff fails and is dismissed with respect to the five villages Gangola, Salehpur, Neknampur, Ghori Bachhera and Sunpehra. The decree of the Court below will be amended accordingly. As regards costs I decline to make any order in favour of K. Naunihal Singh either here or in the Court below. He has succeeded on a plea of limitation which was not raised in the trial Court and in this Court he failed to have translated and printed the evidence by which he sought to support the plea of limitation raised here. In other respects F. A. No. 86 of 1924 fails and is dismissed with costs in this Court against the answering respondent (the plaintiff) including fees on the higher scale. First Appeal No. 494 of 1922 fails and is dismissed with costs.

Kanhaiya Lal, J.—I agree generally with the conclusions at which my learned brother has arrived and only wish to add a few observations in regard to the precise bearing of Articles 134 and 140 of the Indian Limitation Act on the subject-matter in issue in these appeals. The mortgage sought to be redeemed was effected by Thomas Skinner on the 1st September 1863 in favour of the firm of Seth Lakshmi Chand and Seth Govind Das of Muttra for Rs. 50,000. The mortgage money was repayable with interest at Re. 1 per cent per mensem by the 31st December 1863 and in case of default it was to bear interest at 1½ per cent. per mensem from the date of its execution. There was a further covenant that the interest shall be regularly paid every half year and that similar payments will be made towards the principal year after year till the entire mortgage money was paid up ; and that if the mortgagor failed to pay the principal and interest from the profits of his property, as provided in the mortgage-deed, he shall put the mortgagees in possession and occupation of the hypothecated villages so that they might recover the principal and interest by taking the property under their own management and supervision. In other words, the mortgage was a simple mortgage convertible into a usufructuary mortgage on the happening of a certain contingency.

Thomas Skinner died in November 1864 leaving a will, clauses 4 and 5 of which provided that his private zamindari which had been granted to him by the Government as a reward for the services rendered during the rebellion of 1857 and all villages, houses and other property added by him from time to time to the original grants, shall on his demise descend to his eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance ; and in the event of the eldest son, Thomas Brown Skinner, dying without lawful male children, the same shall descend to the next male heir of the testator ; and should all his sons die without lawful male children, it shall descend to his female children or, in the event of their death, to the female children born in wedlock of his sons in succession.

By virtue of this will Thomas Brown Skinner took possession of the estate from the Court of Wards which had meanwhile taken charge of it. On the 10th November 1867 he executed a mortgage in favour of the Muttra firm the proprietor whereof was now Seth Govind Dass, for Rs. 50,000 out of which Rs. 43,294-14-3 were credited on account of principal and interest due to the said firm on account of a previous mortgage, and the balance was taken by him in cash for his own purposes. The same property which had been previously mortgaged was hypothecated again and it was provided that the mortgagors shall

get the name of the mortgagee entered in the revenue papers in respect of the mortgaged villages and that the karindas and servants of the mortgagor shall make collections and assessment in respect of the same of their own authority; but a treasurer and two peons shall be appointed on behalf of the mortgagee to supervise the collections and take charge of the money so realized, to be applied after payment of the Government revenue, the patwari's fee and the village expenses, besides the cost of collection including the salary of the treasurer and peons of the mortgagee, in the reduction of the principal and interest due on the mortgage. There was a further provision that the accounts of the debt and the receipts and disbursements of the mortgaged villages shall be made up six monthly and that if any of the karindas and servants of the mortgagor acted against the wishes of the mortgagee, he shall be liable to dismissal and the mortgagee shall have power to make collections and assessment on his own account.

In 1872 and 1873 Seth Lachmandas, the successor of the mortgagee, purchased some mortgaged villages in execution of certain decrees for money held by other persons against Thomas Brown Skinner, and believing himself to have become thereby the absolute owner of those villages and to be competent to deal with them as if they (they) were his own property, he, on the 26th December 1898, as the surviving member of the family of the mortgagee, mortgaged the said villages along with other properties with the Nawab of Rampur. On the 24th September 1903, he sold the same to the Nawab of Rampur who in turn sold five of the villages now in dispute on the 11th April 1904, to Naunihal Singh the plaintiff for a sum of Rs. 1,77,000, describing himself as the absolute owner of the properties conveyed.

It is urged on behalf of Naunihal Singh that he was a transferee in good faith and for consideration from the Nawab of Rampur who had purchased from Seth Lachmi Das the absolute rights he claimed to have acquired at the auction-sales aforesaid and that he is protected by Art. 134 of the Indian Limitation Act from being made liable to a claim for redemption in respect of the original mortgage of the 1st September 1863. Meanwhile Thomas Brown Skinner died without leaving any male issue. In 1906 a suit was brought by Richard Ross Skinner for the possession of the estate which was in the hands of transferees and it was held by their Lordships of the Privy Council eventually on a construction of the will of Thomas Skinner that Thomas Brown Skinner had only a life-estate and that the mortgage granted by Thomas Skinner was ineffectual to convey or give any right over any estate except the tenancy for life of which Thomas Brown Skinner was possessed. Their Lordships remanded the suit for determining the amount of the mortgage money due under the mortgages granted by Thomas Skinner. But before the suit could be re-heard, Richard Ross Skinner died without leaving any male issue and as he too had only a life-interest in the estate his suit abated. A fresh suit for redemption was then brought by George Corbyn Skinner, the next son and heir of Thomas Skinner, but he too died before the decision of the suit. The present suit was then filed by Alice Georgina Skinner, the daughter and next heir of Thomas Skinner, for the redemption of the mortgage of the 1st September 1863, and it is evident that but for Art. 134 of the Indian Limitation Act the suit would be within time under Art. 148 read with Art. 140 of that Act. As between the transferees and the present plaintiff no question of adverse possession can arise, because under Art. 140 of the Indian Limitation Act a remainder man or devisee can sue for possession of immovable property devised to him within 12 years from the date when the estate falls into possession. Once a person enters as a tenant for life he cannot hold adversely to the remainder man. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life.

Art. 134, however, allows only a period of 12 years for a suit to recover possession of immovable property mortgaged and subsequently transferred by the mortgagee for a valuable consideration to be computed from the date of such transfer. It applies to cases where the mortgagee purports to transfer what he is not competent to alienate, that is an interest greater

than that of a mortgagee, and it presupposes a mortgage with possession or followed by possession as a necessary incident or ingredient of it because a mortgagee who is not in possession cannot transfer possession to another or give what he does not possess. If the mortgagee acquires possession in some other capacity, the transfer of possession will be deemed to have been made in the capacity, in which it was (rightly or wrongly) acquired and such acquisition cannot be attributed to the mortgage, where the mortgage itself is a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms.

In this case the villages in question were purchased by Seth Lachmi Das at auction sales in execution of certain decrees for money against Thomas Brown Skinner who was afterwards found to have had only a life-interest therein. It is stated on behalf of the mortgagee that he got possession after the auction-purchases in 1872; but the plaintiff states (para. 8 of the plaint) that the mortgagee used to manage the property and make collections under the usufructuary mortgage effected by Thomas Brown Skinner on the 10th November 1867 in lieu of the moneys due on the mortgage of the 1st September 1863, and certain other mortgages and inasmuch as the mortgage of the 10th November 1867, cannot be deemed to operate beyond the lifetime of Thomas Brown Skinner, the possession of the mortgagee must be deemed to have continued after his death under the mortgage of the 1st September 1863 now sought to be redeemed. There was a provision in the mortgage deed of the 1st September 1863, entitling the mortgagee to obtain possession if the principal and interest due thereon were not regularly paid. During the previous litigation which went up to the Privy Council it does not appear to have been disputed that the mortgagee was placed in possession of the mortgaged property by Thomas Brown Skinner under the mortgage of the 10th November 1867 and as that mortgage failed to be operative beyond the life-time of Thomas Brown Skinner who died in 1900, it follows that the possession of the disputed villages qua the mortgagee's interest must be deemed to have been held after that date under the mortgage of the 1st September 1863, which it sought to repay. The mortgagee, however, believed to have acquired the interest of the mortgagor by his purchases at auction sales of 1872 and 1873 in execution of the decrees for money held by certain other persons against Thomas Brown Skinner; and the real position of the rights of the parties was not discovered till the correct construction to be placed on the will of Thomas Skinner was determined by their Lordships of the Privy Council on the 4th March 1913. Till then the period of limitation allowed by Art. 134 of the Indian Limitation Act for a suit for possession of immovable property mortgaged and then transferred by the mortgagee to another person for valuable consideration had not expired in respect of the transfer made by Seth Lachhman Das of what was described as an absolute right in favour of the Nawab of Rampur or that made by the latter in favour of Naunihal Singh. The object of Art. 134 is to protect transferees for value who have purchased an interest larger than that possessed by the transferor and have been allowed to remain in possession and enjoyment of such larger interest for a period of more than 12 years. In the matter of the mortgaged properties so transferred, it controls Art. 148 of the Indian Limitation Act in the same way as it controls Art. 140. If the mortgaged property is in possession not of the mortgagee but in that of a transferee from him who claims to have purchased larger interest therein for consideration, what a man is not allowed to do under Art. 148 of the Indian Limitation Act he cannot be allowed to do under Art. 140 after such possession has been held for more than 12 years. The question is not free from difficulty but in view of the equities of the case and the long and continuous litigation which the transferee had to face both before his possession of 12 years was completed and after it, there is no ground for allowing the remainderman to oust him after such period has expired. It may be that Richard Ross Skinner was suing for possession of the disputed property as much in his own interest as that of his successors, but the order refusing to allow substitution after his death was not challenged and allowed to become final and a remainderman who sues for the redemption of the mortgage cannot escape the consequences which Art. 134 prescribes.

In regard to the other matters raised in either of these appeals I have nothing to add to the decision of my learned colleague with which I am in agreement. I agree, therefore, in the order proposed.

Decree modified.

1925 ALLAHABAD 718

MUKERJI, J.

Rafiq and *others*—Defendants—Appellants.

v.

Shankar Lal and *others*—Plaintiffs—Respondents.

Second Appeal No. 906 of 1923, Decided on 16th January 1925, against a decree of the Sub.-J., Ghazipur, D/- 16th February 1923.

(a) *Civil P. C., S. 100—Tenants whether entitled to sell site of house is mixed question of law and fact.*

The question whether by custom a tenant is entitled to transfer the site of his house in the village abadi is a mixed question of law and fact and in the second appeal the question of sufficiency or insufficiency of the evidence in support of such a custom may be gone into. 30 *All.* 311, *Foll.* [P. 718, C. 2]

(b) *Custom—Question whether tenant in village can alienate land and house involves question of title.*

A custom as to whether tenants in a village can alienate land and house involves a title and no question of the reasonableness or unreasonableness of the custom can arise. 19 *A. L. J.* 104, *Foll.* [P. 718, C. 2]

(c) *Custom—Alienation of house and site—Residents in Pandauli though not co-sharers can alienate.*

Ordinarily in a purely agricultural village, the zamindar is the owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence. [P. 718, C. 2]

In the village Pandauli, District Gazipur, the occupiers of the village are entitled to sell the houses as they stand *viz.*, the material and the site. [P. 719, C. 2]

M. A. Aziz—for Appellants.

S. N. Sen—for Respondents.

Judgment.—The respondents brought the suit, out of which this second appeal has arisen, for recovery of the site of a house sold along with the building standing thereon by the Appellant No. 4 in favour of the other appellants.

It appears that the respondents were co-sharers in the village of Pandauli and on a partition, they obtained exclusive ownership over that portion of the village in which the house in suit was situated. The respondents were dissatisfied with the sale and contended that the site was their property and could not be disposed of by the Appellant No. 4 who, they said, was a mere tenant. They asked for recovery of possession and alleged that they had no objection to the purchasers removing the materials of the house.

The vendor did not enter appearance. The vendees, however, contested the suit on the ground that there was a custom in the village by which the residents were entitled to sell their houses along with the sites.

The Court of first instance came to the conclusion that the custom contended for on behalf of the appellants existed and it accordingly dismissed the suit. The Court of First Appeal, *viz.*, the learned Subordinate Judge. came to the conclusion that the evidence was insufficient for establishing the custom and he decreed the suit, allowing two months' time to the appellants to remove the materials.

The question raised being a mixed one of fact and law, vide *Ram Bilas* v. *Lal Bahadur* (1). I allowed the question of sufficiency or insufficiency of the evidence to be discussed.

It has been definitely held in this Court [see *Faiyaz Ali* v. *Rekhab Das* (2)] that a custom like the one set up is not an invalid custom. Indeed, the custom comes only to this : that the occupier of a house is also the proprietor of the site. It is really a question of title and, therefore, no question of the reasonableness or unreasonableness of the so-called custom arises [see also the judgment of Aikman, J., in the Full Bench case of *Ram Bilas* v. *Lal Bahadur* (1) referred to.]

It has been held in this Court that ordinarily in a purely agricultural village, the *zamindar* is the owner of every bit of land in the village and whoever asserts that a mere resident in the village, not being a co-sharer, is entitled to sell the site of his house must prove his case by weighty evidence. In the case before me, it appears that the village Pandauli is a very big one and is also a very ancient one. The waijb-ul-arz of the year 1867, a copy of which is on the record,

(1) [1908] 30 All 311=(1908) A.W.N. 112=5 A. L. J. 456=4 M.L.T. 169 (F. B.)
(2) [1921] 19 A.L.J. 104=61 I. C. 24.

shows that the tradition is that the village was founded 500 years ago. The learned pleader for the plaintiffs, in the Court of first instance, admitted that the village had a population of about 1,300 souls, out of whom 300 to 400 persons were not agriculturists. The waijb-ul-arz also gives a list of the several professions held by the residents of the village. This list will show that many of the residents were not agriculturists.

It cannot then be contended that all the residents of the village, who are not co-sharers, were there in the village for the purpose of cultivating the *zamindar's* lands and were, therefore, settled in the village for the benefit of the land-holders. There is a provision in para. 15 of the waijb-ul-arz and it throws some light on the question now before me. It lays down that subsequent to the drawing up of the wajib-ul-arz whoever would want to reside in the village must obtain permission from the landlords for the purpose. It is silent as to what are the rights of the villagers who had already been residing in the village from before the preparation of the waijb-ul-arz.

In this state of things we have to consider the evidence adduced on behalf of the appellants. They have produced no less than 19 sale-deeds, registered and unregistered, by which the residents of the village not being co-sharers, have sold their houses, sites and materials to co-sharers and non-co-sharers and in virtue of which purchasers have occupied houses along with the sites. The learned Judge of the Court below has remarked that only in one case the site is specifically mentioned. But there would be clear difference between the language of sale-deed of a house in its entirety and that of the sale-deed of mere materials of a house, which the purchaser would remove, as soon as the sale is completed. I have heard most of the sale-deeds and I am clearly of opinion that they purported to transfer not only the materials but also the sites. The houses were described as "owned and possessed" by the vendors and they were sold as the absolute property of the transferors. These sale-deeds range from 1872 to 1920. Only three of these sale-deeds are less than 12 years old. Not a single instance has been cited in which these sales were ever questioned.

In addition to the sale-deeds no less than seven witnesses have been examined to prove the so-called custom and three of these are co sharers in the village. The co-sharers are Ahmad Ali, aged 65, Abdul, Karim, aged 45 and Abdul, aged 45. The witness Ismail once owned a share in the village. All these witnesses have sworn that they themselves have purchased houses owned and occupied by the *ryots* and that they have continued to be in possession of the properties purchased.

On behalf of the plaintiffs not a scrap of evidence has been adduced to explain such a heavy body of transactions and evidence adduced on behalf of the appellants.

Having regard to the history of the village, in my opinion, the evidence is overwhelming to establish the appellants' contention that the occupiers of the village sites are entitled to sell the houses as they stand, *viz.*, the material and the site.

It has nowhere been alleged that the vendors' predecessor-in-title occupied the village after the wajib-ul-arz of 1867 had been framed. No special tenancy subsequent to the wajib-ul-arz has been proved. Indeed, para. 2 of the plaint would indicate that the ancestor of the Appellant No. 4 was an ancient resident of the village.

I accordingly allow the appeal, set aside the decree of the lower Court and restore the decree of the Court of first instance, dismissing the suit. The appellants will have their costs in this Court and in the Court below. The counsel's fees in the Court will be calculated on the higher scale.

Appeal allowed.

1925 ALLAHABAD 719

LINDSAY AND KANHAIYA LAL, JJ.

Kamoda Singh—Appellant.

v.

Ramchand and *others*—Respondents.

Second Appeal No. 1420 of 1923, Decided on 12th February, 1925, against the decree of the Sub. J., Muttra.

Pre-emption—Wajib-ul-arz—*Classes mentioning priority among pre-emptors*—*Priority applies to cases inter se.*

Where a wajib-ul-arz classified the preemptors as first class of own brothers the second class of cousins and nephews, the third class, co-sharers in the same patti ; the fourth class of co-sharers

in the thok , and the last class of co-sharers in the village.

Held; that on the language of the wajib-ul-arz these classes were set out in order of preference and that it did provide for pre-emption inter se between the various classes specified therein and therefore a sale to a person in the third class was liable to be pre-empted by a person in the second class. 19 *A. L. J.* 903, *Dist.*

[P 720 C 1]

Narain Prasad Asthana—for Appellant.

Akhail Nath Sanyal—for Respondents.

Lindsay, J.—There is no question in this case as to the existence of the right of pre-emption but the question is whether under custom as recorded, the plaintiffs had a better right to pre-empt than the vendee-appellant.

It appears that the plaintiffs pre-emptors are co sharers in the same khewat and patti with the vendor. The vendee on the other hand, is a co-sharer in a different *thok*.

The wajib-ul-arz lays down that a claim for pre-emption can be made when a co-sharer proposes to sell his property and it sets out a number of classes of persons in order who will be entitled to claim pre emption.

The first class entitled to pre-empt consists of own brothers ; the second class of cousins and nephews ; the third class, co-sharers in the same patti ; the fourth class, of co sharers in the *thok* ; and the last class consists of co-sharers in the village. It is not to be doubted that on the language of the wajib-ul-arz these classes are set out in order of preference ; the strongest claim to pre-emption being awarded to the first class ; the second strongest claim to the second class, and so on. After these classes have been mentioned, there is a statement in the wajib-ul-arz that if no person in any of the classes desires to take the property then the vendor is to be at liberty to sell to a stranger.

We have not the slightest doubt in our minds that the record, as here set out, does provide for pre-emption inter se between the various classes who are specified. It is only by holding this view that we can give full effect to the words, *awwal, phir, phir*.

The case of *Mathura Singh* v. *Ram Lal Singh* (1) has been referred to. There, on language which had some resemblance to the language which we are now considering, it was held that there was no right of pre-emption inter se between the classes of persons who are mentioned in the wajib-ul-arz. It was held that a right to pre-empt only arose in case there was a sale to a stranger and that the recital in the wajib-ul-arz merely indicated the various grades of persons who could put forward a claim to pre-emption in case the sale was to a stranger.

We could not extend the principle of that decision beyond the facts as they are set out in the judgment of the reported case, and in fact in subsequent cases this judgment has been dissented from. An instance may be found in the cases reported in *Dhanraj Misir* v. *Rameshwar Misir* (2).

We think it clear that the judgment of the Court below in this case was correct and that on the terms of the wajib-ul-arz the plaintiff was entitled to preference over the defendant. The appeal therefore fails and we dismiss with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(1) [1921] 19 A. L. J. 903=64 I. C. 486.

(2) 1924 All. 227=46 All. 170=21 A. L. J. 928 =5 L. R. A. Civ. 14.

★★ 1925 ALLAHABAD 720

SULAIMAN AND MUKERJI, JJ.

Aziz Banu—Defendant—Appellant.

v.

Mohammad Ibrahim Husain—Plaintiff—Respondent.

Second Appeal No. 163 of 1923, Decided on 23rd April 1925, from the decision of the Dt. J., Agra.

★ (*a*) *Practice—Parties not governed by same personal law—Case should be decided according to the law of defendant.*

It is a well-settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be the law of the defendant, and in the absence of any specific law and usage, justice, equity and good conscience.

(*b*) *Muhammadan Law—Difference of opinion between different jurists—Traditions need not be examined—Opinions of recognized jurists will prevail.*

When there is difference of opinion among the jurists the point in dispute cannot be decided by Courts sitting so many centuries afterwards by the examination of traditions only. Reliance must be placed on the opinion of recognized jurists who alone could have undertaken the task of sifting the traditions

and, in case of divergence, on their comparative superiority. [P 723 C 1]

(c) *Muhammadan Law (Shiah)—Authorities—Text-books*—Sharaya-ul-Islam *is most authoritative.*

The *Sharaya-ul-Islam* is the most authoritative text-book of the Shiah Law. 14 *All.* 429 (F. B.) *Rel. on.* [P 723 C 2]

★ (d) *Evidence Act, S. 45—Interpretation of of law—Law of the land—Courts themselves should interpret—Evidence of experts is inadmissible—Foreign Law—Opinions of experts are admissible.*

It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted. [P 727 C 1 & 2]

(e) *Practice—Authorities—Divergent opinions—Those in conformity with equity, justice and good conscience should be accepted.*

It is the duty of Courts, in cases of divergent opinions, when it seems impossible to ascertain the comparative merits of the authorities, to accept the view which is more in accordance with equity, justice and good conscience. [P 728 C 2]

★★ (f) *Muhammadan Law—Marriage of Sunni with Shiah is not illegal.*

The marriage of a Shiah girl with a Sunni husband is not absolutely illegal so as to make it void, it is only obnoxious. (Muhammadan texts discussed at length.) 6 *W. R.* 88, *Ref. to.* [P 728 C 2]

(g) *Muhammadan Law—Marriage—Shiah girl married to Sunni husband by her father as guardian—Marriage is not void—She can exercise option of puberty before consummation.*

If a minor Shiah girl has been given away in marriage by her father while of non-age, when it was impossible for her to have any voice in the matter, and on attaining puberty she considers the marriage to be repugnant to her religious sentiments and grossly disadvantageous to herself, it would be contrary to all rules of equity or justice to force such marriage on her and thereby compel her to live with a person who is abhorrent to her. She must be allowed the option to repudiate it. If she allows the marriage to be consummated, or in some other way ratifies the marriage then her option of puberty would go away and the marriage would be a perfectly valid marriage and her issue legitimate. [P 729 C 2]

S. A. Haider—for Appellant.

S. B. Johari and *Bishambhar Dayal*—for Respondent.

Sulaiman, J.—This is an appeal by Defendant No. 1 arising out of a suit for restitution of conjugal rights. The plaintiff's case was that the Defendant No. 1 was married to him on the 25th of September 1918 on a deffered dower amounting to Rs. 500 plus 2 dinars by her father acting as her guardian, but that she and her relations, the other defendants, were now refusing to send her to the plaintiff. The defence taken by the defendant appellant was that she was not aware of the alleged marriage, that her father had never consented to it, and that she being a Shiah and the plaintiff being a Sunni, no legal valid marriage could have been contracted and, lastly, that on attaining puberty she had repudiated the marriage.

The trial Court had decreed the claim. It found that the Defendant No. 1 was duly married to the plaintiff and her own father had acted as her guardian. It further found that the marriage of a Shiah with a Sunni was not illegal and had also held that the marriage having been performed by the defendant's own father she could not repudiate it, even though as a matter of fact she did so repudiate.

On appeal the lower appellate Court has confirmed that decree. It has held that the marriage was in fact performed with the consent of the father and that the difference in the religions of the parties did not make the marriage void. Before it the finding as to her having exercised the option of puberty was not challenged and it held that though, where a father fraudulently or negligently contracted his minor child in marriage, the marriage was voidable at the option of the minor; nevertheless in this particular case there was no evidence to accuse the father either of negligence or of fraud.

In second appeal two points have been urged on behalf of the defendant: (1) that under the Shiah Law the marriage of a Shiah woman with a Sunni husband was illegal and nullity; and (2) that in any case, such marriage was voidable.

As some argument has been advanced on behalf of the respondent on the point, it is necessary to state that, in my opinion, the personal law which ought to be considered in the case should be the personal law of the defendant. The plaintiff desires to force an alleged marriage on the contesting defendant. The defendant is, therefore, entitled to say that under the law by which she herself is governed such a marriage was void or voidable. It would be grossly unjust to decree the claim on the strength of the personal law governing the plaintiff. It

is a well settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be *the law of the defendant*, and in the absence of any specific law and usage, justice, equity and good conscience. Furthermore under S. 37, sub-clause (2) of the Bengal, N. W. P. and Assam Civil Courts Act the Court, in cases not provided for under sub-clause (1), has to act according to justice, equity and good conscience. There can be no doubt that justice, equity and good conscience require that the question of the validity of the alleged marriage must be determined according to the personal law of the defendant, that is the Shiah Law.

If the first question were to be answered on the authorities of Shiah Law available in the English language, the answer can only be in the negative, that is to say, that a marriage between a Shiah woman and a Sunni husband is not illegal.

There can be no doubt that there has been a divergence of opinion among the Shiah jurists. According to the one set of commentators the equality in respect of Islam is the only condition necessary for the validity of the marriage. According to another set equality in Islam alone is not sufficient, but there must also be equality in *Iman*. *Iman* in the Shiah text-books is used in a special sense so as to distinguish the Shiahs from Sunnis or other sects of Islam.

Mr. Baillie's Digest of Mohammadan Law, Vol. II, is composed mainly of translations from the *Sharaya-Islam* which had been made and published at the suggestion and with the aid of the Nawab Saiyed Muhammad Husain, Khan Bahadur Tuhawur Gunj, who was himself a Shiah. Mr. Baillie had also access to the Digest of Shiah Law compiled under the superintendence of Sir William Jones. At page 34 of Vol. II Mr. Baillie states as follows :—

"Equality is a condition in marriage, that is in respect of Islam. or the general profession of the Mussalman religion. Whether it is also a condition in respect of *Islam*, or true belief, is a question of which there are two traditions ; but according to the most notorious or generally received of these, equality in respect of Islam is all that is required."

Mr. Shama Charan Sircar, in his Tagore Law Lectures, has extracted the principles of Shiah Law from the Sharaya-ul-Islam and occasionally from the Rouzat-ul-Ahkam, Mafatih Irshad and Tahrir-ul-Ahkam, which he considered books of "paramount authority among the Imamias." On points difficult and doubtful he invariably consulted the learned Mujtahid of Lucknow who was with the ex-King of Oudh. He has not merely adopted the translations of Baillie, but has checked them himself. In his Lecture No. 13 he says:

"Equality is a condition in marriage, that is in respect of Islam, or the general profession of the Mohammadan religion."

As to the necessity of Iman, he, on the authority of Sharaya-ul-Islam, says:

"The most notorious of the two traditions is that equality in respect of Islam is all that is required."

He, however, quotes Tahrir-ul-Ahkam to say that the man's ability to support the woman is a condition in addition to that of Islam.

Mr. Ameer Ali,in preparing his Mohammadan Law of the Shiah School, has made use of Mabsut, Nihaya, Istibsar, Intisar, Hidaya, Sarair, Ghunia, Sharaya-ul-Islam, Jawahar-ul-Kalam, Jama-ush-Shittat and Siratun Nijat (*vide* Vol. I, p. 32). In Vol. II, at page 416, his conclusion on this disputed point of Shiah Lal is :

"Islam and ability to support the wife are the two necessary conditions to constitute a well assorted marriage. A Muslim possessed of sufficient means to maintain a wife may among the Shiahs marry any Muslim woman without question of lineage or rank ; for are not, it is pertinently asked, all Muslims equal ?"

This statement of the law is based on the authority of Sharaya and Jama ush-Shittat. Again at page 450 he remarks:

"As regards equality two conditions alone are insisted upon :

(i) Equality in respect of Islam, in other words, the general profession of the Islamic religion; and (ii) ability to support the wife."

At page 27 he has remarked generally:

"Sunnis and Shiahs may validly intermarry without any change of sect or communion."

Mr. Tyabji in his principles of Mohammadan Law, paragraph 80, when considering whether a marriage should not be avoided on the ground of inequality,

says that the Shiah Law requires equality *only* in regard to Islam.

In the case of *Syed Gholam Husain* v. *Musammat Setabah Begam* (1), a Bench of the Calcutta High Court had to decide the question as to whether a Sunni could marry a Shiah woman. They remarked that they could nowhere find that a Sunni was incapacitated from marrying a Shiah and accordingly held that the marriage was good. That case, however, may be distinguishable on the ground that it was the defendant, a representative of the husband, who was pleading the invalidity of the marriage of the plaintiff.

The learned advocate for the appellant, who has argued the case with great ability, realised that he had to face all these authorities. The line of argument adopted by him was that all the above-mentioned authorities are substantially based on the Sharaya-ul-Islam, but that the view of its author has not been accepted by a number of other eminent jurists. His contention, therefore, has been that in face of the other authorities which outweigh Sharaya-ul-Islam, the marriage should be held to be void.

That it was likely that a divergence of opinion might arise becomes at once apparent when it is appreciated how the authenticity of traditions came to be examined centuries afterwards. Differences of opinion were quite natural. When such differences arose among the Sunni jurists Imam Abu Hanifa, Imam Malik, Imam Shafi and Imam Hanbal, who flourished in the first and the second centuries of the Hijra, it is not at all surprising that differences of opinion arose among the Shiah jurists also of whom the earliest jurists, whose book is in existence, namely, Ali Mufid, flourished in the third and the fourth centuries. The point in dispute cannot now be decided by Courts sitting so many centuries afterwards by an examination of traditions only. Reliance must be placed on the opinion of recognised jurists who alone could have undertaken the task of sifting the traditions of and, in cases of divergence, on their comparative superiority.

The first difficulty in our way is that all the authorities referred to by the various commentators are not available to us. It is, therefore, impossible to find out exactly how many authorities are one way and how many the other way. Even most of the books which have been made use of by Messrs. Baillie, Shama Charan Sircar and Ameer Ali, have not been laid before us. It is, therefore, not an easy task to say that the conclusion at which these learned authors arrived was necessarily wrong or that it was not supported by authorities other than Sharaya-ul-Islam. Another danger that has to be guarded against was pointed out by their Lordships of the Privy Council in the case of *Abdul Fatah Ahmad Ishak* v. *Russomoye Dhur Chowdhry* (2) and the case of *Bagar Ali Khan* v. *Anjuman Ara Begam* (3). In the last-mentioned case their Lordships remarked :

"That danger is equally great whether reliance be placed upon fresh texts *newly brought to light* or upon fresh logical inferences newly drawn from old and undisputed texts."

It is, therefore, dangerous to depart from the view of the law which has remained unchallenged for at least over half a century and which is to be found in the Sharaya-ul Islam, the book of the highest authority in India, merely because some other authors have taken a contrary view.

As to the Sharaya-ul-Islam, Mr. Baillie in his Vol. II, p. 26, has said that it is a work of the highest authority. Mr. Shama Charan Sircar has called it a work of the highest authority, at least in India, and more universally referred to than any other Shiah Law book and the chief authority for the law of the Shiahs in India. Mr. Ameer Ali, in his introduction to Vol. I at page 31, has pointed out that the Sharaya-ul-Islam is a well-known work on the Shiah Law on which several commentaries are in existence. It is true that according to Mr. Ameer Ali the narrow conceptions of the author of Sharaya-ul-Islam have by gaining ground, stopped all growth, but this is bound to be so when conclusions are based on traditions which cannot alter by mere lapse of time. Mr. Ameer Ali has himself in his book largely relied on Sharaya-ul-Islam. In

(1) [1866] 6 W. R. 88.

(2) [1895] 22 Cal. 619=22 I. A. 76=6 Sar. 572 (P. C.).

(3) [1903] 25 All. 236=30 I. A. 94=7 C.W.N. 465=5 Bom. L. R. 410=8 Sar. 397 (P. C.)

the case of *Agha Ali Khan* v. *Altaf Hasan Khan* (4), Mahmood, J.. in delivering the judgment of the Full Bench, remarked at page 420 that :

"the Sharaya-ul-Islam is the most authoritative text-book of the Shiah Law."

In the case of *Mahomad Abid Ali Kumar Kadar* v. *Ludden Sahiba* (5) the learned Judges of the Calcutta High Court, at page 286, were not prepared to doubt the correctness of the Sharaya-ul-Islam as a binding authority amongst the Shiahs in India. In the case of *Nazir Husain* v. *Rafiq Husain* (6) Piggot, J., remarked that the impression which he gathered from the Full Bench case of *Agha Ali Khan* v. *Altaf Hasan Khan* (4) was that :

"the Sharaya-ul-Islam is the leading and the most weighty authority for the law applicable to the Shiah sect in India."

In the case of *Khurshed Husain* v. *Fyaz Husain* (7), Rafique, J., remarked :

"the opinion of the learned author of the Sharaya must carry greater weight than the opinion of other Shiah jurists, as he has been held by the Courts in this country from early times as the chief authority on the law of the Shiahs."

The learned counsel for the parties have not been able to lay before us the original text of the Sharaya-ul-Islam, but Mr. Agha Haider has placed before us the book called Jamaa-i-Razwi which purports to be a translation of the Sharaya published at Lucknow. This book shows that the extracts made by Mr. Baillie are accurate. There is a special section which deals with the cases of prohibition in marriage (*hurmat*). These are stated to be six in number. Among these six cases infidelity is mentioned as one, but the subject of a marriage between a "momina" with a Muslim other than a "Momin" is not discussed at all. This discussion finds place separately under a heading "Things connected with the contract" (Lawahiq Aqd). These latter are seven in number. The first is equality. The learned author mentions that equality as a condition in marriage means equality in respect of Islam. He then goes on to say that as to whether 'Iman' is also a condition is a question on which there are two traditions, the most notorious being that Islam is all that is required. The text of Sharaya-ul-Islam is quoted and its commentary Jwabir-ul-Islam shows that the translation by Baillie is perfectly correct. The original Arabic word in the text is *Azhar* which means most notorious. There can be no doubt that the author of Sharaya-ul-Islam has nowhere said that without 'Iman' the marriage would be a nullity or void, but later on he considers it "Makruh." Mr. Baillie has translated this word as abominable which is rather too strong a word. A better translation would be 'obnoxious' or 'hateful'. An act which is makruh is not absolutely forbidden as "haram" would be, nor is there any sin in committing it, but it is to be deprecated and, as far as possible, to be avoided. Even : if there had been any ambiguity in the text of Sharaya which there is not, the fact that the question is not discussed under the heading "Hurmat", that two traditions are mentioned by the author one of which is called the most notorious and that it is nowhere stated that the marriage is illegal or void, the conclusion would have been justified that the author did not consider such a marriage to be absolutely prohibited but only undesirable.

Mr. Agha Haider's main contention is that in view of the other text-books the Sharaya-ul-Islam should not be considered an authority on the question before us.

The first book relied upon by him is Sharah-i-Loma. Undoubtedly, this is a book of some authority in the Shiah School. But when dealing with its comparative merit it is necessary to point out that this book is not mentioned in the lists of the authorities on Shiah Law prepared by Mr. Shama Charan Sircar or by Mr. Ameer Ali, but Mr. Tyabji in his Muhammadan Law, 2nd edition, at page 86, does, however, mention it. Sharah-i-Loma Damishqiya is named Rauzatul Bahiah and is a commentary by Zain-ul-Abdin on Loma Damishqi by Ibni Makki. The text Loma Damishqi itself is by no means clearly in favour of the appellant. It merely says that *kafat* (equality) is an accepted condition

(4) [1892] 14 All. 429=(1892) A. W. N. 187 (F. B.).
(5) [1887] 14 Cal. 276.
(6) [1911] 8 A. L. J. 1154=12 I. C. 730.
(7) [1914] 36 All. 289=23 I. C. 253=12 A. L. J. 417.

in marriage and after discussing the marriage with an infidel, or *Nasib* or *Nasiba*, the author merely says that:

"there are two traditions on whether the marriage of *momina* with "Mokalif" is valid."

It may very well be urged that had the author's view been that such a marriage is absolutely illegal, he would not have contented himself by merely referring to the divergence of opinion and not saying that it is prohibited.

But there is no doubt that the author of the Sharah-i-Loma, when dealing with the conditions of marriage has taken the view that equality (kafat) in marriage means equality both in Islam and Iman. He first says that the marriage with a Nasibi man or Nasibia woman is not valid as they are worse than Jews and Christians. He then goes on to consider the question whether the marriage of a momina with a mukalif from whatever sect of Islam he may be even though he be a Shiah other than Imamia, is or is not valid. He quotes that there are two traditions on this point: one that it is invalid, and the other that it is valid but hateful. The commentator himself prefers the first view. It is obvious that the view of the author of Sharah-i-Loma is an extreme view which would make not only the marriage of an Imamia with a man of every other sect of Islam invalid, but also her marriage with a Shiah other than the Imamia invalid. The author has, however, pointed out that the first view is based on three traditions :

The Momins are equals of each other.

If comes to you some one whose moral conduct (khulq) and religion you agree with then marry him. If you do not act like this there will be mischief on the earth and great trouble. A Momin does not agree with the religion of any one other than a Momin.

An Arifa is not to be kept near any one but an Arif.

The first two traditions are based on the sayings of the Prophet. As in the lifetime of the Prophet the different sects did not come into existence at all, and as the special use of the word Momin by the Shiah jurists in relation to themselves is of a much later origin, it is obvious that the first two traditions cannot be said to be decisive on the question. The word Momin there obviously means Muslim The third tradition is quoted from Imam Jafar Sadiq and uses the words Arif and Arifa. Now Sunnis and Shiahs both regard Hazrat Jafar Sadiq in high reverence. And there is nothing to show that the words Arif and Arifa were at that time used for Shiahs, and for the matter of that, it is not clear that even now they mean anything more than devout and pious persons. Literally Marifat means recognition. The learned Advocate for the appellant has referred us to a more restricted meaning given to it in a legal lexicon 'Majmaul Bahrain,' but even that book does not suggest that the word arif is applied to Shiahs as a sect.

Furthermore, the third tradition seems to be merely directory for Sheikh Tusi in his book Istibsar, third volume, page 990, has stated a tradition that Faizul questioned Hazrat Abu Jafar as to whether a Nasib could marry an Arifa woman He replied 'no,' as a Nasib is a 'kafir'. Faizul then asked what about the case if any one other than a Nasib who is not an Arif marries her. He replied 'one other than he is preferable (ahabbo) to me'. This would also suggest that in the case of Nasib the marriage would be illegal but in the other case only undesirable.

Besides basing his opinion on these three traditions, the learned author mentions a further ground that a woman takes from the etiquette of her husband and may have his religion forced on her. Referring to the second view, he has pointed out that it was adopted with 'kavayatha' by Al Mufid, Al Mohakkiq Ibn Saiyid on the ground that Iman was the same thing as Islam and that the ground for coupling with it the condition of Iman was weak because the traditions are either incomplete or weak and Majhul.

It is interesting to note that we have had two printed editions of Sharah-i-Loma produced before us. The marginal note on the edition produced by the learned advocate for the plaintiff when referring to the second tradition says that this does not involve the absolute prohibition of the marriage of any one other than the one mentioned therein. In the second edition there is a marginal note that sufficiently of Islam has been accepted by Al Mufid Ali Mohakkiq and Ibn Hamza. And there is a further note that the second tradition has been criticised in Masalik inasmuch as it does not indicate the scope of the validity of marriage and that the joining of 'khulq'

(conduct) with *din* (religion) in *kafat* is not in accordance with the well-accepted doctrine. The marginal note adds that the idea is to indicate the husband in his perfection, and it is said that the prohibition of the marriage with any one other than that mentioned is not necessarily invalid.

It has been contended by the learned advocate for the appellant that the word Nasib means a Sunni and that, therefore, the marriage is void according to the unanimity of opinion. He has cited before us a passage said to have been taken from Vol. II of Jawahar-ul-Kalam to show that a Nasib is not only one who hates the Ahlibait but also the followers of Ahlibait. He has, therefore, argued that Nasib stands for all sects of Islam other than Shiahs.

But in view of misquotations from Vol. V made by the translator for the appellant, referred to by me hereafter, I am not prepared to take this passage as correctly representing the opinion of the author (specially as in Vol. V he uses the word Nasib for a particular sect and the word Mukhalif for all sects other than the one to which the author himself belongs) when Vol. II itself has not been laid before us. This contention is also contrary to the way in which the distinction between Mukhalif and Nasibi is drawn in Sharah-i-Lomia itself. Nasibi is a class by itself, whereas Mukhalif may be a person belonging to whatsoever sect of Islam even though he be a Shiah (ghair Imamia). It is obvious that the word Mukhalif stands for all the sects of Islam other than the Shiahs and the *Nasibis*. The distinction is made clearer still in Jamaa-i-Razvi (translation of Sharaya-uf-Islam) where it is pointed out that a *Nasib* is one who proclaims his hostility to Hazrat Ali and Ahlibait or one who though does not proclaim it but whose hostility is evident from his conduct. It goes on to add :

"The mere fact that he is a *Mukhalif* of the Imamia religion will not make the rule as regards Nasibis applicable to him."

Mr. Ameer Ali, in his Vol. II, page 6, has pointed out that the enemies of Ahlibait are called *Nasibis* (rebels) or *khawarij* (insurgents or deserters). In Lane's Arabic English Lexicon, Book I, part 8, Nawasib, Nasibia and Ahlul Nasb are stated to be

"appellations of a sect who made it a matter of religious obligations to bear a violent hatred to Ali, the son of Abu Talif ; so called because they acted with hostility or enmity towards him and openly opposed him : they were a sect of the *khawarj*."

Similarly in *Farshang* published by the Nawal Kishore Press of Lucknow *Nawssib* is said to be a sect of Mussalmans who bear enmity towards Hazrat Ali. It is clear that Sunnis who have a reverence for Hazrat Ali and Ahlibait do not come under this appellation which is an historical expression for a particular sect which never recognizes Hazrat Ali as the rightful Khalifa. This point will be made very clear when the next authorities are discussed.

The next book relied upon on behalf of the appellant is Jamaa-i-Abbasi by Bahauddin which, according Mr. Ameer Ali is.

"generally considered to be the work of Bahauddin Muhammad Amili."

It is a book in the Persian language. Al Muhakkiq has given six things as being *haram* in marriage. This author, however, gives eight things as being *haram* in marrige. His classification does not, however, tally with that in Sharaya-ul-Islam. The sixth thing mentioned by him is marriage of a *Momina* woman with a Sunni husband. He has, however, added that some of the *Mujtahids* regard it as only *makruh*. On the same footing with such a marriage are placed other prohibitions like the third one, namely, marriage of a woman by her vakil to himself, and the seventh one, namely, destruction of articles which are given in sacrifice at the time of marriage knowing that the owner is not consenting. It is possible to suggest that the third prohibition would make the marriage only voidable, and the seventh one would have no effect on the validity of the marriage at all.

The next book Majmaul Bahrain is really an Arabic legal lexicon and is by the author of Jammai-Abbasi. In this the compiler has expressed the view that *kafat* means not only Islam, but Iman and the ability to maintain the wife.

The next authority relied upon is a Persian book, Zakhiratul Maal, by Sheikh Zainul Abdin of Karbala. In answer to the question as to whether the marriage of a Sunni woman with a Shiah husband

or a Shiah woman with a Sunni husband is valid, the author says the first one is valid and the second one is invalid. He adds that some of the learned men have regarded the marriage of a Shiah woman with a Sunni husband as valid, but this is the weaker view. He goes on to add that if the marriage of a Shiah woman with a Sunni husband takes place under ignorance of law, without purposely refraining from finding out that law, then there is no sin, and the issue will be legitimate. It is also said that if the marriage takes place under compulsion, there would be no sin.

It is obvious that the author of *Zakhiratul Maal* does not consider that a Sunni is a *Nasibi* for in that view he would not have upheld the marriage of a Shiah husband with a Sunni woman as valid ; for as to *Nasibias* there is a unanimity of opinion that an intermarriage is illegal.

The next book quoted is Alkafi which also says that the marriage with *Nasibi* is not valid. This book, in view of the meaning of the word *Nasib* as given in the dictionaries, is not in point,

An extract from the fifth volume of Jawhar ul-Kalam has been quoted to show that it is illegal to wed a Shiah woman to a Nasib who declares his enmity with Ahailbait. On a careful examination I discovered that the passage embodying the view of the author of Jawahar-ul-Kalm which is against the appellant's contention had not been quoted. After discussing the two traditions and quoting the reasons for and against each, the learned commentator's own conclusion is that in the matter of equality in marriage, Iman is a synonym for Islam and is not used in its special meaning for the special meaning attached to Iman is of a later origin and is not a necessary condition in marriage. In his opinion the validity rests on *kalma* alone. Of course an exception is made in the case of *Nasbis* who are regarded as being outside the place of Islam, even worse than Christians and Jews. But it is pointed out that every *Mukhalif* is not a *Nasib*.

This exhausts the authorities relied upon on behalf of the appellant.

Mr. Agha Haider has also tried to rely on the opinion of Maulvi Nasiri Sahib who apparently was examined in this case as an expert witness. In my opinion his evidence does not come within S. 45 of the Indian Evidence Act and is inadmissible. The Shiah Law on marriage is the law of the land and is in force in British India. It can by no means be called foreign law; nor such law is a science or art within the meaning of that section. It is the duty of Courts themselves to interpret the law of the land and apply it and not to depend on the opinion of witnesses howsoever learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are, therefore, allowed to be admitted.

The learned vakil for the respondents has confessed that he has had no access to the text-books of Shiah Law, not even those to which there are references that they hold the view in his favour, because such books are not easily available. He has placed his reliance on the law to be found in the English commentaries and has urged that it is not fair to say that those books are based merely on the Sharaya-ul-Islam. He has pointed out that Mr. Shama Charan Sircar and Mr. Ameer Ali have made use of a large number of other books which have not been laid before the Court. He has, therefore, urged that the conclusion at which these learned authors arrived must have been arrived at after an examination of all the leading books. Furthermore, he has contended that even if there are other books giving preference to the contrary opinion, the authority of Sharaya-ul-Islam which has always been regarded as the most authoritative text-book so far at least as India is concerned, should be accepted.

Sharaya-ul Islam is undoubtedly the most universally known authority on Shiah Law so far at least as India is concerned. The view of Al Muhakkiq, its author, is undoubtedly that such a marriage is not illegal. It cannot be disputed that mixed marriages of this kind have existed and do exist in this country. The plaintiff's witness, Ashiq Ali, who is an uncle of the contesting defendant, has stated that his own mother was a Shiah and his father a Sunni and that such mixed marriages do take place. Even the defendant, Mt. Aziz Bano, in her statement on oath, has

admitted that marriages between Shiahs and Sunnis do take place, though she has added that a Saiyid's daughter is not sent to a Sunni. She has also admitted that her grand-mother's relations are Sunnis. The existence of such marriages cannot be doubted. It is, therefore, a fair inference to draw that the view of the author of Sharaya ul-Islam has been accepted so far as India is concerned and that the contrary view that such a marriage is illegal has not been accepted here, though the fact that such marriages are not very common may be said to indicate that they are considered undesirable. To take the view that the rule laid down by the author of Sharaya-ul-Islam is not the correct law would have most far-reaching effect and I am by no means satisfied that Al Muhakkiq's view is not the correct view. His is a liberal view which considers that persons belonging to sects other than Shiahs are within the pale of Islam and there is equality between them so far as marriage is concerned. The view expounded by the author of Sharahi Luma would render illegitimate not only the children of a Shiah wife married to a Sunni husband but also of all Imamia women married to Ghair Imamia Shiahs. It seems to me that it is now too late in the day to urge that the view of the author of Sharahi Luma should be accepted.

As to the text books in Persian, I am by no means satisfied that in India they are of authority comparable to Sharaya-ul-Islam or Jawahirul Kalam, or for the matter of that, even to Sharai Luma.

The fact that only on one occasion, when the point was raised, the Calcutta High Court decided against the invalidity, and that since then such a marriage has not been challenged, at least so far as the reported cases go, is very significant.

The conclusion of Mr. Ameer Ali, who is well acquainted with the doctrines of Shiah Law, also carry great weight. It may further be pointed out that Tudball and Rafique, JJ., in the case of *Khurshed Husain* v. *Fyaz Husain* (7), had before them 19 authorities including Sharahi Luma and Jawahar-ul-Kalam on the one hand and yet they did not consider them to be of sufficient weight as against Sharaya-ul-Islam. In the present case even Jawahar-ul-Kalam supports Sharaya-ul-Islam.

Even apart from all these considerations it is the duty of Courts, in cases of divergent opinion, when it seems impossible to ascertain the comparative merits of the authorities, to accept the view which is more in accordance with equity, justice and good conscience. Mr. Ameer Ali in his preface to the third edition at page 7 has referred to the important rule to which attention had been called by Sir William Jones that :

"When the great expounders of Musalman Law have enunciated divergent doctrines or expressed different opinions, the Judge administering Mussalman Law is to adopt the one most conformable to equity and the requirements of the times."

Mr. Tyabji also in his book on Muhammadan Law, paragraph 11 (*a*) pointed out :

"When Musalman jurists of authority have expressed dissentient opinions on the same question the Islamic Courts presided over by Kazia have authority to adopt that view which in the opinion of the presiding officer is most in accordance with justice in the particular circumstances."

And in paragraph 11 (*b*) he has considered how the functions and powers of the Kazia are exercised by the Courts of British India. In this case there can be no doubt that the view that the marriage is not illegal is 'most conformable to equity and the requirements of the times.'

I am, therefore, of opinion that the marriage of a Shiah woman with a Sunni husband is not absolutely illegal so as to make it void.

There now remains to consider the second question as to whether such a marriage is voidable even though contracted by the father. Mr. Ameer Ali, in his Muhammadan Law, Vol. II, page 420, has on the authority of Jamaa-ush-Shittat remarked :

"When the contract is entered into by the father or in his absence by the nearest living paternal ancestor, the minor, whether male or female, has no option on attaining puberty unless the contract is to the manifest disadvantage of the minor or *has been carelessly or wickedly entered into*, e. g., when the father of a girl has married her to a lunatic or an eunuch or if a boy has married him to a female who is unfit for connubial intercourse or has bound him to pay a dower which is

utterly beyond his means, the contract is subject to the minor's option on attaining puberty. These examples are by no means exhaustive."

Mr. Wilson in his note under paragraph 88, when referring to another statement in Mr. Ameer Ali's book that

'there seems to be a general consensus amongst all jurists that where a father has acted wickedly or heedlessly the marriage is voidable,'

has said that a Muhammadan marriage being simply a civil contract this agrees with the general maxim of the English Law. Mr. Tyabji in paragraph 70 of his book says:

"The authorities of all sects of Muhammadan Law are agreed that where a father or paternal grandfather fraudulently or negligently contracts his minor child or grandchild in marriage, it is voidable at the option of the minor, on his or her attaining majority."

Further in paragraph 72 he has stated that the more approved Shiah doctrine is that the marriage contracted by a father or paternal grandfather on behalf of his minor child or grandchild is voidable by the minor on his attaining majority, if the father or grandfather has agreed to an improper dower.

There is no doubt that even on this question there is some divergence of opinion and there are two traditions as to whether the marriage contracted by the father is or is not absolutely binding. The learned counsel for the parties, however, have not produced before us any original texts on the question one way or the other. Mr. Baillie's Digest, though it states that according to the more approved of the two traditions a young girl who has been given away in marriage by her father has no option after attaining puberty, does not expressly consider the case where the marriage is to the 'manifest disadvantage of the minor' or 'has been carelessly or wickedly entered into.' As to this contingency the book is silent. Whereas both Mr. Ameer Ali and Mr. Tyabji have, as already mentioned, expressed the view that even in the case of a marriage performed by the father there is no absolute finality. It would be in accordance with equity, justice and good conscience to accept the tradition which says that in certain special cases there is an option left to the minor boy or girl even though the marriage has been performed by the father or grandfather.

I have already said that although there is a great divergence of opinion on the question of the validity of the marriage of a Shiah woman with a Sunni husband, there is absolute unanimity that such a marriage is at least *makruh*, that is to say, 'obnoxious,' or hateful. It is considered *makruh* because of religious sentiments as well as the danger that a wife is likely to adopt the religion of her husband. It seems to me that if a minor Shiah girl has been given away in marriage by her father while of non-age, when it was impossible for her to have any voice in the matter, and on attaining puberty she considers the marriage to be repugnant to her religious sentiments and grossly disadvantageous to herself, it would be contrary to all rules of equity or justice to force such marriage on her and thereby compel her to live with a person who is abhorrent to her. When her religion says that such a marriage is abhorrent she must be allowed the option to repudiate it, if any option can ever exist. Had she allowed the marriage to be consummated, or in some other way ratified the marriage then her option of puberty would have been gone and the marriage would be a perfectly valid marriage and her issue legitimate. But in this case it is an admitted fact that there has yet been no consummation at all. The finding of the first Court, which was not challenged before the lower appellate Court, is that she repudiated the marriage on attaining puberty. If, therefore, she had an option in the matter, the marriage has been avoided. In view of the rule of Shiah Law as laid down by Messrs. Ameer Ali and Tyabji, and in view of the fact that no texts expressly laying down a contrary opinion have been cited before us, I am bound to hold that the option of puberty existed in this case.

It follows that, although I hold that the marriage of a Shiah woman with a Sunni husband, if entered into when the parties are of age or if performed by her guardian, and ratified by her on attaining puberty, is valid and legal and her offspring are legitimate, I also hold that such a marriage, if performed by her guardian, no matter whether he is the father or the grandfather, is capable of being repudiated by her on attaining puberty because it may affect her religious

sentiment and may therefore be said to be to her manifest disadvantage. This is a liberal view to take and is obviously in accordance with justice, equity and good conscience as well as the requirements of the times.

I may further add that even if a decree for restitution of conjugal rights could have been passed, it would have been almost a futile one as under the amending Act No. XXIX of 1923 the defendant cannot even be detained in prison for disobedienee of a decree for restitution of conjugal rights.

I would, therefore, allow the appeal and setting aside the decrees of the Courts below, declare that though the marriage was not illegal, yet the defendant had an option of repudiation which has been duly exercised, and that, in consequence, the marriage tie no longer subsists. She will of course have no longer and claim for any dower.

Mukerji, J.—This appeal arises out of a suit for restitution of conjugal rights and raises a point of Muhammadan Law, the decision on which must have a far-reaching consequence. Owing to the importance of the point involved this appeal was laid before a Bench of two Judges although it was ordinarily cognisable by a single Judge.

The facts involved are all admitted in second appeal. It has been found that the plaintiff Mohammad Ibrahim, who is the respondent in this Court, is Sunni by faith. He was married with the consent of her father to the appellant, Mt. Aziz Bano, who was a minor at the time of the marriage. Mt. Aziz Bano and her father both profess the Shiah faith. Aziz Bano, on attaining majority according to the Muhammadan Law (on attaining puberty) repudiated her marriage with Mohammad Ibrahim on the ground that Mohammad Ibrahim being a Sunni by faith, and Aziz Bano herself being a Shiah, the marriage was void in law. Mohammad Ibrahim wanted that Aziz Bano should come and live with him and therefore made atttempts to induce her father (the mother is dead) to sent away the girl to him. This being refused, he brought the suit out of which this appeal has arisen.

The principal plea was that the marriage was void in law. The Court of first instance found the issue in favour of the plaintiff and its judgment has been upheld by the Court of first appeal which relied on the case of *Ghulam Husain* v. *Setabah Begum* (1).

In this Court Mr. Agha Haider has contended that according to the true interpretation of Shiah Law, the marriage of a Shiah girl with a Sunni husband is absolutely void, although the marriage of a Shiah man with a Sunni girl will not be so. He has candidly confessed that so far as the authority of Sharya-ul-Islam is concerned it is against him although it holds that a marriage like this is "abominable" or is to be detested. He argued that Sharya-ul-Islam was not the only book on Shiah Law and that for the simple reason that this was the only Shiah book that happened to be translated and no other book was rendered accessible to the English knowing jurists, Sharya-ul-Islam received the weight that was not really due to it. Mr. Agha Haider took us through several original texts in different books and it is due to him that we should examine what these books have to say.

We then start with the fact that according to Sharya-ul-Islam and the rule of Shiah Law as recognized by English knowing authorities, viz., Ameer Ali, Shama Charan Sircar, Wilson and Tyabji there is no inherent bar to a Shiah of either sex contracting a lawful marriage with a Sunni of the opposite sex. The opinion of most of these jurists is based on Sharya-ul-Islam but the opinion of Ameer Ali is also based on the authority of Jame-ul-Shittat. Coming then to the authorities quoted by Mr. Agha Haider the first book to be examined is Jame-ul-Riswi. It is really a Persian translation of Sharya-ul-Islam which is in Arabic. According to the Shiah Law two things are necessary for marriage, viz. equality and the ability of the husband to support a wife. The question is: What is equality, that is to say, whether equality of religion is enough or should there be equality of faith in the doctrines of Shiah faith as well? On this point Jame-ul-Riswi says that there are two views. The usual view is that the husband and wife both must be Muhammadans, that is to say, must profess the Islam faith, and that should be enough for their marriage. Others say that as a woman generally follows her husband's faith, it is not desirable that a Shiah woman should marry a Sunni husband

and thus run the risk of losing her own faith by adopting that of her husband. Thus, in the opinion of the translator of Sharya-ul-Islam, as given out in Jame-ul-Riswi, the 'better opinion' is that a Shiah woman should not marry a non-Shiah husband. The language that has been really used by the translator is to the effect that the marriage or 'nikah' of a Momina or a Shiah girl with a 'Nasib' is invalid and is to be deprecated. Mr. Agha Haider argued that a Nasib is a Sunni. We asked the learned counsel to produce any authority to prove his statement. Mr. Agha Haider relies on Majmaul Bahrain to show that a Sunni is a 'Nasib'. According to the Law Lexicon, Majmaul Bahrain, edited by the author of Jame-Abbasi, a 'Nasib', is one who shows enmity not only to the house of the Prophet but also to those who are their followers, that is to say, the Shiahs. This exposition of law is sought to be based on a statement of Imam Jafar Sadiq the sixth Imam. But it is extremely doubtful if any such opinion can be hung on the short 'hadis' of the said Imam. For Imam Jafar Sadiq said simply this that 'that person is a Nasib who shows enmity to the Ahl-Bait or descendants of Mohammad.'

If we recall the history of the rise of the Muhammadan faith we find that the Nasibs were really the followers of Ommaya and his descendants who made war on Ahl-Bait or the descendants of the Prophet. The Sunnis fought the house of Ommaya and took away all the temporal power from them. Thus between the Sunnis and the original Nasibs no love was lost. Thus although Sunnis and Shiahs are not at all friendly, there is no real authority for the statement that the words "Nasibs and Kharjis" apply to Sunnis pure and simple. On the other hand, the dictionary of Lane Pool does not give Sunni as one of the meanings of the word Nasib. To sum up. the author of Jame-ur-Riswi, who is only translating Sharya-ul-Islam, gives it as his opinion that it is not open to a Shiah woman to marry a Nasib. Giving full force to all that has been said by the author it does not follow that he prohibits the marriage of a Shiah girl with a Sunni husband.

The next authority relied upon by Mr. Agha Haider is Sharya Looma, S. 14. This book is not mentioned in the bibliography of Shama Charan Sarkar and Ameer Ali. Tyebji mentions it at p 86. There is, however, no doubt that such a book exists. But its weight as a book of authority has been denied at least where it conflicts with the rules laid down in Sharya-ul-Islam. The author of Sharya Looma is not known. It has not been established, though it has been asserted, that it is Ibn Makki. Discussing the question as to what is necessary for a valid marriage. viz., discussing the principle that equality is necessary for marriage the author gives the opinion that although there are two opinions on the point and one of the opinions is that Islam is "Imam" it is safe to be cautious and therefore a Shiah should not marry a a non-Shiah. As authority for his opinion the author quotes an alleged saying of the sixth Imam Jafar Sadiq, viz.— 'an Arifa could not live with a non-Arif'. The whole question, therefore, is whether this tradition or 'hadis' handed down through the sixth Imam really means that a Shiah girl should not marry a non-Shiah husband. The answer to the question would turn upon the meaning of the word Arif. Mr. Agha Haider's contention is that an Arif is a Shiah and Arifa is a Shiah girl. Mr. Agha Haider was unable to produce before us any authority for the statement that an Arifa can mean only a Shiah girl and nobody else. Shakespeare in his dictionary says that an Arifa is a pious or devout woman. Unless therefore we take it that a Shiah writer thinks that all the Shiahs are Arifa the learned counsel cannot maintain that the 'hadis' handed down by the sixth Imam means what he contends for. The further question remains whether the word Arif was ever used, at the time when the sixth Imam flourished, in the sense of a Shiah. The authority of Sharya Looma on this point, therefore, is not conclusive. No doubt, so far as the opinion of the author goes, it is in the appellant's favour. But the authority on which that opinion is based would not appear to support it (the opinion).

The next book relied upon is Jame-Abbasi. Closely connected with this book is the law lexicon already mentioned, by the same author (Baha Uddin) viz., Majmaul Bahrain. This book is no doubt referred to in their bibliography by the important writers on Muhammadan

Law, viz, Ameer Ali, Tyebji and Shama Charan Sarkar. The opinion of Jame-Abbasi is recorded at p. 121 of the book. He says that eight things make a marriage 'haram' or illegal. The sixth thing is the marriage of a Momina (Shiah girl) with a Sunni. The author adds that some are of opinion that such a marriage is not illegal but only 'maqruh' (abominable). Assuming that the word haram is used to signify something absolutely illegal, the author of Jame-Abbasi quotes two opinions and does not ve his own opinion with any clearness. But the same author, in his book Majmaul Bahrain is clearly of opinion that of the two opinions held, the opinion that the marriage of a Shiah girl with a Sunni husband is illegal is 'the more acceptable'. The question is whether this is a mere opinion of the author or whether it is based on something more sacred than the author's opinion. We are left in darkness on this point.

The next authority relied upon by Mr. Agha Haider is Zakirut-ul-Maad by Zain-ul-Abin, otherwise known as Shaik-ul-Islam. The book is in Persian and states the law in the form of answers to questions. Two of the answers are that a Shiah male person can marry a Sunni woman, but a Shiah woman cannot marry a Sunni man. Then the question is put to the author: "If there be no Shiah bridegroom available, whether the marriage would be valid," the answer given is: "If the marriage should take place in ignorance of law and without any attempt to shut one's eyes to the correct state of the law, the marriage would be good and the issues would be legitimate, or if the marriage be under compulsion it would be good. The author, however, goes on to express the opinion that it would be better for the people concerned to leave the country in order to avoid such mixed marriage. Again the author says that some scholars hold that a marriage of a Shiah with a Sunni is valid, but such opinion is weak (Za-eef).

Apart from the authoritativeness of the opinion expressed in this book, it is clear that the author is of opinion that there is no inherent bar to a Shiah woman marrying a Sunni man. For if anything inherently wrong in marriage be omitted in ignorance of law or under compulsion the marriage cannot become valid and the children cannot become legitimate.

The next book that is relied upon is *Al Kafi*. This book is mentioned in their bibliographies by Tyebji and also by Shama Charan Sarkar. The author, in this case, also. bases his opinion on the self-same tradition said to have been handed down by the sixth Imam Jafar Sadiq. One Fuzail states that he asked Jafar Sadiq if he could marry a Nasib. The reply he got was "By God, it is surely not lawful." Fuzail goes on to say that he repeated the question and thereupon was asked in his turn whether the person who proposed to marry was an Arifa. Fuzail replied that she was and then Jafar Sadiq replied: 'An Arifa will never associate with one who is non-Arif.' Thus, to find out the opinion of Al-Kafi we have to find out the meaning of the words, Nasib and Arif. These words have already been discussed above and the result arrived at is that it is not established that an Arif or Arifa meant a Shiah man or a Shiah woman alone and nobody else, and that a Nasib is not the same person as a Sunni.

The sixth and the last authority quoted is Jawahir-ul-Kalam, Vol. II. This author discusses the tradition said to have been handed down by Jafar Sadiq already quoted above, and comes to the conclusion that it is not lawful for a Shiah girl to marry a Nasib and a Nasib is one who hates the Shiahs. The conclusion sought to be drawn is that a Sunni hates Shiahs and is therefore a Nasib. The author of Jawahir-ul Kalam, it is said, discusses who is Nasib and states that Nasib is a man who bears enmity to the Ahl-Bait and to the *friends* of Ahl-Bait. But the original book has not been placed before us. The friends of Ahl-Bait are said to be the Shiahs and hence it is argued that a Sunni is a Nasib.

Now the question is whether the authorities quoted and relied upon by Mr. Agha Haider are enough to outweigh the clear authority of Sharya-ul-Islam. In my opinion it is not right to say that all the writers in the English language on Muhammadan Law have gone astray because of the facts that Sharya-ul-Islam was the only book that was translated into English. The question arises 'if there are other equally important books or more important books on Shiah law, why did not anybody suggest the translation of such a book and why were no such books relied upon in cases so as to bring

them into prominence? The simple answer must be that the authority of Sharya-ul-Islam stands paramount and if there were any books of equal authority they would have been brought out and translated. It will be noticed that several of the books relied upon by Mr. Agha Haider are nothing but mere commentaries on Sharya-ul-Islam itself.

Wherever authorities have been quoted with the object of outweighing the authority of Sharya-ul-Islam, the Courts have always accepted the authority of Sharya-ul-Islam as against other books. In the case of *Agha Ali Khan* v. *Altaf Ali Khan* (4) Mr. Justice Mahmud expressed the opinion that Sharya-ul-Islam was the most authoritative text-book of the Shiah Law. He also points out that Jawahir-ul-Islam itself is nothing but a commentary on Sharya-ul-Islam. Again, in this Court Piggott, J., in *Nazar Husain* v. *Rafiq Husain* (6), expressed the opinion, based on the opinion of Mahmud, J., quoted above, that Sharya-ul-Islam was the leading and most weighty authority so far as the Shiah Law was concerned in India. The Privy Council, in the case of *Baker Ali Khan* v. *Anjuman Ara Begam* (3), quoted with approval a certain remark, their own dictum, in the case of *Abdul Fatah* v. *Russomoye Dhar* (2) and pointed out the danger of relying on ancient texts and supposed precepts of the Prophet where fresh texts are newly brought to light or fresh logical inferences are drawn from old and undisputed texts.

Following the principle laid down by the Privy Council and following the opinion expressed by Mahmud, J. and supported by Piggott, J., in this Court, I must hold that the opinion of Sharya-ul-Islam must be accepted in preference to the opinions relied upon on behalf of the appellant. I would not repeat what I have already said, viz., most of the texts and commentaries quoted by Mr. Agha Haider do not go to the length of supporting his contention that it is a universal rule of law that the marriage of a Shiah girl with a Sunni husband is void ab initio. I am further fortified in my view by the fact that since the practice of law reporting started, and this started many years ago, we have not got a single case in the pages of the reports to show that the validity of such a marriage was ever seriously questioned. It was questioned only once, viz., in the case of *Syad Gholam Husain* v. *Setabah Begam* (1), and the answer was given adversely to the contention of the appellant. I hold that as a matter of universal law it is not right to say that a marriage of a shiah girl with a Sunni husband is void ab initio.

Now I come to another equally important question raised by Mr. Agha Haider in the course of his argument. It is this: although a marriage of a Shiah girl with a Sunni husband, if it has been consummated, be irrevocable and absolutely good, it does not follow that it is open to the father of a shiah girl to marry her, during her minority, to a Sunni man so as to deprive her of her right of repudiation of marriage on attaining majority. In other words, Mr. Agha Haider contended that a marriage of a Shiah girl with a Sunni husband was repudiatable by the girl on attaining majority.

It is common ground that the marriage in the present case has not been consummated. It has been found as a fact that the girl repudiated the marriage at the earliest possible opportunity, on being aware of the fact. It has been found that no fraud was practised by the father in negotiating and celebrating the marriage.

It is the opinion of Sharya-ul-Islam that although equality of faith (Islam) alone is sufficient for the validity of a marriage, the marriage of a Shiah girl with a Sunni man is abominable (makruh). This opinion has been repeated by the commentators of Sharya-ul-Islam quoted by Mr. Agha Haider.

This argument leads us to examine whether it is open to a Shiah girl to repudiate a marriage contracted by her father for her during her minority. According to the law as quoted by Mr. Ameer Ali in Vol. II, p. 420, it is open to a Shiah girl to repudiate a marriage celebrated during her minority by her father if it be to the manifest disadvantage of her. Mr. Johari on behalf of the respondent, has not been able to show any authority to contest the statement of law quoted by Mr. Ameer Ali. On the other hand, it appears that Wilson quoted the opinion of Ameer Ali with approval. (See p. 95 foot-note.) Tyebji's book in Articles 70 and 72 would show that where a marriage has been brought about negligently or dishonestly by a father, it would be voidable by the girl on attaining majority, e.g., where it has been celebrated in considera-

tion of an insufficient dower. I have, therefore, no hesitation in accepting the rule as correct that a Shiah girl is entitled to repudiate her marriage, although contracted by her father, during her minority if the marriage be to the manifest disadvantage of her.

The question then is whether a marriage with a Sunni husband, where she objects to it, is to her manifest disadvantage. There can be no doubt that if it be a correct statement of law that she can question the validity of a marriage which has been celebrated in consideration of an insufficient dower, she should be entitled to question a marriage in which she is placed in the awkard position of a wife of a person who believes in a more or less antagonistic faith. Whatever may be the justification or want of justification for it, there can be no doubt that there does exist a serious difference in respect of their faiths between a Shiah and a Sunni. It is a matter universally known, and if any authority were needed, the recent case of *Manzoor Husain* v. *Mohammad Zaman* (8). decided by the Privy Council, supplies it. Thus, to compel a minor girl who had no voice in her marriage, to live for ever as the wife of a person professing a faith which she does not believe in and which is antagonistic to hers is certainly more to her disadvantage than mere insufficiency of debt. I am, therefore, clearly of opinion that no Court administering equity, justice and good conscience can find it possible to decree a suit for restitution of conjugal rights in the circumstances of this case.

I may point out that it is a proposition of Muhammadan jurisprudence that where there are two opinions on a point of Muhammadan Law, the Court should accept only that opinion which is in consonance with justice, equity and good conscience. (see Preface, Vol. II, Ameer Ali's Muhammadan Law, p. 7.)

I would, therefore, allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit.

In the circumstances of the case I would direct the parties to pay their own costs.

(8) 1925 P. C. 36=47 All. 151=52 I. A. 61=48 M. L. J. 23=3 P. L. T. 115=21 M. L. W. 239=27 Bom. L. R. 170=23 A. L. J. 179=5 L. R. P. C. 34=2 O.W.N. 53=29 C.W.N. 486 (P. C.).

By the Court.—The order of the Court is that this appeal is allowed and the decrees of the Courts below are set aside; and it is hereby declared that though the marriage of the plaintiff with the Defendant No. 1 was not illegal, yet she had an option of repudiation which has been duly exercised and that in consequence the marriage tie no longer subsists. The suit is accordingly dismissed with costs including in this court fees.

Appeal allowed.

1925 ALLAHABAD 734

DANIELS, J.

Prag—Plaintiff—Appellant.

v.

Bhagwan Din and *others*—Defendants—Respondents.

Stamp Reference Decided on 14th May 1925.

Court Fees Act, S, 7 (9) and Sch. 1, Art. 1—Foreclosure suit dismissed—Appeal—Ad valorem fee according to subject-matter of appeal is payable.

On a memorandum of appeal by a plaintiff whose suit for foreclosure of a mortgage has been dismissed the Court-fee payable is an ad valorem Court fee on the value of the subject-matter of the appeal. 1922 *Oudh* 82, *Diss.*; 36 *All.* 40, (*F.B.*) *Foll.* [P 735, C 1]

Kailas Nath Katju—for Appellant.

Daniels, J.—This is a reference under S. 5 of the Court-fees Act. The question for decision is the amount of fee payable on a memorandum of appeal by a plaintiff whose suit for foreclosure of a mortgage has been dismissed. The appellant relies on an elaborate judgment of the Judicial Commissioner's Court of Oudh in *Sangat Bakhsh* v. *Rawat Dijdeo Bakhsh* (1) where it was held that in such a case the Court-fee payable in appeal is the same as the Court-fee payable in the Court of first instance, and if the appeal was against a decree in favour of the plaintiff, the Court-fee would be on the amount in dispute. The Taxing Officer relies on the Full Bench decision in *Raghubir Prasad* v. *Shankar Bakhsh Singh* (2). The question is whether the case is covered by the Full Bench ruling. There appears to me no doubt that it is. That was a case of

(1) 1922 Oudh 82=25 O.C. 30.
(2) [1914] 36 All. 40=21 I.C. 723=11 A.L.J. 1016 (F.B.)

cross-odjections by the defendant asking that a foreclosure decree should be set aside and the suit dismissed, S. 7 (ix) of the Court-fees Act was relied on. The Full Bench held that the fee prescribed by S. 7 (ix) applies only to the suit which is instituted in the Court of first instance. "In the case of an appeal the Court-fee payable is an ad valorem Court-fee on the value of the subject-matter of the appeal —see Schedule 1, Article 1 of the Court-fees Act." It is true that they were dealing with cross-objections by the defendant and not with an appeal by the plaintiff, but the principle on which their decision rests is equally applicable to both cases, I cannot therefore, treat their remarks as a mere obiter dictum which I am at liberty to disregard. It has been suggested that I should refer this case to a larger Bench with a view to reconciling the view of the law taken in this province with the view taken in Oudh, but I am not prepared to unsettle the law as laid down by a Full Bench nearly twelve years ago. If the law is to be altered, it must be left to the legislature to do it. I accordingly hold that the report of the office is correct. The appellant must make good the deficiency of Rs. 346-12-0 within two months from this date.

1925 ALLAHABAD 735

BOYS AND ASHWORTH, JJ.

Mul Chand — Decree-holder — Appellant.

v.

Rajdhar—Judgment-Debtor — Respondent.

Execution Second Appeal No. 1556 of 1924, Decided on 19th June 1925, from a decree of the D. J., Jhansi, D/- the 29th July 1924.

Provincial Insolvency Act (V of 1920), Ss. 28 (2) and 78—Permission under S. 28 (2) impossible to act upon.—S. 78 applies.

Where the permission to execute under S. 28 (2) was one that was not only not acted upon but on which it was in the circumstances impossible to act,

Held: that such permission was ineffectual to exclude the unfettered operation of S. 78 and that the period between the adjudication and annulment should be deducted from the period allowed for limitation. [P. 735, C. 2]

K. N. Katju—for Appellant.

Judgment.—The appellant before us is the decree-holder Mulchand. He is represented by Dr. Katju. The respondent Rajdhar is unrepresented. In this case the respondent on the 28th of June 1913, was declared an insolvent on his own petition. By the adjudication order Mulchand, the present appellant, was given permission to sue and to execute, but this was limited by the condition that the proceeds were to be deposited with the Receiver. In pursuance of this permission, Mulchand obtained a decree, on the 18th of February 1914. On the 10th of September 1914, he was entered in the schedule of creditors under S. 33; but he did not proceed to attempt to execute his decree, and it is indeed difficult to see how he could have proceeded, when the property of the insolvent was wholly vested in the Receiver. To execute the decree against the Receiver, obtain payment of his debt, and then to re-deposit it with the Receiver in pursuance of the conditions laid down in the order would have been a futile proceeding. During the subsequent years, certain dividends were paid by the Receiver in which Mulchand shared. The last dividend was paid on the 29th of July 1921. On the 30th of November 1921, an annulment order was passed apparently under S. 43 (1) as a result of which nobody having been specially appointed under S. 37, the remaining property re-vested in the debtor Rajdhar. On the 7th of July 1923, Mulchand applied to execute his decree for the balance. His application has been dismissed by both Courts; both of which held that Mulchand having been granted permission to sue and execute under S. 28, Cl. (2) was debarred from invoking S. 78 to extend limitation, that section being expressly inapplicable to a case where a party is permitted under S. 28, Cl. (2) to take proceedings. With this finding we are unable to agree. The permission to execute was one that was not only not acted upon but on which it was (in the circumstances) impossible to act, and was therefore ineffectual to exclude the unfettered operation of S. 78. We hold, therefore, that the period between the adjudication and annulment should have been deducted from the period allowed for limitation.

We, therefore, set aside the orders of both the lower Courts and remit the case to the First Court for disposal according

to law. The appellant here will have his costs in the lower appellate Court and in this Court including in this Court Counsel's fees on the higher scale. The costs in the First Court will abide the result.

Appeal allowed.

1925 ALLAHABAD 736

MUKERJI, J.

Ram Sarup Chaube—Plaintiff—Petitioner.

v.

Ram Dular Pande—Defendant—Opposite Party.

Civil Revision No. 192 of 1924, Decided on 3rd February 1925, against an order of the Judge of the Small Cause Court, D/- 15th September 1924.

(a) *T. P. Act, S. 68—Sub-mortgagee of occupancy holding can sue mortgagor for money if the latter fails to put him in possession—Occupancy holding.*

Where a mortgagor is himself holding a mortgage of occupancy tenancy and purports to make a sub-mortgage of his right, he is doing nothing forbidden by law and the sub-mortgagee can sue his mortgagor for money if the latter fails to put him in possession. 35 *All.* 405 *Foll.* [P 736 C 2]

Mushtaq—for Applicant.

S. C. Das—for Opposite Party.

Judgment.—This is an application to revise a judgment of the Court of Small Causes under the following circumstances:—The applicant obtained a document, said to be a sub-mortgage, from the respondent on the 3rd of August 1923, for a consideration paid by him of Rs. 300. It appears that the respondent was in possession of certain plots of land as mortgage under a deed, dated the 10th August 1918. The respondent said that he would pay interest till *Jeth* following the execution of the deed, when the plaintiff would take possession of the property mortgaged. The applicant said in the plaint that he had neither been paid interest nor had he been put into poseession of the property. He accordingly sued to recover his money with interest.

The respondent pleaded payment of the money which he had borrowed, and also urged that the contract was an illegal one and could not be enforced and the money could not be refunded.

The learned Judge of the Court of Small Causes held that the money borrowed had not been re-paid, but he was of opinion that the mortgage was an illegal one and the money could not be recovered.

In this Court it has been urged that the learned Judge has really mis-applied the law and there is nothing illegal in the transaction and there is no bar to the recovery of the money.

It appears that a Division Bench of two Judges of this Court in the case of *Balgobind Bhagat* v. *Nagina Misir* (1) held that where a mortgagor was himself holding a mortgage of occupancy tenancy and purported to make a sub-mortgage of his right, he was doing nothing forbidden by law. This argument was actually put forward before the learned Judge of the Court below, but was not accepted by him. In view of the ruling of this Court, the transaction was not illegal. I may point out that the mortgagor was quite secure in his possession. He could not be ousted by his mortgagor, the occupancy tenant, without the tenant paying up the money he had taken from his mortgagee. If the respondent had handed over such possession as he did have over the property mortgaged to him, the money advanced by the applicant would have been quite secure to him.

In this view of the case, it is not necessary to consider several other cases that were cited before me.

The learned counsel for the respondent argued that the remedy of the applicant was whatever may have been provided for in the deed itself and not a suit for money. But I find in the plaint that the plaintiff did allege that not only he was not paid but that he was not put into possession of the mortgaged property. Under S. 58 of the Transfer of Property Act, the mortgagor was bound to put the mortgagee into possession. The applicant, therefore, was entitled to receive back his money.

I allow the application, set aside the decree of the Court below and decree the claim of the applicant against the respondent with costs in this Court and in the Court below.

Application allowed.

---

(1) [1913] 35 All. 405=19 I. C. 745.

★ 1925 ALLAHABAD 737

SULAIMAN AND DANIELS, JJ.

(*Thakur*) *Bilas Singh*—Applicant.

v.

King Emperor—Opposite Party.

First Appeal F. O. No. 147 of 1924, Decided on 18th May 1925, from an order of the Election Commissioners of Bareilly.

★ (*a*) *Appeal—Competency—Order passed without jurisdiction—Appeal lies if the order, when passed with jurisdiction, is appealable.*

Where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. 13 *All.* 575; 12 *A. L. J.* 1113; and 24 *C. L. J.* 235, *Rel. on.* [P 738 C 1]

★ (*b*) *Criminal P. C., S. 476 B—Order passed by Commissioners without jurisdiction—Appeal lies*

Where Election Commissioners passed an order purporting to act as a civil Court under S. 476, Criminal P. C

Held: that appeal lay from their order, although passed without jurisdiction. [P 738 C 1]

★ (*c*) *Criminal P. C., S. 476 and S. 195 (1) (b)—Election Commissioners are not 'civil Court' within S. 476—Complaint by them purporting to be under S. 476 should be deemed to be one under S. 195 (1) (b).*

The Election Commissioners are not a "civil Court" within the meaning of S. 476, Criminal P. C., and they have no jurisdiction to proceed under that section. The complaint which they purport to make under S. 476 must be deemed to be one under S. 195 (1) (b) by a Court in its wider meaning excluding a "civil, revenue or Criminal Court." [P 739 C 2]

(*d*) *Criminal P. C., S. 195 (3)—Election commissioners are not Court subordinate to principal Court of ordinary original civil jurisdiction.*

Election commissioners would not be considered to be subordinate to the principal Court of ordinary original civil jurisdiction under sub-clause (3) because neither appeals ordinarily lie thereto nor are the commissioners a civil Court. [P 740 C 2]

★ (*e*) *Criminal P. C., (1923), S. 195 (2)—The word "includes," as substituted for "means," has widened the scope of "Court"—(Sulaiman, J., Daniels, J. contra.)*

Per Sulaiman, J.—The word "means" in S. 195, sub-clause 2, of the old Code has been substituted by the word "includes," which suggests that the term "Court" is intended to be a wider expression than a "civil, revenue or criminal Court." If it had not a wider meaning, it was wholly unnecessary to say "but does not include a registrar or sub-registrar etc."

Per Daniels, J.—It seems doubtful whether the Legislature, in substituting the word "includes" for "means" in S. 195 (2), really intended to widen the definition. They may have thought that to say that the term "Court" means "a Civil, Revenue or Criminal Court but does not include a registrar or Sub-Registrar", implies that registrar or sub-registrar" would be a Court unless specially excepted from the definition. The word "includes" in an enactment is not always of a wider significance than the word "means." 1899 *App. Cases* 99, *Rel. on.* [P 741 C 2]

P. L. Banerji and *M. N. Misra*—for Applicant.

G. W. Dillon—for the Crown.

Sulaiman, J.—This appeal was filed in the Court of the District Judge of Bareilly from an order of the election commissioners purporting to act as a civil Court under S. 476 Criminal P. C. As the learned District Judge happened to be one of the Commissioners himself he referred the case to this Court recommending that it should be transferred from his file. Without prejudice to the question whether an appeal lay we directed that the case be transferred to the High Court.

A preliminary objection has been taken on behalf of the respondent that if the commissioners had no jurisdiction to proceed under S. 476 Cirminal. P. C. no appeal lay from their order at all. We think that the preliminary objection cannot prevail. The commissioners have professedly acted as a Civil Court and assumed jurisdiction under S. 476, Criminal. P. C. As an appeal is expressly provided from an order passed by a civil Court under S. 476, Criminal. P. C., the present appeal does lie even though the commissioners might have acted without jurisdiction. This principle was laid down as early as 1891 in the case of *Jwala Prasad* v. *Salig Ram* (1). That this has been the uniform practice of this Court is shown by the judgment in the case of *Walayat Husain* v. *Ramlal* (2). A Bench of this Court, of which one of us was a member, has recently held in the case of *Nasir Khan* v. *Itwari* (3), that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In the cases of *Ranjit Misser* v. *Ramudar Singh* (4) and

(1) [1891] 13 All. 575=(1891) A. W. N. 158.
(2) [1914] 12 A. L. J. 1113=25 I. C. 643.
(3) 1924 All. 144=45 All. 669=21 A. L. J 667=5 L R. A. Civ. 26
(4) [1912] 16 C. L. J. 77=16 I. C. 940=17 C W. N. 116

Kalipada Karmakar v. *Shekhar Basini Dasya* (5), Mukherji, J., laid down that where jurisdiction was usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. These cases have been recently followed in the case of *Bandiram Mookerjee* v. *Purna Chandra Roy* (6). There is therefore ample authority for holding that because an appeal would have lain if the Commissioners had acted with jurisdiction, an appeal lies when they have purported to act as such even though in reality without jurisdiction.

Section 476, B Criminal P. C., provides that an appeal shall lie from an order passed by a civil Court under S. 476 to the Court to which such former Court is subordinate within the meaning of S. 195 sub-S. (3), and this last named section provides that in the case of a civil Court from whose decrees no appeal ordinarily lies, the Court shall be deemed to be subordinate to the principal Court having ordinary civil jurisdiction within the local limits of whose jurisdiction such civil Court is situate. It follows that if the Election Commissioners were such civil Court the appeal from their order passed under S. 476, Criminal P. C., should lie to the District Judge of Bareilly.

As a civil appeal was pending before the District Judge, the High Court had jurisdiction under S. 24, Civil P. C., to transfer that appeal to its own file.

Even if there had been any difficulty in holding that an appeal lies from an order purporting to have been passed under S. 476, Criminal. P. C., though without authority, we would have no hesitation in treating the appeal as a civil revision and interfering provided we were satisfied that the Election Commissioners had no jurisdiction to act as a civil Court, which they professed to do.

Coming to the merits of the appeal we have to consider whether the Election Commissioners were a civil, revenue or criminal Court within the meaning of S. 476, Criminal P. C.

It has not been and cannot be, suggested that the Election Commissioners were either a revenue or a criminal Court. Their function was obviously not that of either of such Courts. The learned Election Commissioners themselves were of opinion that they were a civil Court with power to proceed under S. 476, Criminal P. C. In this view they have relied on the case of *Nanda Lal* v. *Khetra Mohan* (7) as well as on S. 3 of the Indian Evidence Act which defines a 'Court' (not civil Court) as including all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

The definitions of words and expressions in S. 3 of the Evidence Act, unlike those in the General Clauses Act, are exclusively for the purposes of the Indian Evidence Act. But S. 6 of the Indian Elections, Offences and Inquiries Act (No. XXXIX of 1920) makes the provisions of the Indian Evidence Act applicable subject to the provisions of this Act. But even then, the Election Commissioners being "persons legally authorized to take evidence" would merely be a "Court" and not necessarily a "civil Court." It is, therefore, to be seen whether under Act No. XXXIX of 1920 the Election Commissioners are constituted a "civil Court" so as to be able to exercise jurisdiction under S. 476, Criminal P. C.

The Election Commissioners have not all the powers which are vested in a civil Court under the Code of Civil Procedure of 1908, but their powers under that Court are restricted to the matters mentioned in S. 5. It is true that they have power to take oral and documentary evidence and examine witnesses on oath, but that fact by itself does not necessarily constitute them a "civil" Court. For it is easy to conceive of tribunals vested with such powers though not a civil Court administering justice. I may instance the case of the Commissioner sitting as an election authority under the Municipalities Act which came up for consideration before the Full Bench in *Abdul Rahman* v. *Abdul Rahman* (8).

I may further mention that to say that the Commissioners are to have certain powers vested in a civil Court

(5) [1916] 24 C. L. J. 235=35 I. C 348=20 C. W. N. 967.
(6) [1918] 45 Cal. 926=43 I. C. 758=27 C. L. J. 115.
(7) [1918] 45 Cal. 585=27 C. L. J. 463=44 I. C. 331=19 Cr. L. J. 315.
(8) 1925 All. 380=23 A. L. J. 385=6 L. R. A. Civ. 191 (F. B.).

is one thing and to say that they constitute a civil Court is quite another. That they are not deemed to be a civil Court for all purposes is abundantly clear from the concluding portion of S. 5 which says that the Commissioner "shall be deemed to be a civil Court within the meaning of "Ss. 480 and 482 of the Code of Criminal Procedure, 1898." Had they been a civil Court for all purposes it would have been superfluous to make such a special provision. The very fact that S. 476 is not mentioned here shows that they are not to be deemed to be a civil Court within the meaning of that section.

The matter is made still further clear if we examine the rules for the election and nomination of members to the United Provinces Legislative Council made by the local Government. No doubt R. 36 provides that the Commissioners are to be appointed for the *trial* of the election petitions, and R. 37 says that every election petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, provided that it shall only be necessary to make a memorandum of the substance of the evidence, and no doubt under R. 44, Sub-Cl (1) "the election of the returned candidate shall be void" if in the opinion of the Commissioners the contingencies mentioned in the sub-clause have occurred, and under Sub-Cl. (2) they may 'find" that the election is not void. But under R. 45 at the conclusion of the enqiry the Commissioners shall report whether a party has been duly elected, and the Governor, on receipt thereof, shall issue orders in accordance with the report, and publish the report in the Gazette, and the orders of the Governor shall be final.

The whole scheme appears to be to appoint a special tribunal which should enquire into the election petition and follow the ordinary rules of procedure and evidence and then report its findings to the Governor who shall pass final orders thereon, though those orders have to be in accordance with the report. That tribunal in itself is not a "civil Court" which administers justice directly, even though it is a "Court" in its wider meaning. Its purpose is to enquire into the petition, record its findings and report, though its recommendation has to be acted upon by the Governor.

In re Maharajah Madhava Singh (9) their Lordships of the Privy Council had to consider the character of the constitution of a tribunal of commissioners appointed 'for the purpose of enquiring into the truth of (a certain) imputation and of reporting to the Viceroy and Governor-General in Council how far the same is true to the best of their judgment, and belief.' They had full power conferred on them to call for and receive or reject evidence, documentary or other, and to hear such persons as they should think fit, and they also were invested with like powers to try any person other than the petitioner on any charge which might be presented against such person in connection with that enquiry, and in case of the conviction of such person 'to pass upon him such sentence as might be passed in a like case by a Court of criminal jurisdiction in British India. Their Lordships held that the commission in question was one appointed by the Viceroy himself for the information of his own mind in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of justice and equity, and was not in any sense a Court, or, if a Court, was not a Court from which an appeal lay to His Majesty in Council. That was a special tribunal constituted for a special purpose and vested with special powers and was certainly not a civil Court from which an appeal could lie to their Lordships.

The Madras High Court *In re Nataraja Iyer* (10) had to consider whether a Divisional Officer acting under the Income-tax Act had acted as a revenue Court and had jurisdiction to pass an order under S. 476 Criminal P. C. It came to the conclusion that he was a revenue Court. Sundara Ayyer, J. at p. 86, conceded that a mere authority to receive evidence would not make the officer recording it a Court, but thought that the test for deciding whether the officer was a Court or not was whether he was empowered to *deal with* a particular matter and authorized to receive evidence bearing on that matter in order to enable him to arrive at

(9) [1905] 32 Cal. 1=31 I. A. 239=1 A. L. J. 691=8 C. W. N. 841=6 Bom. L. R. 763 (P. C.).

(10) [1912] 36 Mad. 72=23 M. L. J. 393=13 M. L. T. 367=(1912) M. W. N. 1012=16 I. C. 755=13 Cr. L. J. 723.

a determination. Sadasiva Ayyar, J., at page 89, was of opinion that the test for deciding whether a particular officer was a Court did not depend upon whether he was empowered to take evidence but whether he had been given jurisdiction by the constituted authorities to deal out justice in any particular defined class of cases. The facts of that case are quite different from the case before us. I would however point out that the word 'Court' may be of a wider meaning than the expression a 'civil revenue or Criminal Court.'

I have already said that I do not think that the Election Commissioners are intended to administer justice themselves. Their function is to hold an enquiry and report and it is not their report but the order of the Governor in accordance with the report which has a finality Even if having regard to their powers and procedure they are to be deemed to be a 'Court they certainly do not constitute a 'civil Court' for the administration of civil justice.

The learned Commissioners have relied on the case of *Nanda Lal Ganguli* v. *Khetra Mohan Ghose*(7) where the question turned on the character of the tribunal constituted by the Calcutta Improvement Act, 1911. But S. 71 (a) of the Calcutta Improvement Act provided that the tribunal should be deemed to be the Court and the president the Judge. The Bench pointed out that the word 'Court' had a wider meaning than, for instance, 'a Court of justice.' They had not to consider the expression 'Civil Court' as occurs in S. 476 but only the expression 'Court' which occurs in S. 195, Cr. P. C. and they held that the tribunal was a "Court."

I have already pointed out that the question before us is not merely whether the Election Commissioners are a 'Court' within the meaning of S. 195, but whether they are a 'civil, revenue or criminal Court' within the meaning of S. 476. It is noteworthy that by S. 47 of the Code of Criminal Procedure Amendment Act (No. XVIII of 1923) the word 'means' in S. 195 sub-Cl. (2) has been substituted by the word 'includes,' which suggests that the term 'Court' is intended to be a wider expression than a 'civil, revenue or criminal Court.' If it had not a wider meaning, it was wholly unnecessary to say "but does not include a Registrar or Sub-Registrar etc." Even if therefore the Commissioners, in view of S. 3 of the Indian Evidence Act and S. 6 of Act XXXIX of 1920 and their powers to hold an enquiry, take evidence and record a finding, are taken to be a 'Court,' it does not follow that they necessarily are a 'civil revenue or Criminal Court. They really constitute a special tribunal, out of the ordinary course, appointed by a special Act and rules made by Government to hold an enquiry, arrive at a conclusion and report. They are not necessarily a 'civil Court' trying a matter of a civil nature and administering justice.

I find it impossible to hold that the Election Commissioners are a 'civil Court' within the meaning of S. 476 Cr. P. C. and must therefore hold that they had no jurisdiction to proceed under that section. The complaint which they purport to make under S. 476 must be deemed to be one under S. 195 (1) (b) by a Court in its wider meaning excluding a 'civil, revenue or criminal Court' But even then they would not be considered to be subordinate to the principal Court of ordinary original civil jurisdiction under sub-Cl. (3) because neither appeals ordinarily lie thereto nor are the Commissioners a civil Court.

The Magistrate who receives the complaint will have jurisdiction to proceed under S. 190 (1) (a) treating it as a complaint made under S. 195 (1) (b) by a Court, in which case the examination of the complainant will not be required in view of the provisions of S. 200 (aa). It will also of course be open to the Magistrate to proceed under S. 190 (1) (c) upon information received from persons other than a police officer in which case he would pay due regard to the provisions of S. 191, Cr. P. C. The question whether the complaint can be said to be one made by public servants as referred to in S. 200 (aa), Cr. P. C., depends on whether the Commissioners can be said to be "acting or purporting to act in the discharge of their official duties." It is certainly within their power, but is it also a part of their official duty to file such a complaint? Whatever view is taken it is obvious that an examination of the complainants will not be required.

Daniels, J.—I agree with my learned brother that the Election Commissioners are not a civil Court within the meaning of Ss. 476, 476-A and 476-B of the Code

of Criminal Procedure. Apart from the other considerations referred to by him, the language of S. 5 of the Indian Elections Offences and Inquiries Act is, in my opinion, decisive. It is specially provided that they shall be deemed to be a civil Court within the meaning of Ss. 480 and 482 of the Code. There is no corresponding provision that they shall be deemed to be a Court within the meaning of S. 476. If a special provision is necessary to constitute them a Court under S. 480, it is equally necessary to constitute them a Court under S. 476. The two sets of provisions stand on the same footing. They occur in the same chapter of the Criminal Procedure Code which deals with offences affecting the administration of justice. It is a clear case of the application of the principle *inclasio unius est exclusion alterius.*

The term 'civil Courts' as used in S. 476 is restricted to Courts constituted under the Bengal, N. W. P. and Assam Civil Courts Act, 1887 and similar enactments and Courts specially declared to be civil Courts within the meaning of the section.

The above finding does not, however, compel us to hold that the complaint was not validly made. It is not really necessary to decide in this case whether the election commissioners are a Court within the meanining of S. 195, Criminal P. C. My learned brother has given the considerations in favour of holding that they are. The considerations on the other side are as follows: they are not described as a Court in the Act under which they are constituted. They are described as Commissioners appointed to hold an enquiry. They do not pronounce any judgment. They merely report to the Governor, and though it is true that the Governor is bound to accept their recommendations, the final orders are those of the Governor and not of the Commissioners. It may be said that the highest tribunal in the Empire the Privy Council, equally frames its judgment in the form of a recommendation to His Majesty, but there is no real analogy between the two cases. The jurisdiction of the Privy Council is, in fact, the jurisdiction of His Majesty in Council, and it is therefore His Majesty, and not the Council alone, by whose authority the judgment must be pronounced. S. 5 of the Indian Elections Offences and Inquiries Act invests the Commissioners with certain of the powers of a Court under the Code of Civil Procedure, but does not declare them to be a Court except for certain purposes. It is no doubt true that S. 195 uses the word 'Court' without the qualifying words civil, revenue, or criminal," which occur in S. 476, but in this respect the amending Act merely retains the language of Act V of 1898, and under the former Act the two expressions were equivalent in their scope. It seems to me doubtful whether the Legislature, in substituting the word 'includes' for 'means' in S. 195 (2), really intended to widen the definition. They may have thought that to say that the term 'Court' means a 'civil, revenue or criminal Court but does not include a Registrar or Sub Registrar,' implies that Registrar or Sub-Registrar would be a Court unless specially excepted from the definition. If it were permissible to refer to the report of the committee which was responsible for the draft of the amending Act, it would seem that they imagined the amendment to be a mere drafting amendment involving no alteration of substance. That the word "includes" in an enactment is not always of a wider significance than the word "means," is established by the judgment of the Privy Council in *Dilworth* v. *The Ne wzealand Commissioners of Stamps* (11). If the term "Court" in S. 195 is raally wider than the civil, revenue or criminal Court in S. 476, the curious result follows that whereas the order of the civil, revenue, or criminal Court making or refusing to make, a complaint is subject to appeal and to a special procedure prescribed by S. 476, a similar order passed by a Court constituted is not subject to any appeal. The marginal note to S. 476 read with the language of the section shows that it was enacted in order to prescribe the procedure to be followed in cases coming under S. 195 clauses (b) and (c) and presumably in all such cases.

On the other hand it may be urged with considerable force that it is unlikely that the legislature, which has made such elaborate provision against prosecution for perjury in connexion with judicial proceedings being commenced except on the complaint of responsible authority, should have left it open to any one

(11) [1899] A. C. 99=68 L. J. P. C. 1=76 L. T. 473=47 W. R. 337=15 T. L. R. 61.

to initiate a prosecution for perjury committed on the trial of an election petition—a class of cases which is likely to rouse violent party feeling. It must also be conceded that in ordinary usage where the word "includes" is used the enumeration which follows is not intended to be exhaustive.

On the whole therefore, if it were necessary to decide the point, I should not be prepared to differ from my learned brother. The question will, however, only arise if and when an attempt is made to start a prosecution of this kind without a complaint by the commissioners. In this case if the commissioners are a Court the requirements of S. 195 have been fulfilled. I am not prepared to entertain the suggestion that they ceased to have jurisdiction to make a complaint the moment their report was signed. If on the other hand they are not a Court then this is a complaint made under the ordinary law by public servants in whose presence the alleged offence was committed, and any magistrate having jurisdiction can take cognizance of it under under S. 190 Criminal P. C. As the complaint is made by public servants purporting to act in the discharge of their official duties S. 200, Cl. (a) applies to it.

For these reasons I concur in the order proposed.

By the Court.—We accordingly allow this appeal and set aside the order of the Election Commissioners, dated 28th August 1923, in so far as it purports to be an order under S. 476, Criminal P. C., but leave it in fact as a complaint entertainable under S. 190, Criminal P. C.

We make no order as to costs.

1925 ALLAHABAD 742

STUART AND BOYS, JJ.

Kallu Mal Dhakkan Lal—Appellants

v.

Bhawani Das Rekhab Das—Respondents.

Second Appeal No. 78 of 1925, Decided on 22nd April 1925, against the decree of the D. J., Bulandshahr.

Evidence Act, S. 34—Statement in books of account may be corroborated by any evidence.

Section 34 does not limit in any way at all the nature of the material upon which Court may rely to support the statements in a book of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence or of sworn oral testimony. [P. 743, C.1.]

N. C. Vaish—for Appellant.

Stuart, J.—This is a case in which the plaintiff obtained a preliminary decree for rendition of accounts from the defendants who were commission agents. The Munsif referred the question of the accounts to a Commissioner. His order referring the case was not exactly in terms of O. 20, R. 17 of the Code of Civil Procedure, but we may take it for the present purposes that it was an order intended to be under that rule. In view of our opinion on other points, we do not decide this and it is not necessary for us to do so. He ordered that account books should be filed in Court and gave the Commissioner authority to consider those accounts books. Twelve account books were filed and subsequently during the proceedings before the Commissioner four further account books were filed, the last of which to be filed is what is known as a "Sauda Bahi" or a "transaction account book." It is in regard to the acceptance of this Sauda Bahi in evidence that a second appeal has been filed in this Court. The Munsif arrived at a determination of the amount due holding the Sauda Bahi to be of no value. The lower appellate Court arrived at a different determination holding the Sauda Bahi to be reliable. It had seldom been our fortune to read a more painstaking and capable judgment than that of the lower appellate Court. The learned District Judge has gone into every single point with the most commendable thoroughness. It is objected before us that the Sauda Bahi was not admissible in evidence because it was not supported by any other evidence and, therefore, could not in view of the provisions of S. 34 of the Evidence Act, be relied upon as the sole evidence of the transactions to which it purported to testify. The first question which arose on this point was—was there in fact nothing before the Commissioner and the Munsif to support the Sauda Bahi so as to render it inadmissible in view of the terms of S. 34 ?. A second question which might arise is—do the terms of O. 20, R. 17, override the provisions of S. 34 ?. The learned Judge stated

this latter question at page 12 of his original judgment but he did not decide it, nor do we find it necessary to do so for we find that there has, in fact, been no breach of the provisions of S. 34 of the Evidence Act. The learned District Judge has dealt with this matter at page 13 of his judgment. The nature of the material required to support a Bahi is not set forth in S. 34 of the Evidence Act; that only states that the statements in a book of account "shall not be alone sufficient evidence to charge any person with liability". It does not limit in any way at all the nature of the material upon which the Court may rely to support the statements in the books of account. Such material may take the shape of contemporary vouchers, receipts or other documentary evidence. It might take the shape of sworn oral testimony. It is not suggested in this case that there was any documentary evidence beyond the other books of account. We have not thought it necessary to consider how far those other books of accounts might or might not in themselves, though subsequent in date, support the Sauda Bahi. The point is at least arguable. We are left in doubt as to whether there was or was not any oral evidence in support of the Sauda Bahi. It is alleged on behalf of the appellant, the respondent has not represented here that there was no such oral evidence. All that we nave been able to find is the document in the form of an application filing the Sauda Bahi, apparently at the instance of the Commissioner becuse we find a hint of its existence in the last words of the deposition of the Munib. The learned District Judge has referred to the possibility of corroboration by oral evidence but has not referred to any specific oral evidence given in this case; but he has referred in detail to many of the circumstances surrounding the transactions between the plaintiff and the defendants and the circumstances surrounding the existence of this Sauda Bahi and from all the circumstances it is clear that he accepted the genuineness of the Sauda Bahi. There is nothing in S. 34 to limit or define the material which the Court may rely upon as corroborating the account books. We think therefore, that the learned Judge was justified in law in relying upon these account books and we may add that he was fully justified in fact. Under these circumstances there is no need to consider the second question that might have arisen as to whether O. 20, R. 17, Civil Procedure Code, supersedes the terms of S. 34 of the Evidence Act. Accepting, therefore, the findings of the learned Judge as good in law, we dismiss this appeal under O. 41, R. 11, Civil Procedure Code.

Appeal dismissed.

1925 ALLAHABAD 743

MUKERJI, J.

Nehal Singh—Defendant—Appellant.

v.

Jagannath Das—Plaintiff—Respondent.

Second Appeal No. 1191 of 1923, Decided on 7th April 1925, against a decree of the Sub-J. Meerut, D/- 21st April 1923.

(a) *Agra Tenancy Act, S. 193, Cl. (b)—Any isolated plot in a mahal is not a share of the mahal.*

Any isolated plot of land within the ambit of a mahal may be a part of a mahal, but it cannot be a share in a mahal under S. 193 (1). [P.744,C,1]

(b) *Agra Tenancy Act, S. 193—Sale which ought to be held by Collector held by the Assistant Collector—Sale is not vitiated.*

Where in the execution of a decree a property which ought to have been sold by Collector, is sold by an Assistant Collector, the irregularity does not vitiate the sale. [P.744,C.1]

Haribans Sahai—for Appellant.

P. L. Banerji—for Respondent.

Judgment.—Briefly, the facts involved in this appeal are these: The plaintiff's father purchased the shares of the descendants of one Amjad in a hamlet appertaining to Khewat No. 1 in a certain mahal described in paragraph 1 of the plaint at an auction sale held on the 16th of July 1910. The plaintiff filed the suit out of which this appeal has arisen on the last day of limitation against the appellant who was a co-sharer in the mahal The statement in the plaint was that the defendant took possession of the purva without the plaintiff's consent. The plaintiff stated that he was in possession and was dispossessed, but did not state when he got possession and when he was dispossessed.

The appellant's defence was mainly the following :

(1) The auction sale was held through an amin and this was in contravention of S. 193, Cl. (*l*) of the Tenancy Act and the sale did not pass any title to the plaintiff;

(2) the suit is barred by time ;

(3) the share purchased by the plaintiff is less than what is claimed ; and

(4) at the time of sale some of the judgment-debtors were minors and their certificated guardian was not made their guardian of the suit, and that therefore the sale was invalid.

The Court of first instance dismissed the suit. But the lower appellate Court gave a decree without, however, clearly specifying to what extent the plaintiff's suit stood decreed.

I will now consider the several points that have been urged on behalf of the defendant-appellant before me.

The first point that has been urged is that the qurq amin was not competent to sell. Section 193, Cl. (*l*) of the Tenancy Act says that when any property is to be sold is a mahal or a share in a mahal the decree should be sent to the Collector who would execute the same as if it had been a decree of his own Court. The purva or hamlet is neither a whole mahal nor a share in a mahal. It may be a part of a mahal or portion of a mahal being an isolated plot of land within the ambit of a mahal. It is clear, therefore, that the rule contained in Cl. (*l*) does not govern the present case. I may point out that, ordinarily everything that is usually sold in execution of a revenue Court decree is situate within a mahal, e g., a tree, a house, etc. If the interpretation put by me on S. 193, be too narrow, all execution cases must be heard in the Court of the Collector himself and no other officer. This could hardly have been contemplated. Further, it appears to me that there is nothing in S. 193 which would go to show that the irregularity would vitiate the sale. There is no question of jurisdiction. The Collector can sell only as the revenue Court and the decree in this instance being a rent-decree was also passed by the revenue Court. Instead of a Collector an Assistant Collector sold the property. I hold that the sale is good and the cases cited by the learned counsel for the appellant, viz. *Fatmatul Kubra* v. *Achchi Begam* (1) and *Mahmud Jahan Begam* v. *Govind Ram* (2) have no application. The language of law on which those rulings were given was different.

The second point that was urged before me was that three of the seven descendants of Amjad, viz., Ibrahim, Mt. Najiban and Mt. Naziran were minors and were not properly represented in the execution proceedings. This point was not urged before the lower appellate Court in support of the judgment. It, however, appears that they were represented in the execution proceedings by the same persons as had been appointed guardians for the suit in the suit itself. This is to be gathered from the judgment of the Court of first instance. I hold that there is nothing irregular to vitiate the sale.

The third point urged was that of limitation and I think the lower appellate Court was right. The defendant appellant is a co-sharer and he never asserted that he was holding adversely to Amjad or his heirs.

The last question that was urged before me relates to the quantity of share to be decreed to the plaintiff. On this point, as I have already said, there is an ambiguity and the learned Judge of the lower appellate Court has not decided the point. I remit the following issue to the Court below under O. 41, R. 25, of the Civil P. C.

What shares did the judgment-debtors hold in the purwa at the date of the auction-purchase, *viz.*, on the 16th of July 1910 ?

Fresh evidence will be admitted and the finding will be returned in two months.

I may draw the attention of the Court below to the fact that it is a part of the appellant's case that one at least of the heirs of Amjad had already transferred his share in the purwa before the auction sale. The effect of this on the issue will have to be considered by the lower appellate Court.

Order accordingly.

---

(1) 36 All. 33 =11 A. L. J. 1009=21 I. C. 831.
(2) 43 All. 45=18 A. L. J. 783=59 I. C. 4.

1925 ALLAHABAD 745

MUKERJI, J.

Lakshmi Chand—Defendant—Appellant.

v.

Lila Dhar—Plaintiff—Respondent.

Second Appeal No. 802 of 1923, Decided on 3rd December 1924, against a decree of the Sub. J., Budaun, D/- 19th March 1923.

(a) *U. P. Land Revenue Act* (3 *of* 1901), *S.* 36—*Agreement between vendor and vendee fixing rent payable by former for his ex-proprietary tenancy is not void but can be accepted by Revenue Court for decision as to the rent.*

An agreement between vendor and as to what rent should be paid by the vendor with respect to his ex-proprietary tenancy is not enforcible in a Court of Justice. On the other hand, it is not a void contract. So long as it is a reasonable rent that was fixed by the parties, the revenue Court can accept it as a fair estimate of the rent to be paid under S. 36 of the Revenue Act by an ex-proprietary tenant. The ultimate word, however, on the question of the amount of rent must be said by the revenue Court. 16 *A. L. J.* 212, *Foll*; 36 *All.* 155, *Ref.* [P 745 C 2]

(b) *Specific Relief Act, S.* 42—*Bare declaratory decree which would be useless should not be granted.*

A mere declaratory decree should not be granted where the grant of the decree would be a useless affair. The grant of a declaratory decree is a matter within the discretion of the Court and the Court is not bound to make a declaratory decree simply because it is within its competency to do so. [P 746 C 1]

N. C. Vaish—for Appellant.

Harnandan Prasad—for Respondent.

Judgment.—This appeal must be decreed. The plaintiff is the respondent in this Court. He sold to the defendant-appellant certain zamindari property and became thereby an ex-proprietary tenant of certain *sir* lands. On the very day on which the sale-deed was executed the plaintiff executed an agreement of rent by which he agreed to pay a sum of Rs. 170 a year as the rent of the ex-proprietary holding. On foot of this agreement the purchaser made an application in the revenue Court under S. 36 of the Land revenue Act to have a rent assessed. The Revenue Court assessed it at the same sum of Rs. 170 as the plaintiff had agreed to pay. The order was an ex-parte one. The plaintiff made an attempt to have the order set aside and the case re-heard, but he failed. Thereupon he brought the suit, out of which this appeal has arisen.

The plaintiff alleged in the plaint that the kabuliyat had been obtained from him by exercise of undue influence and pressure. He also alleged that the rent fixed was much higher than the rent which could lawfully be fixed for the holding. The suit failed in the Court of first instance. The learned Munsif came to the conclusion that no case of fraud or undue influence had been made out. He was also of opinion that evidence was adduced to prove fraud of a kind other than that alleged in the plaint. The learned Subordinate Judge on appeal agreed with the Court of first instance that the plaintiff was not entitled to any relief on the ground of fraud. But he accepted the argument that the kabuliyat was void as a matter of law, the effect of it being a contravention of the provisions of S. 36 of the Land Revenue Act.

The sole question for determination in this appeal, therefore, is whether on the ground taken up by the Court below a declaratory decree could be granted in favour of the respondent.

There have been some cases discussing the question whether it was open to a vendee and a vendor to arrive at an agreement as to what rent should be paid by the vendor with respect to his ex-proprietary tenancy. The latest case on the point is that of *Jahangira* v. *Karrar Hussain* (1). An earlier case is *Prag* v. *Sital Pershad* (2). In the former case it was held that an agreement between the vendor and the vendee as to the rent to be paid by the former was not by itself void. So long as it was a reasonable rent that was fixed by the parties the revenue Court could accept it as a fair estimate of the rent to be paid under S. 36 of the Revenue Act by an ex-proprietary tenant. Thus, it is clear that an agreement by itself is not enforcible in a Court of justice. On the other hand it is not a void contract. The ultimate word on the question of the amount of rent must be said by the revenue Court and that has been done in this case. The Revenue Court held definitely that the rent should be Rs. 170.

It is clear, therefore, that the plaintiff-respondent should not be granted any declaratory decree. The agreement by itself is not void and a prayer for its

(1) [1918] 16 A. L. J. 212=44 I. C. 513.
(2) [1914] 36 All. 155=22 I. C. 965=12 A. L. J. 136.

avoidance cannot be made the object of any suit. If it is allowed to stand it cannot do any harm to the plaintiff. Further, a mere declaratory decree should not be granted where the grant of the decree would be a useless affair. The grant of a declaratory decree is a matter within the discretion of the Court and the Court is not bound to make a declaratory decree simply because it is within its competence to do so.

The appeal is allowed, the decree of the Court below is set aside and the decree of the first Court is restored. The appellant will have his costs throughout. The costs in this Court will include counsels' fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 746

STUART , J.

Mahadeo Prasad—Plaintiff—Appellant·

v.

Basant Lal and *others*—Defendants—Respondents.

Second Appeals Nos. 948 and 949 of 1923, Decided on 10th Feburary 1925, against the decree of the Sub-J., Mirzapur, D/- 15th March 1923.

(a) *Agra Tenancy Act* (2 *of* 1901), *S.* 167—*Mortgagee a recorded co-sharer—Decree for joint possession can be passed but not for mesne profits—Jurisidiction of civil Courts is barred in such cases.*

A mortgagee of zamindari plots who is entered as such in the khewat is a recorded cosharer, and if he is obstructed in the collection of rents he is entitled to a decree for joint possession against the other cosharers, but not to a decree for mesne profits. As he is a recorded cosharer he can only obtain his share of the profits by a suit in a rent Court. Section 167 bars the jurisidiction of the civil Courts in the matter. 1922 *All.* 314 and 1922 *All.* 162, *Foll.* [P. 746, C. 2]

K. N. Katju—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—Manna and others mortgaged certain zamindari plots of an area of about 12 bighas in favour of Jhak and Ramnandan Lal. The mortgagors transferred all their rights to Basant Lal. Basant Lal has redeemed half the mortgage and is mortgagor in respect of the remainder. The mortgagee rights in respect of the remainder have been sold to Mahadeo Pande in execution of a decree. Mahadeo Pande's name has been entered as mortgagee in the khewat. He is thus a recorded cosharer.

The situation is now this : Basant Lal owns half the property and is mortgagee of the remainder. Mahadeo, the present appellant, is the mortgagee of the remaining half. These remarks apply only to the area in dispute. That area is recorded as a portion of certain khata and in the remainder of the khata many other people are cosharers.

Mahadeo's grievance was this : the area in dispute is cultivated by tenants. When he endeavoured to collect rents from those tenants through the Courts, he was opposed and was unable to collect the rents. He has now come into Court to claim his rights. The lower appellate Court has given him a decree declaring that he is the mortgagee, but has refused him any other relief. He appeals against this decree.

It appears to me that following the recent Bench decisions in this Court in *Bisheshar Singh* v. *Hanuman Singh* (1) and in *Sarbjit Singh* v. *Raj Kumar Rai* (2), the appellant is entitled to a decree for joint possession. According to the latter decision he is not entitled to mesne profits. As he is a recorded cosharer he can only obtain his profits in this matter by a suit in a rent Court. Section 167 of the Tenancy Act bars the jurisdiction of the civil Court in the matter.

In the result I modify the decree of the lower appellate Court by granting the appellant a decree for joint possession. I do not, however, see my way to award him costs, and consider that he should pay the costs of the other side, for it appears to me that he himself is responsible for unnecessary litigation. As he is a recorded cosharer there was nothing to prevent his collecting the profits in the ordinary way. Why a recorded cosharer should wish to come into a civil Court to ask for a decree for joint possession is a question that can probably only be answered in the eastern districts. While permitting him modified relief I direct that Mahadeo pay his own costs and costs of the other side on the higher scale.

Decree modified.

---

(1) 1922 All. 314=44 All. 1= 19 A. L. J. 780.
(2) 1922 All. 162=44 All. 5=19 A. L. J. 783.

1925 ALLAHABAD 747

LINDSAY AND KANHAIYA LAL, JJ.

Ishwar Datt Upadhiya—Defendant—Appellant.

v.

Mahesh Datt Upadhiya and *another*—Plaintiffs—Respondents.

First Appeals Nos. 25 and 26 of 1925, Decided on 8th May 1925, from an order of the Sub.-J., Basti.

Pre-emption—Partition made under Rev. Act—Relationship of parties to partition, continues until partition becomes effective.

Where partition has been made under the Land Revenue Act the previous relationship between the parties for purposes of pre-emption continues till the partition becomes effective.
[P.747, C.1]

Harnandan Prasad—for Appellant.

Lindsay, J.—The following pedigree will explain the portion of the parties.

JAGANNATH

Ishwar Dat	Shyama Nand	Sada Nand	Rama Nand
	Mahesh Dat	Brijmohan	Ganesh Dat.

The principal defendant in the two suits out of which these appeals have arisen is Ishwar Dat, whose name appears in the pedigree above. Two sale-deeds were executed in his favour; one on the 27th April 1923, by Brijmohan; and the second on the 10th of August 1923, by Ganesh Dat.

It appears that previous to certain partition proceedings, which are about to be mentioned, all these parties were co-sharers in a patti of mauza Latwapur called patti Jagannath.

A partition was begun and by the 15th December 1922, the partition was confirmed by the Collector. Under S. 131 of the Land Revenue Act that partition could not take effect till the 1st July 1923.

Under the arrangement which was made by these partition proceedings, patti Jagannath was divided, and one of the new pattis erected was patti Baqimanda. In this patti Baqimanda the pre-emptor in both suits, namely, Mahesh Dat Upadhiya, is a co-sharer with each of the vendors. It is admitted that Ishwar Dat, the purchaser, is not a co-sharer in patti Baqimanda from the date on which the partition takes effect.

The Court of first instance dismissed both these suits for pre-emption, being of opinion that the partition could not take effect in law up till the 1st of July 1923, regard being had to the provisions of S. 131 of the Land Revenue Act. The Munsif held that, although the partition proceedings had been brought to an end by the Collector's order of confirmation passed on the 15th of December 1922, yet for the purposes of pre-emption, the previous relations between the parties were still in existence and did not determine until the partition became effective.

We have no doubt whatever that the view taken by the Munsif is correct, and we disagree with the judgment of the Court below in the contrary sense.

We have then to consider what was the situation on the 27th of April 1923, when the first of these two sales was made by Brijmohan in favour of Ishwar Dat. Having regard to the state of things which existed before the partition became effective, the plaintiff pre-emptor had no better right to take this property than the vendee had, because at that time both parties were co-sharers in the patti Jagannath.

Then, as rightly held by the first Court, if we come to the conclusion that the suit of the plaintiff must fail with regard to the first of these two sales, it must necessarily fail with regard to the second, because by virtue of the first sale the vendee, Ishwar Dat, by the time of the second sale, *i. e.*, the 10th August 1923, had become a co-sharer in the new patti—patti Baqimanda.

As regards both the sales then the position is this; that both the pre-emptor and the vendee Ishwar Dat are in the same category of pre-emptors. None of the Courts below seems to have appreciated the fact that both these casee are governed by the Agra Pre-emption Act (IX of 1922), both the sales having taken place subsequent to the commencement of the Act, the date of which was the 17th February 1923.

Both the pre-emptor and the vendee being in the same class of pre-emptors under the scheme provided by S. 12, in order to ascertain whether there is any preference between them, we have to refer to the provisions of sub-S. (3)

of S. 12. There a preference is given to the person who is the nearest heir of the vendor. If we look at the pedigree, which is set out at the head of this judgment, the rights of the cases are with the vendee, Ishwar Dat; for he is a nearer heir of both the vendors than is Mahesh Dat, the pre-emptor.

We hold, therefore, that in neither case is the plaintiff entitled to pre-empt, and we, therefore, allow both these appeals, set aside the decrees of the Courts below, and direct that the plaintiff's claim be dismissed in all Courts with costs.

Appeals allowed.

★ 1925 ALLAHABAD 748

MUKERJI, J.

Ram Brichh Singh and *another*--Plaintiffs—Appellants.

v.

Chhakauri Singh and *another*--Defendants--Respondents

Second Appeals Nos. 770 and 771 of 1923, Decided on 27th November 1924, from the decision of the D. J. Ghazipur, D/- 6th February 1923.

(*a*) *N. W. P. Act* (1873), *S. 7—Possession by mortgagee is possession by proprietor, for accrual of ex-proprietary rights.*

For the accrual of the right of occupancy all that is necessary is that the land should be held as *sir* and that the proprietary rights should be lost, after the passing of the N. W. P. Rent Act of 1873. The law does not require for the accrual of the right of an ex-proprietary tenant that the land to which the right would attach itself should be in the immediate possession of the proprietor losing his interest. Although the land is held by a mortgagee, the proprietor mortgagor may be considered to hold land within the meaning of S. 7. [P. 749, C. 2]

★ (*b*) *T. P. Act, S. 63—Mortgagee planting trees on land—Mortgagor unwilling to pay for them on redemption—Mortgagee may be allowed to remove the trees.*

The language of S. 63 does not imply that separate possession or enjoyment must be on the spot and not out of it. For example, if on a piece of land mortgaged the mortgagee chooses to erect a building he would be entitled to remove the bricks, the timber and every article constituting the building from the land if the mortgagor seeks redemption. Similarly if the mortgagee has planted trees, and on redemption the mortgagor is not willing to pay for them, the mortgagee may be allowed to remove them.

[P. 751, C. 1]

Judgment.--These are two appeals by the same set of plaintiffs and are directed against the same set of defendants.

The facts of the case are given with sufficient detail in the almost exhaustive judgment of the learned District Judge. Only one point is not mentioned in that judgment, but on it there is no controversy.

The plaintiffs' predecessor-in-title, Deoki Singh, made a usufructuary mortgage of *sir* plot bearing No. 90, dated the 27th of June 1861, in favour of one Nandu Bhaiya. It is this mortgage that is being now sought to be redeemed by Deoki Singh's sons, the plaintiffs in the case. The defendants to the suit claim to be the proprietors of the entire property which once belonged to Deoki Singh under various transactions, most of which are detailed in the judgment of the learned District Judge. It appears that Deoki Singh, after executing the mortgage of the 27th of June 1861, made a mortgage by conditional sale of his entire zamindari property on the 29th of September 1861 in favour of one Sundar Prasad. Janki Prasad, the predecessor-in-title of the defendants, and another brought a suit for pre-emption. The result was that the entire mortgage over the entire property of Deoki Singh was split up into two equal shares and one share was given to Janki Prasad as the pre-emptor on payment of half their mortgage-money. The plaintiffs who had pre-empted the other half did not pay the purchase-money and the property remained with the mortgagee Sundar Prasad. Sundar Prasad's interest was, therefore, reduced to one-half of the entire mortgage. Subsequently it appears that in 1874 or thereabout Janki Prasad foreclosed his half interest in the mortgage and became the owner of one-half of Deoki Singh's property. This incident is not mentioned in the judgment of the learned District Judge, but documentary evidence has been read out to me from the record and the fact is mentioned in the written statement of the defendants. Deoki Singh's sons, the plaintiffs, do not claim to possess any proprietary interest whatsoever in the property which once belonged to Deoki Singh. In 1887 Sundar Prasad's heirs Doda Singh and others brought a suit for foreclosure of one half-share in the mortgage. To this suit Janki Prasad's sons were parties. Deoki Singh was also a party. The suit ended in a compromise

dated the 28th of February 1887. The learned District Judge has relied on a portion of this compromise and has inferred that Deoki Singh's interest in *sir* lands came to an end by virtue of the provisions of the compromise. We can leave this point for the present. As one of the results of the compromise, Janki Prasad's heirs paid up the heirs of Sundar Prasad and became, by foreclosure, the owners of the remaining half of the property of Deoki Singh. Thus, the defendants are the proprietors of the entire property which once belonged to Deoki Singh. There is no controversy on this point.

It is common ground that the mortgage held by Nandu Bhaiya was redeemed on the 28th of June 1887 by the ancestors of the defendants. Deoki Singh's sons now ask that they should be allowed to redeem the mortgage of the 27th of June 1861. The question is whether they are entitled to do so.

As I have stated, the learned Judge relied on the compromise of the 28th of February 1887 as establishing the fact that Deoki Singh's interest in the *sir* lands was relinquished. I have heard the entire compromise and I could find nothing in the document which would indicate that Deoki Singh was giving up his interest as an ex-proprietary tenant in Plot No. 90, which was not in his possession. There can be no doubt that the proprietary interest of Deoki Singh in Plot No. 90 (the plot in suit) was transferred to the defendants' ancestors by virtue of the compromise and by virtue of the foreclosure proceedings taken by the sons of Janki Prasad in 1887. The question is whether Deoki Singh relinquished his ex-proprietary interest in Plot No. 90 by virtue of the compromise. The compromise was read out to me and I have not been able to find any statement anywhere in it, which can indicate that Deoki Singh was giving up his tenancy right in Plot No. 90 which was, it must be taken, in the possession of Nandu Bhaiya or his heirs since the date of the mortgage.

The learned District Judge was of opinion that no ex-proprietary interest could accrue to Deoki Singh in Plot No. 90. It appears that ex-proprietary tenancy was created for the first time by Act XVIII of 1873. The mortgage in suit was created in 1861. Thus, in 1887, and 1874, the dates at which Deoki Singh lost his proprietary rights, Deoki Singh was not in possession of Plot No. 90, although admittedly it was his *sir* land. The learned Judge was of opinion that under the circumstances Deoki Singh could not acquire an ex-proprietary tenancy in the plot by virtue of the Act of 1873, an Act which was passed subsequently to the mortgage. This opinion of the learned District Judge is against the authorities of this Court, vide *Karamat Khan* v. *Samiuddin* (1) and *Sham Das* v. *Batul Bibi* (2).

Looking at the language of the law itself there should be no manner of doubt as to the correctness of the contention of Deoki Singh's heirs. S. 7 of the Rent Act (1873) runs as follows:

"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, etc."

For the accrual of the right of occupancy all that is necessary is that the land should be held as *sir* and that the proprietary rights should be lost after the passing of the Act of 1873. It is conceded that the proprietary rights of Deoki Singh were lost after 1873. The next question is whether the *sir* land was "held" by Deoki Singh at the date of the loss of the proprietary rights. It is quite clear that Deoki Singh was not in physical possession of the land in question. But he was certainly in constructive possession through his mortgagee whose possession was on behalf of the mortgagor. The law does not require for the accrual of the right of an ex-proprietary tenant that the land to which the right would attach itself should be in the immediate possession of the proprietor, losing his interest. I am, therefore, of opinion that although the land was held by Deoki Singh's mortgagee, Deoki Singh held the land within the meaning of S. 7. It follows that Deoki Singh became an ex-proprietary tenant of the land in suit.

Having acquired the ex-proprietary tenancy it does not appear that Deoki Singh lost it at any time. Indeed, after the possession of Nandu Bhaiya came to an end, on redemption on the part of the defendants' ancestors, the defendants'

(1) [1886] 8 All. 405=(1886) A. W. N. 83.
(2) [1902] 24 All. 538=(1902) A. W. N. 155.

ancestors stepped into the shoes of Nandu Bhaiya and their possession was on behalf of the mortgagor Deoki Singh. There will, therefore, be no difficulty in the way of the plaintiffs' success.

A question of limitation was raised in the Court of first instance, but both the Courts have found that there was an acknowledgment by the defendants' ancestors which took the case out of the rule of limitation. That question has not been discussed before me, and I need express no opinion on that point. One argument was advanced by Dr. Agarwala and it is this: he argued that by virtue of the compromise of 1887 and by virtue of the dakhlnama that was passed in favour of Janki Prasad's heirs, Janki Prasad's heirs obtained physical possession over Plot No. 90. This argument is not supported by any statement to that effect in the written statement and is vitiated by the admitted fact that the defendants' ancestors took the trouble of redeeming the mortgage executed in favour of Nandu Bhaiya which was a usufructuary one.

In the result the plaintiffs' claim for redemption must succeed.

It appears that since the mortgage, the mortgagee in possession planted trees on the land. The plaintiffs' contention is that on payment of the mortgage-money they are entitled not only to the land, but also to the trees. The Court of first instance, while decreeing the claim for redemption, decided that so long as the trees stood, the defendants' possession over the trees would continue. The learned District Judge did not express any opinion on this point because in his opinion the whole suit for redemption failed. In this Court, in support of the plaintiffs' contention, two cases have been cited. One is the case of *Zubeda Bibi* v. *Sheo Charan* (3), and the other is an unreported case, viz., Second Appeal No. 148 of 1923, *Nageshar Rai* v. *Nand Lal Rai*, decided by Daniels, J., on the 25th of June 1924. In the former case there was a distinct finding that separate possession and enjoyment of the grove without detriment to the principal property was not possible. The question is whether I should follow these cases. Both the cases are decisions by a single Judge, and are, therefore, not binding on me.

(3) [1899] 22 All. 83=(1899) A. W. N. 189.

The law on the subject is contained in S. 63 of the Transfer of Property Act. In both the cases cited the same section has been relied upon. There can be no doubt that when a mortgagee of a plot of land plants trees on the same, the trees are to be considered as an accession. The ordinary rule is that a mortgagor upon redemption will be entitled to any accession that takes place in the property mortgaged. There is an exception however. The language is this:

"Where such accession has been acquired at the expense of the mortgagee and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it."

The mortgagor here is not willing to pay for the expense that was incurred in planting and rearing up the trees. The question, therefore, reduces itself to this, viz., whether the plaintiffs are entitled to the trees without any payment whatsoever. This question has to be answered by finding out whether the accession is capable of separate possession or enjoyment without detriment to the principal property. It has been contended on behalf of the appellants that the trees as such were incapable of separate possession or enjoyment without detriment to the land itself. There can be no doubt that if the trees are to be enjoyed as standing trees they cannot be enjoyed without detriment to the land. On the other hand there seems to be no reason why the trees, as timber, cannot be separately possessed or enjoyed without detriment to the property. The trees can be cut down and removed and the mortgagee will be able to enjoy the timber by separate possession. It has not been contended seriously that the severance of the trees from the soil would be detrimental to the land, that the land would be incapable of being used again as *sir* land. All that has to be done is to remove the roots of the trees which can be easily done, and if necessary the mortgagee may be required to remove the roots when they remove the trees.

If we look to the provisions of the law as to lease we find that a lessee is permitted to remove at any time during the continuance of the lease all things which he has attached to the earth provided he leaves the property in the state in which

he received it: Cl. (*h*), S. 108 of the Transfer of Property Act. The mortgage in suit was of only a plot of land. Instead of raising crops the mortgagee found it more paying to have a number of trees on the land. The trees have added to the value of the land if they be allowed to stand on the same. There is no principle of law by which the plaintiff may be allowed to have the privilege of having a more valuable property on redemption that he gave to the mortgagees. Unless, therefore, the language of the law expressly compels the Court to hand over the trees to the mortgagor, there seems to be no reason, certainly no moral reason, why the mortgagee should lose the trees. In my opinion the language of S. 63 does not imply that separate possession or enjoyment must be on the spot and not out of it. For example, if on a piece of land mortgaged the mortgagee chooses to erect a building, in my opinion he would be entitled to remove the bricks, the timber and every article constituting the building from the land if the mortgagor seeks redemption.

Such being my view the suit for redemption succeeds; and setting aside the decrees of the Courts below I grant a decree for redemption on condition of payment of Rs. 100 within six months of this date. In the circumstances of the case the parties will pay their own costs. The formal decree under O. 34, R. 7, Civil P. C., will be prepared. The defendants-mortgagees would be entitled to remove the trees planted on the land in suit before delivery of possession to the plaintiffs and within two months of the notice of the deposit of the mortgage-money in Court.

Decrees set aside.

1925 ALLAHABAD 751

STUART, J.

Gulab Singh and *another*—Applicants.

v.

Emperor—Opposite Party.

Criminal Rev. No. 110 of 1925, Decided on 24th March 1925, from an order of the First Class Mag., Agra, D/- 19th January 1925.

Criminal P. C., S. 215—Manifest and fatal flaw in prosecution—Prosecution must be quashed.

Commitments should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution.

The accused were railway clerks who, under the orders of the station master, altered certain entries in the registers which were maintained by them. The action of the station master was held by a civil Court to be wrong. But the error was due to the honest mistake of the station master in his view as to some railway rules. The accused had no animus in the matter, and were only acting on the orders of their superior officer.

Held: that the proceedings which had been taken against the accused for forgery must be quashed. [P. 751, C 2]

C. Ross Alston—for Applicants.

Assistant Govt. Advocate—for the Crown.

Judgment.—Commitments should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution. In this particular case there is a fatal flaw. There is no case in law at all. The two persons whom the committing Magistrate has ordered to be prosecuted for forgery under S. 466 of the Indian Penal Code are two railway clerks and the case against them is briefly this:

They are responsible for the upkeep of certain registers. Two waggons containing coal arrived at Agra railway station and the consignee was given time till a certain hour to unload. He completed his unloading by a certain hour and the time of completion was recorded accordingly in the register; but he was not only, according to the view of the station master, obliged to complete unloading by a particular time in order to save payment of demurrage, but he was also responsible for putting the waggons in such a position as to enable them to be despatched; and if he did not have the waggons cleared by that time, so as to be capable of despatch, the station master considered that he was liable to pay demurrage even though the waggons had been unloaded. The consignee had actually unloaded the waggons by a certain time and that time was entered in the registers, but the station master subsequently discovered that, while unloading, he had blocked the passage of the waggons by leaving accumulations of coal on the permanent way so that the waggons' despatch (to Tundla) had been delayed. The station master told the consignee to clear the line so that the waggons might be despatched, The consignee cleared the line. The station master then went to the clerks in charge of the registers and told them to alter

the hour of unloading from the hour originally recorded when the waggons had been actually unloaded to the hour which he now gave them when the line had been cleared so that the waggons could be despatched. The two clerks carried out his orders, and it is for this, and this alone, that they have been committed to the sessions on a criminal charge.

It is admitted that they were acting under the orders of their superior officer, that they could not have had any possible animus in the matter, and that the consignee had no complaint against them. The station master's interpretation of the liability of the consignee has been found to be wrong by a Small Cause Court Judge. I have nothing to say upon that point.

The civil Court has found that the consignee was not liable to pay demurrage. But there was absolutely nothing dishonest, improper or irregular in the station master holding the view which he did hold, even though it was an incorrect view, and for him to tell the clerks to alter the time of unloading to the time when he honestly thought that the waggons had been technically unloaded was in no way a criminal offence, and the clerks who acted under his orders were in no way responsible.

I consider that the action of the civil Court which ordered the prosecution was most unfortunate and that it would be most improper to permit this prosecution to continue as, on the face of it, there is no case of any sort or kind.

I accordingly quash the proceedings, set aside the order of committal of the two applicants and direct that their bail bonds be cancelled. This order will have the effect of an order of absolute acquittal with no reflection of any kind upon the conduct of the applicants.

Order set aside.

★ 1925 ALLAHABAD 752

RYVES AND DANIELS, JJ.

Ram Charan--Defendant—Appellant.

v.

Lal Bihari Varma and *others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 623 of 1922, Decided on 18th November 1924, from a decree of the Additional Judge, Cawnpore, D/-28th February 1922.

★ *Civil P. C., O. 41, R. 27—Reason for admitting additional evidence recorded only in judgment—Law is complied with.*

Although appellate Court does not record at the time when it admits the additional evidence the reasons why it was admitting it but it does record those reasons in its judgment, there is a substantial compliance with the law. [P 753 C 1]

Iqbal Ahmad—for Appellant.

G. W. Dillon and *N. P. Asthana*—for Respondents.

Judgment.—We think that this appeal is concluded by the findings of fact.

The plaintiff brought a suit for a declaration that the goods in the shop of his brother really belonged to him and, as such, were not liable to attachment and sale in execution of a decree obtained by a creditor of his brother.

The First Court dismissed the suit, but on appeal the learned Additional District Judge of Cawnpore has allowed it. It is really purely a question of fact whether the alleged sale by one brother to another was a real sale and not a sham transaction in order to defraud or delay the creditors. Now the learned Judge has noted some very suspicious circumstances in the case which would lead one ordinarily to infer that the transaction was not a genuine one, but, bearing all these circumstances in mind, he has come to a very definite conclusion that the sale was a perfectly valid transaction. What happened was this: one brother agreed to buy the property of his brother and to pay all his creditors six-annas in the rupee and did, as a matter of fact, pay them that amount with the exception of one of the creditors who refused to accept it. This was the defendant-respondent.

Objection is taken to the procedure adopted by the learned Judge in appeal. It appears that the trial Court refused to accept certain accounts which the plaintiff tendered in evidence while he was under examination on the ground that they had not been tendered at the proper time. The learned Judge held that these documents which had been tendered originally in the execution department ought, under the circumstances, to have been received in evidence by the trial Court and he decided in his discretion to admit them. He also admitted certain pass-books and so forth. He admitted these not with the object of assisting the plaintiff, but with the object of giving the defendants material, from which they

could test the genuineness of the plaintiff's case. It seems to us that the appellate Court has a wide discretion in the matter, as has been recently pointed out by the Privy Council, and in this case we think that that discretion was rightly exercised. In our opinion there was nothing illegal in the procedure of the learned Judge. It is true that he did not record at the time when he admitted the additional evidence the reasons why he was admitting it but he did record those reasons very fully, in his judgment. We think this is a substantial compliance with the law which requires that the appellate Court, when admitting fresh documents, should give its reasons. In our opinion the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 753

MEARS, C. J., AND PIGGOTT, J.

Har Sarup and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 190 of 1925, Decided on 25th March 1925, against the order of the Addl. S. J., Moradabad.

Penal Code, S. 300, Excep. 2, Ss. 302, 304 and 100 Enmity between parties—Challenges to come out and fight passing—Accused being followed by deceased inside the accused's house — Encounter occurring inside the accused's house where fatal injury inflicted—Sentence was altered from S. 302 to S. 304 as it came within Excep 2 to S. 300.

Where a savage enmity had been growing up for some time between the two accused, and the deceased and his brother who were their next door neighbours, and acts of aggression had been committed on both sides on the evening of the occurrence, and challenges to come out and fight had passed from one house to the other and there was an encounter in the open space in front of the two houses, in the course of which injuries were inflicted and suffered on both sides, and at some stage of that encounter one of the accused ran into the *dahliz* of his own house and was followed there by the deceased, and a sharp struggle then occurred just inside the entrance door of the *dahliz*, and in the course of that struggle the same accused with his spear inflicted upon the deceased the fatal wound, of which the unfortunate man expired almost immediately.

Held: that as the accused was within the threshold of his own house when he inflicted the fatal injury, though his act was not completely covered by the provisions of the law relating to the right of private defence, Exception 2 to S. 300 sufficiently covered the case to warrant the altering of the conviction to one under S. 304, I. P. C. from under S. 302 I. P. C.

[P 757 C 2; P 758 C 1]

M. M. Raina—for Accused.

Govt. Pleader for Govt. Advocate—for the Crown.

Piggott, J.—Two brothers, Har Sarup and Harbans Lal, Kayasthas by caste. the former aged about 29 years and the latter his senior by 26 years, have been tried and convicted by the Sessions Court, of Bijnor on a charge under S. 302 of the Indian Penal Code, alleging against them the wilful murder of their caste-fellow and neighbour Sham Lal. The record is before us for confirmation of the sentence of death passed by the Sessions Court. Both accused have submitted petitions of appeal, and the case has been argued by counsel on their behalf. The petitions of appeal follow the lines of the defence set up in the Sessions Court, though the accused were certainly most unwise to have reserved that defence for the Court of Sessions and not to have preferred it in full detail when they had an opportunity of doing so before the committing Magistrate. Up to a certain point the facts are scarcely in dispute. The two appellants lived in a house adjoining that of Sham Lal; in fact it would seem that the two had at sometimes formed parts of one and the same house. Sham Lal had a brother Piare Lal, who, more or less, lived with him, though for reasons which we need not go into, he was not in the habit of sleeping at the house. Piare Lal was unmarried, and Sham Lal does not, so far as the evidence goes, appear to have ever had a lawfully married wife. He did, however, keep a concubine who bore him a daughter of the name of Bhaggu. This little girl, aged about 13, is unquestionably the main cause of the tragedy which had occurred. We think there can be no doubt on the evidence that Har Sarup wanted this girl for himself, though, whether he seriously believed that he could contract a lawful marriage with her, which would be recognized by his brotherhood, or merely desired to keep her as his concubine, it is impossible to say. There was very bad blood between the parties, probably in consequence of the offers which the accused were making for the person of this girl. According to the evidence, each of the parties had resorted to the irritating

system of petty annoyances involved in throwing bricks from one house into the other, or the shouting of filthy abuse from outside. The death of Sham Lal occurred somewhere about 9 p. m. on the 28th of September last. On the afternoon of the previous day the appellant, Harbans Lal, had made an elaborate report at the police station, in which he complained that Sham Lal and his brother Piare Lal were annoying and abusing him ; that they were bringing pressure to bear upon him to vacate the house in which he was living; and that he was in fear of his life at their hands. Soon after 9 p. m. on September 28, Piare Lal was at the police station, reporting the murder of his brother Sham Lal by the two appellants Sub-Inspector Ram Ratan Lal proceeded at once to the spot. He found the two appellants inside their house, behind locked doors, which they refused to open at his summons. Their own clothes were stained with blood as also was the clothing of their old mother. In a corner of the entrance-room leaning against the wall, were an axe and a spear, both of them stained with blood. Sham Lal had been carried into his own house. He was quite dead. The medical evidence shows that he had received a thrust with some such weapon as the spear recovered from the possession of the appellants, on the right side of his chest, which had penetrated into the lung. There were also two incised wounds, not of a very serious character, on the head and a contused wound on the shoulder. A youth of the name of Bhukan, who is a witness for the prosecution in the case, was found to have an incised wound on the left arm and a trifling cut on his right little finger. On the other hand, both the appellants showed marks of injury on their persons, though by no means serious ones: Har Sarup had received a slight cut on one of his fingers, the palm of his right hand was bruised, and he had a curious mark in the neighbourhood of the left shoulder which the medical officer thinks might very possibly represent a tooth-bite. Harbans Lal had a bruise on the back of the neck such as might well have been inflicted by the blow of a *lathi*. When the case came into Court, the prosecution called Piare Lal himself and the little girl Bhaggu: also this youth Bhukan, whom we have spoken of as showing the mark of a slight wound. They also called Bhagwan Chander alias Pisu, the own brother of the said Bhukan, another Brahman of the name of Chajju Mal, and a Muhammadan shop-keeper named Nasir-ud-din. The last-named was disabled by illness at the time of the Sessions trial, and the learned Sessions Judge has very properly brought on to the record the statement which this man had made to the Magistrate. One of the most remarkable features of the case has been entirely ignored by the learned Sessions Judge. Piare Lal's report at the police station is quite an elaborate document. It is the work of an intelligent man, well accustomed to describing events in narrative form. It tells in detail the story of Sham Lal's murder and of the circumstances alleged to have led up to the same. It asserts the presence of the deponent himself and of Bhukan on the scene of the crime, and may be said to imply, or at any rate to account for, the presence of the girl Bhaggu. The noticeable point, however, is that the report goes on to give the names of four persons as being those who first arrived on the scene when an outcry was raised. Two of these persons have not been produced in evidence at all ; the names of the other two are Baldeo Kishan and Ganga Sahai. The Sub-Inspector of Police says that he recorded statements made by these two persons in the course of the night following the commission of the crime. They themselves deny this ; but Baldeo Kishan admits making a statement to the police at 11 a. m. on the 29th of September, and Ganga Sahai practically admits having done the same, either on the 29th or on the 30th of September. The Sub-Inspector contents himself with remarking that he did not send up these two men as prosecution witnesses, because he had heard that they would not be willing to give evidence. They actually appeared at the Sessions trial as witnesses for the defence ; so they were willing enough to give evidence. What the Sub-Inspector means is that they were not prepared to bear out the story put forward by Piare Lal and the witnesses who supported him. What we have to do is to consider and to appraise the evidence of Piare Lal, Bhaggu, Bhukan and the two apparently extraneous witnesses whom the police did succeed in producing as against the evidence of

Baldeo Kishan and Ganga Sahai, who, on Piare Lal's own admission, were amongst the very first persons to arrive on the scene of the disturbance. It will now be expedient to indicate in brief outline the nature of the prosecution story, and what the accused and their witnesses say in reply. Piare Lal says that he and his family were being subjected to a sort of persecution in the matter of this little girl Bhaggu; stones were being thrown into their house and threatening letters left at their door. On the night in question both he himself and Sham Lal had been invited to a feast at a neighbour's, though, as a matter of fact, they went there independently and at different times. He himself was making his way towards the house to which he had been invited when he heard a disturbance from the neighbourhood of his own house. He happened at the time to be close to the shop kept by Bhukan and his brother Pisu. He hurried in the direction of his house, being followed, first by Bhukan, and after some interval by the latter's brother. He reached the open space in front of the two houses of the parties. On to this, there open the doors of a room, described as the *tidari* belonging to Sham Lal's house, and also a single door leading into a narrow entrance-room, described as the *dahliz* of the house of the appellants. Piare Lal's story is that as he arrived on the scene the two appellants were attacking Sham Lal, one of them with a spear and another with an axe. He flung himself into the fray, avoided a blow aimed at him by Harbans Lal, and grappling with the latter, flung him to the ground. In the meantime two women, the mother and the sister of Harbans Lal, emerged from their house and began dragging Shamlal into the *dahliz*. The man was already wounded and fell down as the women began dragging him. Bhukan interfered and succeeded in grasping Sham Lal's feet at the moment when about half the man's body had been dragged over the threshold of the *dahliz*. Then Bhukan himself was wounded with a spear-thrust from Har Sarup, while Harbans Lal broke loose from the witness and struck Sham Lal another axe-blow. Then the accused and their womenfolk took refuge inside their house, and Piare Lal and the witnesses with him were able to carry Sham Lal's corpse—the man having by that time expired—first into the open space outside and afterwards into his own house. This is the story told in substance also by the girl Bhaggu and by the prosecution witnesses Bhagwan Chander and Nasir-ud-din. The witness Chajju Mal deposes only to the search of the accused's house and the recovery of blood-stained clothing and weapons from them. It would be quite possible to criticize this evidence in matters of detail, but there are certain general considerations against its credibility. Bhagwan Chander and Nazir-ud-din, as we have already noticed, were not mentioned in the first report, and in the case of Nasir-ud-din we are deprived of the advantage of considering any cross-examination to which he might have been subjected at the Sessions trial. Their evidence reads to us somewhat artificial, and we find it practically impossible to avoid believing that they came on the scene too late to see much of what they have described. Moreover, their evidence, as well as the entire story told by Piare Lal, pre-supposes a struggle of such duration that it is difficult to believe that at the end of it Sham Lal would have shown only the four marks of injury on his person observed at the postmortem. The other difficulty about this evidence lies in the fact that the Sub-Inspector found two very definite pools of blood: one in the open space outside the two houses and the other inside the *dahliz* of the accused's house. He was not examined as carefully as he ought to have been with reference to this very important statement. He did, however, produce and prove a certain plan of the locality, and we are entitled, on the strength of his evidence, to take notice of marks placed upon the said plan and explanatory notes made concerning those marks. Now, the pool of blood inside the *dahliz* was not in the doorway: it was not far from the doorway, but it is shown in the plan distinctly to one side of the same. This is significant when we come to consider the defence of the accused and the statements of their witnesses. We have already remarked that the accused elected to reserve their defence. Even in their statements before the Sessions Court we find the sort of hesitation and confusion which is to be

expected in the statements of persons on their trial on a capital charge, who are not really prepared to make a clean breast of the facts as known to them, but who are anxiously thinking how they can best tell an apparently coherent story which will not involve any direct admission against themselves, Anyone reading Har Sarup's statement. as it stands on the record, cannot fail to realize that the man knows perfectly well that he stabbed Sham Lal in the chest with a spear and thereby caused his death. He will not actually say this; but in reply to the questions put to him he returns answers which practically amount to the same thing. He tells a queer story as to the grounds of enmity between himself and his next-door neighbours, and he says that on the night in question it was the said neighbours who were abusing him and his brother, throwing bricks into their house, and challenging them to come out and fight. The accused were safe indoors with the door shut, and we know that they had inside the house the weapons which the police afterwards found there. Har Sarup, however, wishes the Court to believe that he and his brother grew so alarmed at the thought that Piare Lal and Sham Lal and their friend Bhukan might climb over into their house that they began to shout for help. On this, he says, his witnesses, Baldeo Kishan and Ganga Sahai, came on the scene, and on the arrival of the witnesses he and his brother opened the house-door and came out. As soon as they had done so, they were set upon by Piare Lal, Sham Lal and Bhukan with lathis. While a scuffle was going on outside between Piare Lal and Harbans Lal, in which the two witnesses were vainly attempting to interpose, Har Sarup himself ran into the house, being pursued by Sham Lal and Bhukan. Inside his own dahliz he turned to bay, and, as he puts it, "I struck one spear-blow to save myself. I do not know whether it hit Sham Lal or not." In substance this story is also told by Harbans Lal, and in the main it is corroborated by Baldeo Kishan and Ganga Sahai. The learned Sessions Judge has been very severe on Baldeo Kishan by reason of certain admissions which this witness made in respect of a statement not otherwise proved, which he was said to have made to a vakil of the name of Brij Nandan Saran, who came on the scene in the course of the fight between the 28th and the 29th of September. It seems to us that this statement ought either to have been put frankly in evidence, or that all reference to it ought to have been omitted. As the record stands, we have an admission by Baldeo Kishan that he did make a statement to the vakil, and one or two fragmentary questions are put as to whether he had not said to the vakil this one thing or that other thing. It is quite easy to create a totally misleading impression as to the veracity of a witness by cross-examining him on these lines. Another point severely commented on by the learned Sessions Judge is that neither of these two witnesses hastened to give the investigating police officer the benefit of their evidence the moment he arrived on the scene. If this sort of criterion is to be applied to evidence in this country, there will be very few eyewitnesses to important crimes who will be found entitled to credit, whether they eventually appear as witnesses for the prosecution or as witnesses for the defence. On the whole, we are inclined to agree with the learned Sessions Judge that Baldeo Kishan and Ganga Sahai display in their evidence a certain leaning towards the accused persons and a desire to represent their actions in as favourable a light as possible. At the same time it does not seem to us easy to give any definite reason why they should be regarded as less worthy of credit than the prosecution witnesses, and their story, as a whole has the advantage of accounting for the pool of blood found just inside the dahliz. There is one more curious, and, indeed sensational, feature of this case. Piare Lal had asserted in his first report that he and his brother had been subjected to persecution by means of threatening letters. He handed over to the police three letters which he said had been given him by the little girl Bhaggu; and Bhaggu's account of the matter is that she found these letters lying in the doorway of their house on the morning after the murder. These letters have been most carefully translated on our record, and they have apparently been treated in the Court below as corroboration of the case against the accused. Their only effect on our minds is to introduce a

serious element of uncertainty into the whole matter. They are curiously worded letters, ostensibly addressed in very polite terms to the "dear sister" of the writer. The suggestion is that they are meant for the aged mother of Piare Lal and Sham Lal. They do contain demands for the hand of the girl Bhaggu, and they are accompanied by threats against the life of the person addressed and the lives of everybody connected with her. In two of these letters the writers are very careful to assert that they are going about prepared for murder, armed with a spear and a hatchet, the very weapons with which Sham Lal was eventually killed. The absurdity of supposing that letters threatening the life of a member of the household would continue to be written and delivered after the murder was an accomplished fact does not seem to have presented itself to the mind of the learned Sessions Judge. Some other explanation of the production of these letters before the investigating police officer must be sought. We could suggest more than one but it is useless to indulge in mere speculations. When, however, the police came to examine the clothing of the murdered man, they found on Sham Lal's person, saturated with blood, what they thought to be two letters which have been assumed to belong to the same series. The letters were marked Exhibits G and H. They were certainly never translated for the benefit of the Court, and, so far as we can discover, no attempt was ever made to read them until we insisted on having them opened out at the hearing of the appeal. We at once discovered that there were in reality three letters, and not two : two of them were gummed together by the dried blood. It was exceedingly difficult to decipher these papers now, but we managed to obtain a fair general idea of the contents of one of them. It is a letter similar in style to the three Exhibits D, E and F and it does contain an explicit threat against the life of Piare Lal. Needless to say, it contains no reference to an axe or a spear. We are bound to add also that, although both the appellants are literate and occupy positions which must have made it the easiest thing in the world to secure specimens of their handwriting, no attempt was made to produce evidence regarding the hand writing of Exhibits D, E and F much less of Exhibits G and H, which, as we have said, were not read at all in the Court below. On the whole, we prefer to draw no certain inference from these letters, except that we are inclined to believe the statement made by Piare Lal in his first report as well as in his evidence that letters of a threatening character connected with demands for the hand of the girl Bhaggu had been received during the days immediately preceding the murder.

Coming now to sum up the entire case. the conclusion at which we arrive is that the prosecution evidence, more particularly where it puts forward allegations which if believed, would make the crime of both the appellants unquestionably nothing short of murder is not to be implicitly relied on. We regard it as in itself open to criticism, and it is to a considerable extent outweighed by the defence evidence and by the Sub-Inspector's plan of the locality. We are satisfied that a savage enmity had been growing up for some time between the two appellants and the two brothers Sham Lal and Piare Lal who were their next-door neighbours. We believe that acts of aggression had been committed on both sides on the evening in question. We are not prepared on the evidence to believe that anything more than this is proved, namely, that after challenges to come out and fight had passed from one house to the other, there was an encounter in the open space in front of the two houses in the course of which injuries were inflicted and suffered on both sides. At some stage of this encounter Har Sarup ran in to the dahliz of his own house and was followed there by Sham Lal and Bhukan. A sharp struggle then occurred just inside the entrance door of the dahliz and in the course of that struggle Har Sarup with his spear injured Bhukan and inflicted upon Sham Lal the fatal wound of which the unfortunate man expired almost immediately. This being our conclusion on the case, we think that the conviction under S. 302, I. P. C., ought not to be affirmed. The case is somewhere on the borderland of the second and fourth exceptions to S. 300 of the Indian Penal Code. We should unhesitatingly apply Exception 4, if it were not that we believe on the evidence that Har Sarup was using a spear against a man who was only armed with a lathi. On the other hand, we must give him the benefit

of our belief that he was within the threshold of his own house when he inflicted the fatal injury and though we are by no means prepared to hold that his act is completely covered by the provisions of the law relating to the right of private defence, we think that Exception 2 above referred to sufficiently covers the case to warrant our altering the conviction to one under S. 304, I. P. C. As regards Harbans Lal, we are not prepared to separate his case from that of his brother, except in the matter of sentence. The injuries found on the head of the deceased, although the medical expert was not asked for a definite opinion on the point, are pretty obviously such as would have resulted from blows of an axe or hatchet, and with this corroboration we are prepared to accept the prosecution evidence which proves that Harbans struck at least one, if not two, such blows. Accordingly, we set aside the conviction and the sentence recorded by the Sessions Court. In lieu thereof we convict Har Sarup and Harbans Lal of the offence of culpable himicide not amounting to murder under S. 304, Indian Penal Code. We sentence Har Sarup to undergo rigorous imprisonment for ten years and Harbans Lal for six years.

Sentences reduced.

★ 1925 ALLAHABAD 758

SULAIMAN, J.

Rajaram Dhar Dube and *others* — Defendants—Appellants.

v.

Jadunandan Dhar Dube and *others* — Plaintiffs—Respondents.

Second Appeal No. 805 of 1925, Decided on 15th June 1925, against a decree of the Second Addl. J., Gorakhpur, D/- 21st January 1925.

★ (a) *Evidence Act, S. 116—Mortgagee is estopped in a redemption suit from setting up an interest of a third party, at the time the mortgage was entered into.*

It is not open to the mortgagees to say that at the time when the mortgage was made, anyone other than the mortgagor had also an interest in the mortgaged property. In a suit by the mortgagors to redeem, they are estopped from setting up the interest of a third party. They cannot do so, so long as they have not handed over possession to the representatives of their mortgagors. [P. 758, C. 2]

★ (b) *Cosharer — Joint tenant — Death of a joint tenant does not benefit the zamindar, but surviving joint tenant takes the whole.*

In case of joint tenancies, if a joint tenant dies without any heir-at-law, his interest survives to the surviving joint tenant. The surviving joint tenant does not lose his right in half the tenancy. Holdings cannot be divided in that way. The death of a joint tenant without heirs does not in any way benefit the zamindar, but the surviving tenant still remains a tenant of the whole holdings. [P. 758, C. 2; P. 759, C. 1]

Harnandan Prasad—for Appellants.

Judgment.—This is a defendants' appeal arising out of a suit for redemption.

It appears that Sribhukhan and Mt. Bahorna, the widow of his uncle Tanku, made a mortgage of certain exproprietary tenancies in favour of the defendants. Raghubir, the brother of Tanku, was no party to that mortgage. The defendants obtained possession of the entire tenancies from their mortgagors Sribhukhan and Mt. Bahorna. The plaintiffs are the sons of Sribhukhan. The defence raised by the mortgagees was that Raghubir, the brother of Tanku, also had an interest which he subsequently relinquished in favour of the zamindar, whose interest has devolved on the mortgagees; and they further urged that Mt. Bahorna died childless, and her interest in the holdings also lapsed to the zamindar. The lower appellate Court has not allowed them to raise any such pleas. I am of opinion that the lower appellate Court was right. It is not open to the mortgagees to say that at the time when the mortgage was made anyone other than Sribhukhan and Mt. Bahorna had also an interest in the mortgaged property. They are estopped from setting up the interest of a third party. They cannot do so so long as they have not handed over possession to the representatives of their mortgagors. It, therefore, must be assumed in this case that for some reason or other Raghubir had no longer any interest left at the time when the mortgage was made and that the two persons, Sribhukhan and Mt. Bahorna, only were jointly entitled to make the mortgage in favour of the defendants.

The other plea that the interest of Mt. Bahorna has lapsed to the zamindar is also without any force. In case of joint tenancies, if a joint tenant dies without any heir-at-law, her interest survives to the surviving joint tenant. The surviving joint tenant does not lose his right

in half the tenancy. Holdings cannot be divided in that way. The death, therefore, of a joint tenant without heirs does not in any way benefit the zamindar; but the surviving tenant still remains a tenant of the whole holdings. That is a well-recognized principle underlying joint tenancies. The plaintiffs, therefore, as the representatives of Sribhukhan, were, when the other co-mortgagor died childless, entitled to redeem the entire mortgaged property on payment of the entire sum.

The appeal is without any force and is dismissed under O. 41, R. 11, Civil P. C.

Appeal dismissed.

★ 1925 ALLAHABAD 759

SULAIMAN AND DANIELS, JJ.

Lachman Prasad and *another*—Plaintiffs—Appellants.

v.

Munia and *others*—Defendants—Respondents.

First Appeal No. 63 of 1924, Decided on 28th April, 1925, from an order of the Dt. J., Meerut.

(a) *Practice—Pleadings.*

Evidence of party is not part of pleading.

★ (b) *Civil P. C., S. 92—Though defendants are not proved to be even de facto trustees, still suit for appointing new trustee lies—The new trustees can eject trespassers by suit—Trespassers, though not necessary parties, are not improper parties.*

If the plaintiffs, after their evidence is closed, succeed in establishing that the defendants entered into possession as trustees, or have been acting de facto trustees of these properties, and that the properties are trust properties, then there can be no doubt that the suit under, S. 92 would be maintainable. On the other hand, if they altogether fail to establish such a character of the possession of the defendants, even then they have a right to ask the District Judge in case they prove that the properties are trust properties, to appoint new trustees, because no trustees exist. It is not incumbent on the plaintiffs to first bring a representative suit to recover possession of the properties under O. 1, R. 8, Civil P. C., and then, having obtained possession, ask the Judge to appoint trustees for the same. Where either a breach of trust has been committed, or where the direction of the Court is necessary for the administration of such trust persons interested in the trust can ask the Court to appoint new trustees. After such new trustees have been appointed, it would be open to them to take steps to recover possession of the property from the hands of the trespassers who may hold the properties. In a suit under S. 92 it is within the jurisdiction of the Court to first decide the question whether the property in dispute is or is not trust property. If the Court has jurisdiction to decide this question it is obvious that such a question ought to be decided in the presence of persons who are interested in denying the trust. If trespassers in possession are made defendants they cannot be said to have been improperly impleaded, though they might not be absolutely necessary parties. Even it if be held that the properties are trust properties and that the defendants are mere trespassers and have no right to retain possession thereof, the Court cannot order their ejectment. But there can be nothing to prevent the Coutr. from declaring that the properties are trust properties, and they vest in the newly appointed trustees. 19 *I. L. J.* 236, *Dist*; 41 *Cal.* 749; 33 *All.* 660. *Expl.*, 35 *Bom.* 170, *Foll.*

[P 761 C 1,2]

Peary Lal Banerjee and *Narmadeshwar Prasad Upadhiya*—for Appellants.

Nehal Chand—for Respondents.

Sulaiman, J.—This is a plaintiffs appeal arising out of an order returning the plaint in a suit under S. 92 of the Code of Civil Procedure for presentation to the proper Court. The plaintiffs alleged that the houses and other properties detailed in the plaint were trust properties situated in the cantonments at Meerut and had been endowed for public and religious purposes for over a century. They further alleged that part of the constructions had been made from public subscriptions and that houses and residential quarters had been built for barbers. It was the plaintiffs' case that the barber community of the cantonments used to appoint a manager to look after the worship of the temples and to manage the properties, and that the last manager was one Dhi Mal, father of Defendant No. 2, who died in 1916. The plaintiffs went on to allege that since the death of Dhi Mal no manager had been appointed, but the Defendant No. 1, a lady, as guardian of Defendant No. 2, had been acting as manager of the said properties. They then proceeded to state that various breaches of trust had been committed, that no accounts had been rendered, that the buildings were out of repairs, and that the defendants were even denying the existence of the trust. After having obtained the permission of the Legal Remembrancer, the suit under S. 92 of the Civil Procedure Code was instituted, and the reliefs claimed were:

(1) That the defendants be removed from the management of the said trust;

(2) that new trustees be appointed;

(3) that the trust properties be vested in the new trustees;

(4) that accounts of the trust properties be taken from the defendants from 1916 up to date ;

(5) that a scheme be laid out for the future guidance and maintenance of the trust ; and lastly,

(6) that any other relief which from the nature of the case might be deemed just and convenient be granted.

The contesting defendants denied the existence of the trust. They denied that they even entered into possession of the properties as trustees, and set up their own title.

One of the issues framed was, whether the suit was maintainable under S. 92 of the Code of Civil Procedure. No statement of the plaintiffs was taken at the time of the settlement of issues which might have concluded this disputed point. The plaintiffs led their evidence first, and put in Lachman Prasad, one of themselves, as a witness. In the course of his cross-examination Lachman Prasad stated that after the death of Dhi Mal no manager was appointed, and that no one worked as such ; and that the Defendant No. 1 took possession of the properties on behalf of the minor defendant and claimed to be the owner since Dhi Mal's death. After this statement had been recorded, the objection was again raised on behalf of the defendants that the suit was not maintainable. The learned Judge, without recording any further evidence of the plaintiffs, proceeded to dispose of this point. He came to the conclusion that, having regard to the fact that there was only a half-hearted assertion in the plaint as to the defendants acting as managers, and the evidence of Lachman Prasad himself, it was clear that the defendants could not be regarded as constructive trustees. He, in effect, held that the defendants were mere trespassers and that the suit against them under S. 82 was not maintainable. He wound up by ordering that the plaint should be returned for presentation to the proper Court.

As to the procedure adopted by the learned Judge, we may remark that if Lachman Prasad's statement had been taken as part of the oral pleadings, then it would have been conclusive for the purposes of the case. This, however, was not done. His statement on oath was a part of the evidence which the plaintiffs were leading, and we think that the plaintiffs' evidence should not have been stopped after Lachman Prasad's statement had been recorded, especially as there was another plaintiff in the suit and Lachman Prasad might not have been personally aware of all the circumstances under which the defendants took possession.

The obvious defect in the order is that the plaint which has been ordered to be returned for presentation to the proper Court is bound to be thrown out if presented in an ordinary Court of civil jurisdiction. Most of the reliefs claimed in the plaint are reliefs which come expressly under S. 92 of the Code of Civil Procedure, and no suit seeking such reliefs can under clause (2) of that section be instituted otherwise than in accordance with that section. It is, therefore, obvious that the plaint could not have been ordered to be returned merely on the ground that the suit under S. 92 was not maintainable.

What, however, the learned Judge meant to hold was that the defendants were not persons who were either admitting the trust or had at any time entered into possession as trustees *de son tort*, but that they were trespassers who, from the very beginning had been denying the trust and asserting their own title. He, therefore, thought that no suit under S. 92 could be maintained as against them. In support of his view he relied on the case of *Muhammad Bakhsh* v. *Mt. Piari* (1). There can be no doubt that that case to some extent supports his view. Apart, however, from the case relied upon by the learned District Judge, the cases in which a suit against a trespasser has been held not to be covered by S. 92 are, so far as we are aware, all cases in which a person claiming to be trustee or mutwalli has asked for a declaration of his personal right and for the removal of the person in possession of the property : such, for instance, are *Ayatunnissa Bibi* v. *Kulpar Khalifa* (2) and *Dasondhay* v. *Muhammad Abu Nasar* (3). On the other hand, the Bombay High Court has held in *Collector of Poona* v. *Bai Chanchalbai* (4) that where a breach of trust is complained of and where the alienee of trust property

(1) [1921] 19 A. L. J. 236=62 I. C. 744.
(2) [1914] 41 Cal. 749=22 I. C. 677=19 C. W. N. 234.
(3) [1917] 33 All. 660=11 I.C. 26=8 A.L.J. 710.
(4) [1911] 35 Bom. 470=12 I. C. 30=13 Bom. L. R. 690.

denies that it is the subject of a trust, he is a proper party to the litigation, although no decree in ejectment can be given against him.

If the plaintiffs, after their evidence is closed, succeed in establishing that the defendants entered into possession as trustees or have been acting as de facto trustees of these properties, and that the properties are trust properties, then there can be no doubt that the suit would be maintainable. On the other hand, if they altogether fail to establish such a character of the possession of the defendants, even then it seems to us that they have a right to ask the District Judge, in case they prove that the properties are trust properties, to appoint new trustees, because no trustees exist. It is not incumbent on the plaintiffs to first bring a representative suit to recover possession of the properties under O. 1, R. 8, Civil Procedure Code, and then having obtained possession, ask the Judge to appoint trustees for the same. Where either a breach of trust has been committed, or where the direction of the Court is necessary for the administration of such trust, persons interested in the trust can ask the Court to appoint new trustees. After such new trustees have been appointed, it would be open to them to take steps to recover possession of the property from the hands of the trespassers who may hold the properties.

If, therefore, it was open to the plaintiffs to institute the suit under S. 92 for the appointment of new trustees, can it be said that their plaint is defective because they have chosen to implead the defendants who are denying the trust? It seems to us that in a suit under S. 92 it is within the jurisdiction of the Court to first decide the question whether the property in dispute is or is not trust property. If the Court has jurisdiction to decide this question, it is obvious that such a question ought to be decided in the presence of persons who are interested in denying the trust. The defendants are certainly interested in denying the trust, and therefore it cannot be said that they have been improperly impleaded. It is true that they might not have been absolutely necessary parties to the suit, and the suit might have been instituted without impleading them at all; but when they have been impleaded, it is impossible to say that they have been improperly impleaded. Of course it cannot be doubted that, even if it be held that the properties are trust properties and that the defendants are mere trespassers and have no right to retain possession thereof, the Court cannot in these proceedings order their ejectment. But there would be nothing to prevent the Court from declaring that the properties are trust properties, and they vest in the newly appointed trustees.

We are, therefore, of opinion that the order directing that the plaint should be returned cannot be upheld. We allow this appeal and, setting aside that order, direct that the case be sent back to the learned District Judge for disposal according to law.

We direct that the costs of this appeal should abide the event.

Case remanaed.

1925 ALLAHABAD 761

SULAIMAN, J.

Ganga—Defendant—Appellant.

v.

Mahmud-un-nissa Begam—Plaintiff—Respondent.

Second Appeal No. 892 of 1923, Decided on 16th January 1925, against the decree of the D. J., Bulandshahr, D/- 23rd March 1923.

(a) *Civil P. C., S. 11—Decision on a point of law is not res judicata if cause of action is different as in the case of recurring liability—Right to eject a tenant is a recurring liability. Decision in ejectment suit against a tenant is not res judicata.*

A decision on a point of law does not operate as res judicata if the cause of action in a subsequent suit is different from that in the former suit as often happens in the cases of recurring liability; but if the cause of action is the same the decision would be res judicata. The right to eject a tenant accrues afresh every year. Therefore the previous decision that an ejectment suit was not maintainable in a revenue Court cannot operate as res judicata. 32 *Cal.* 749, *Foll.*

Gulzari Lal—for Appellant.

Judgment.— This is a defendant's appeal arising out of a suit for ejectment. Previous to this litigation in 1910 a suit for ejectment in respect of this very plot was fought out between the parties. It was dismissed on the ground that such a suit was not maintainable in a revenue Court. That decision was based on certain rulings of the

Board of Revenue which were then in force. Subsequent to this it appears that the Allahabad High Court, in the case of *Param Hansman Tewari* v. *Dasrathman Tewari* (1), has taken a view that a suit under S. 58 would be maintainable in a revenue Court. This ruling has since been followed by the Board of Revenue. The result is that under the rulings which are now in force the suit is maintainable. The learned advocate for the appellant concedes this.

The Court of first instance, however, dismissed the suit holding that it was barred by the principle of res judicata. It remarked that although the present conception of the law may be different, nevertheless as between the parties the ruling that the suit was not maintainable was final.

The learned District Judge has taken a contrary view. He has held that the principle of res judicata cannot apply to this case. It is obvious that if the plaintiff were to go to the civil Court her suit would be thrown out by the civil Court on the ground that she ought to go to the revenue Court. The civil Court will, of course, not be bound by the previous revenue Court decision and would naturally follow the view of this High Court.

The decision in the previous case turned entirely on an incorrect view of the law. It is true that an issue of law may be res judicata in certain circumstances. The rulings on the point are numerous and some of them are not easily reconcilable, but it may be laid down broadly that a decision on a point of law does not operate as res judicata if the cause of action in a subsequent suit is different from that in the former suit, as often happens in the cases of recurring liability such as maintenance allowance or even ejectment suits. On the other hand, if the cause of action is the same, the decision would be res judicata. This was clearly laid down in the case of *Alemunnisa Chowdhurani* v. *Shama Charan Roy* (2). In the present case the right to eject a tenant accrues afresh every year. Following the Calcutta ruling I, therefore, hold that the previous decision that a suit of this kind was not maintainable in a revenue Court cannot operate as res judicata. It is open to the revenue Court to say that in the correct view of the law which now prevails it has jurisdiction to entertain it.

In these circumstances the suit was rightly decreed. The appeal is accordingly dismissed, but without any order as to costs as no one appears for the respondent.

Appeal dismissed.

(1) [1921] 43 All. 445=60 I. C. 770=19 A.L.J. 292.

(2) [1905] 32 Cal. 749=9 C. W. N. 466=1 C. L. J. 176.

★ 1925 ALLAHABAD 762

SULAIMAN AND DANIELS, JJ.

Prem Narain and *others*—Defendants—Appellants.

v.

Jagdamba Sahai—Plaintiff — Respondent.

First Appeal No. 3 of 1924, Decided on 27th April 1925, from an order of the Addl. D. J., Bareilly.

★ (*a*) *Tort—Defamation—Privilege—Act without express malice—Privilege is not lost because of other defendants' having malicious motives.*

Where some defendants were entitled to claim privilege and acted without express malice.

Held : that they did not lose their privilege because the other defendant may have had malicious motives. [P. 764 C. 1 and 2]

★ (*b*) *Tort — Defamation — Fair Comment—Calling an official who made repeatedly unfounded charges against his follow officials quarrelsome is fair comment—Words used on privileged occasions must not be too strictly scrutinized.*

The personal file of municipal official might be confidential as regards the general public, but in giving an opinion to the Commissioner as to his fitness for further employment, the Municipal Commissioners are not only entitled, but are under a duty to look at his previous record as shown in the personal file. It would be perfectly a fair description of a person who repeatedly makes unfounded charges against, (1) a number of his fellow officials; and (2) other persons, to call him a quarrelsome person; and that it is a fair comment in view of both the incidents together to say that he had earned a notoriety for quarrelsomeness. To submit the language used on privileged occasions to a strict scrutiny, and hold all excess beyond the absolute exigency of the occasion to be evidence of express malice would greatly limit, if not altogether defeat, the protection which the law gives to statements made on such occasions.

(c) *Tort—Defamation—Malice — Statement not going beyond what the occasion warrants—No malice is to be inferred.*

When the statement made does not in any way go beyond what the occasion warrants, and is indeed a statement the truth of which can be inferred from the plaintiff's own allegations no inference of malice can be drawn.

[P 765 C 1]

Peary Lal Banerji—for Appellants.

Narain Prasad Asthana—for Respondent.

Daniels, J.—This is an appeal in a suit for defamation brought by the plaintiff, a peshkar in the employ of the Bareilly Municipal Board, against four members of the Board. The Board had passed a resolution on the 15th of September 1919 that the plaintiff should be removed from service. The Commissioner asked for a further report from the Board before accepting the resolution. The majority of the Board then went back on their previous opinion and recommended the reinstatement of the plaintiff. The four defendants wrote a dissentient note. The dissenting note contains the following passage which is relied on by the plaintiff as furnishing his cause of action:

"who has earned a notoriety for quarrelsomeness, not only by assuming a defiant and insulting attitude before a full house towards a member of the Board (which formed the subject-matter of the case against him), but also by resorting to similar acts while in service under his former employers, but rather had been at the root of much friction lately in evidence in the Board's working."

The learned Subordinate Judge, Babu Govind Sarup Mathur, in an excellent judgment, dismissed the suit, and it is much to be regretted that the District Judge should have been persuaded to disturb his decision. The occasion was obviously privileged, and the Subordinate Judge found that two out of the three statements contained in the alleged libel were fully justified. As to the third, he found that there had been dissension in the Board, and, though there was no actual proof on the record that the plaintiff was responsible for the dissension, he found that it was generally believed, and was believed, in good faith by the defendants. that the plaintiff was responsible. He found, therefore, that the alleged libel was written in good faith in the discharge of a public duty and was not actionable.

The learned District Judge, in an inordinately long judgment, has reversed this decision. It is perhaps indicative of the weakness of the case which the learned District Judge set himself to argue that he should have found it necessary to write a judgment three times as long as that of the trial Judge, though the latter had dealt adequately with all the issues arising in the case. The judgment is so long and contains so much repetition, that it is not altogether easy to reconcile different portions of it and to discover exactly what the learned District Judge means to find. Some passages dealing with the attitude of the defendants towards the Chairman of the Board are quite irrelevant for the purpose of the present suit.

It is quite clear, on the findings of the learned District Judge himself, that there is no case against the second, third and fourth defendants. The learned Judge expressly finds that there is no proof of malice on their part. He thinks that they are liable because they signed the note jointly with the first defendants, whom he finds to have been actuated by malice. It is hardly necessary to say that this is a mistaken view of the law. If the three defendants are entitled to claim privilege and acted without express malice, they do not lose their right because the first defendant may have had other motives. If four persons commit a joint tort, they are no doubt all equally liable, but these three defendants committed no tort at all. They only used language which they were justified in using in the bona fide discharge of a public duty.

There had been some previous enmity between the first defendant and the plaintiff, and on this ground, and because he finds that the defendant has not proved the truth of the statements used, the learned Judge holds that the defendant was actuated by malice. The plaintiff's counsel contends that these are pure findings of fact which conclude the case against this defendant. It is, therefore, necessary to examine how far the learned Judge's conclusions are conclusions of fact and how far they are legal inferences from other facts which he has found. The first part of the alleged libel states that the plaintiff has earned a notoriety for quarrelsomeness from two circumstances. The first of these circumstances

is that he assumed a defiant and insulting attitude towards a member of the Board before a full house. The last sentence is merely a plain statement of fact, the truth of which is accepted by the Court below. The learned Judge's only comment on it is that the incident did not justify the defendants in saying that the plaintiff had earned a notoriety for quarrelsomeness by reason of it. The second circumstance referred to is that the plaintiff had resorted to similar acts while in service under his former employers. It is admitted that this statement rests on a letter of the Assistant Registrar of the Co-operative Societies, under whom the plaintiff was formerly employed, which had been placed on the personal file of the plaintiff in the records of the Board's office. In that letter it was stated that the plaintiff had made reckless and unfunded allegations regarding the probity of various persons, official and non-official, working under the Registrar and had been unable to give a satisfactory explanation of his conduct. The learned Judge's comment on this is twofold. He thinks, in the first place, that the defendants were not entitled to make use of the letter because it was not a public document; and, secondly, he thinks that it does not justify the assertion that the plaintiff committed similar acts or was quarrelsome, because, according to the learned Judge, the acts of which he was accused in the Assistant Registrar's letter were far more serious than those imputed to him in the alleged libel and could have formed the foundation for criminal or civil proceedings. The learned Judge is wrong on both points The personal file might be confidential as regards the general public, but it was part of the official records of the Board, and in giving an opinion to the Commissioner, as to the plaintiff's fitness for further employment, the defendants were not only entitled, but were under a duty, to look at his previous record as shown in the personal file. We have also no hesitation in holding that it is a perfectly fair description of a person who repeatedly makes unfounded charges against a number of his fellow-officials and other persons to call him a quarrelsome person. Nor is it an unfair comment in view of both these incidents together to say that he had earned a notoriety for quarrelsomeness. "To submit the language used on privileged occasions to a strict scrutiny, and hold all excess beyond the absolute exigency of the occasion to be evidence of express malice, would greatly limit, if not altogether defeat, the protection which the law gives to statements made on such occasions." Halsbury's Laws of England, Vol. XVIII, para. 1303.

The learned Judge remarks more than once that the whole object of the note was to prevent the plaintiff from being reinstated as if this disposed of the matter. The learned Judge forgets that an intention to prevent the plaintiff from being reinstated was not necessarily contrary to, and might indeed be identical with, the public duty laid on the defendants. The whole Board had at its previous meeting resolved that the plaintiff should not be reinstated, and the defendants were giving, at the request of the Commissioner, the reasons in support of that resolution.

For the above reasons we hold that the learned Judge's findings as to these two statements are not pure findings of fact, but are vitiated by the erroneous view which the learned Judge has taken of the law.

There remains only the third allegation, namely, that the plaintiff had been at the root of much recent friction in the Board's working. This statement is quite unimportant as compared with the two already considered. A man may easily be a cause of friction without any fault of his own. That there had been friction in the Board's working is found by both Courts, and is undeniable. The trial Court thought that there was no direct evidence of the plaintiff being responsible, and the District Judge, without discussing it separately, draws the further inference that the statement must have been untrue.

It seems to us that it was quite unnecessary for the defendants to offer any formal proof since the fact is not only admitted by the plaintiff, but forms an essential part of his case. From the statement of facts contained in the judgment of the trial Court, which the learned District Judge accepts as correct, it appears that the case which the plaintiff set out to establish was that Sahu Shiam Sundar Lal was elected chairman in the hope that he would prove a dummy, but that owing to the able assistance he received from the plaintiff he was able to

assert his independence and rule the Board, and that this was resented by some of the members and led to the formation of a clique. Another fact which is actually part of the plaintiff's cause of action is that there had first of all been a division of opinion in the Board as to whether the plaintiff should be suspended ; that there had been a subsequent unanimous resolution in favour of his removal ; and that, when the Commissioner raised a technical objection to this resolution there was again a division of opinion as to whether he should be reinstated. These facts alone are sufficient to justify the statement that the plaintiff had been a cau e of friction in the Board's working. When the statement made does not in any way go beyond what the occasion warrants, and is indeed a statement the truth of which can be inferred from the plaintiff's own allegations, no inference of malice can be drawn.

We, therefore, set aside the order of the Court below and restore the decree of the trial Court with costs in this Court and in the Court below.

Appeal allowed.

1925 ALLAHABAD 765

SULAIMAN, J.

Abhainandan Prasad—Plaintiff—Appellant.

v.

Bhagwan Datt Pathak and *another*—Defendants—Respondents.

Second Appeal No. 1174 of 1923, Decided on 26th March 1925, from a decree of Dt. J., Gorakhpur, D/- 29th March 19-3.

(a) *Pre emption—Two properties sold under the same sale deed—One property capable of being pre-empted—Pre-emptor paying (under decree) entire co sideration—Both properties cannot be pre-empted.*

If two properties are sold under a sale deed, one of which is capable of pre-emption and the other is not and the prope ty capable of pre-emption is pre empted, the vendee cannot lose his rights in the property which was not capable of pre-emption. That property must be deemed to remain vested in the vendee. It is immaterial whether the plaintiff did pay the whole or only a part of the total sale considera-tion. It would be open to the plaintiff to ask the Court to apportion the considerati n and reduce the amount in view of the fact that part of the property sold was not being pre-empted, but if for so ne reason or other a pre-empt r omits to do so, and submits to a decree for pre-e nption of a part of the property on payment of the whole amount, that would not destroy the rights of the vendee in the property which had not and could not have been pre e npted. [P. 766 C 1]

(b) *T. P. Act., S. 6 (e)—Past arrears of profits can be sold but not pre-empted.*

Arrears of pr fits which have accrued due already are capable of being sold, but cannot be pre-empted.

(c) *Agra Tenancy Act* (2 *of* 1901), *S.* 165—*Assignee of arrears of profits can sue in revenue Court.*

An assignee of arrears of profits can sue to recover those profits in the Revenue Court.

Sankar Saran—for Appellant.

G. Agarwala—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for arrears of profits. The position has arisen in a curious way. On the 15th of January 19-0 one Ram Samujh executed a sale deed in favour of the plaintiff Rai Bahadur Abhainandan Prasad under which he sold a certain share in village together with the arrears of profits in respect of sir and khudkasht lands due from the co-sharers on account of the previous years 13-4, 13-5 and 13-6 Fasli, for a total sum of Rs. 1,000. A suit for pre-emption was brought by the present defendants with regard to the share sold and was ultimately decreed. The judgment in the pre-emption suit is not on this file, but it is admitted that the decree for pre-emption was with regard to the share and it was on payment of the full consideration of Rs. 1,000.

The plaintiff instituted the present suit in the revenue Court claiming arrears of profits against the co-sharers. The Court of first instance granted the plaintiff a decree, but on appeal the learned District Judge has dismissed the suit. In the first Court a point was raised that the plaintiff being a legal practitioner had purchased an actionable claim, but that objection was overruled by that Court and the matter was not pressed any further, nor has that point been argued before me in this appeal.

The main ground on which the learned Judge dismissed the suit was that under the pre-emption decree the whole of the sale consideration, which had been advanced by Rai Bahadur Abhainandan Prasad had been paid back to him by the pre-emptors who happen to be the

present contesting Defendants Nos. 1 and 2, and the payment "must have the effect of destroying any rights which the plaintiff obtained under that decree." The learned Judge thought that, inasmuch as there remained no consideration for the transfer of the arrears of profits, that right no longer existed.

I am unable to agree with the view taken by the learned Judge. If two properties are sold under a saledeed, one of which is capable of pre-emption and the other is not, and the property capable of pre-emption is pre-empted, the vendee cannot lose his rights in the property which was not capable of pre-emption. That property must be deemed to remain vested in the vendee. It is immaterial whether the plaintiff did pay the whole or only a part of the total sale consideration. It would have been open to the plaintiff to ask the Court to apportion the consideration and reduce the amount in view of the fact that part of the property sold was not being pre-empted; but if for some reason or other a pre-emptor omitted to do so, and submitted to a decree for pre-emption of a part of the property on payment of the whole amount, that could not destroy the rights of the vendee in the property which had not and could not have been pre-empted. It follows, therefore, that if the arrears of profits were capable of being sold separately and were not capable of being pre-empted, and have not been pre-empted, then they remain vested in the vendee quite irrespective of the fact that the vendee has received back the entire consideration which he had originally paid for the sale. The effect of the decree for pre-emption cannot be said to destroy his rights in the arrears of profits which also he had purchased.

I can find no law under which arrears of profits, which have accrued due already, are not capable of being sold. As a matter of fact there is considerable authority for the view that such arrears are saleable.

The main question, however, to consider in this case is whether the assignee of such arrears can maintain a suit in revenue Court for these profits although he has no longer any interest left in the property itself. This question is certainly of considerable difficulty and curiously enough there appears to be no reported case under the new Tenancy Act which has decided this point; at least none has been brought to my notice by counsel on either side.

It cannot be denied that under the old Rent Act there was some divergence of opinion between the Board of Revenue on the one hand and the Allahabad High Court on the other. Although the rulings in either Court were not absolutely unanimous, yet it may be said broadly that the Board of Revenue inclined to the view that assignees of rent or profits can maintain a suit in the revenue Court because such suits were suits for rents or profits and came exclusively within the jurisdiction of the Revenue Court. On the other hand the Allahabad High Court took a strict view of the sections of the Rent Act and held that assignees of such lease or profits were neither landholders nor co-sharers within the meaning of those sections and that their remedy, therefore, lay only in the civil Court.

The learned vakil for the respondents has drawn my attention to the cases collected by Dr. Agarwala under S. 102 in his learned Commentary on the Tenancy Act, and has pointed out that the learned author is inclined to favour the view taken by the High Court in the earlier cases. But the author has had to note that as regards suits brought by assigns of arrears of rent there is a ruling of a single Judge of this Court reported as *Kanhai Ram* v. *Sukh Deo* (1) laying down that a suit was cognizable by the revenue Court only, and not following the cases of the Allahabad High Court under the old Rent Act. Cases of assigns of rent however, may be distinguishable because S. 102 does not specifically use the words "landlord or co-sharers," whereas S. 165 expressly contains the word "co-sharer."

But even as regards the old Act there was a passage in the judgment of the learned Chief Justice in the Full Bench case of *Lekhraj Singh* v. *Rai Singh* (2) to the effect that there was nothing in the Rent Act, so far as it related to suits for arrears of rent, to indicate that the section applied only where the person suing was the person who was the landholder or landlord at the time when the

(1) [1914] 12 A. L. J. 98=22 I. C. 337.
(2) [1892] 14 All. 381=(1892) A. W. N. 143 (F. B.).

rent became due ; nor was there anything in the section to indicate that the person to be sued in a suit for arrears of rent must necessarily be the person who occupied the position of tenant at the time when the rent, the arrears of which were sued for, became due. Knox, J., at page 402 (14 All.) also referred to a number of cases where the revenue Court had been held to have jurisdiction where a rent decree had been purchased from the landlord and the purchaser of the decree found it necessary to continue the litigation in the revenue Court, or where a sharer in possession of his share at the time of his suit was allowed to claim in the revenue Court the profits of his share for a previous period during which he was not in possession.

The present Tenancy Act, however, has a new section, S. 166, corresponding to which there was no section in the old Act. It seems to me that this section was expressly added in order to put an end to this apparent conflict of opinion. Under the new section the word "cosharer" in Ch. XI includes also "the heirs, legal representatives, executors, administrators and assigns of such person." Prima facie it would seem that an assign of a cosharer would be entitled to maintain a suit for settlement of account and his share of the profits under S. 165.

The point which has been pressed before me very strongly is that though an assign of the property of a cosharer has a right to maintain a suit for profits a mere assign of arrears of profits has no such right. The contention is that the person who is suing must have not only acquired the arrears of profits, but must have also acquired the share in the village itself before he can be called an assign of the cosharer within the meaning of Ch. XI. After careful consideration of the various sections I have come to the conclusion that this contention cannot be upheld.

If an assign of a cosharer is suing for profits which have accrued since the assignment then he is not suing as an assign of a cosharer at all, but he is suing as a co-sharer himself for the profits which have accured during the time when he is a shareholder. On the other hand a suit for profits by an assign of a cosharer must of necessity relate to arrears of profits for the period during which the assignor was the cosharer and the assignee was not, and which profits have been transferred to the assignee. This position must be conceded.

It is, however, further contended on behalf of the respondents that there is a distinction between the case where there has been an assignment of profits as well as the property, and the case where there has been an assignment of profits only. It is argued that in the former case the arrears of profits go with the property and, therefore, the assignee may have a right to sue for them : but it is urged that a mere assignee of profits must bring a suit in the civil Court and not in the revenue Court. On principle I am unable to see any such distinction. In the present case, if no suit for pre-emption had at all been brought, it would be difficult to contend that Rai Bahadur Abhainandan Prasad would not have been entitled to maintain a suit for arrears of profits against the other cosharers in the revenue Court in respect of the years prior to his assignment. He would have been suing for a period when he was not a cosharer at all. Nevertheless, his suit was bound to have been decreed. Does it make any difference that subsequent to his assignment he has lost the property, though not the profits, by virtue of the pre-emption decree? In my opinion his right to sue for the profits has not been lost at all, nor has the forum where he can maintain such a suit been altered.

The learned Judge has said that this was the only point argued before him. I have already come to the conclusion that the view taken by him on this point was wrong. I accordingly allow the appeal, and setting aside the decree of the lower appellate Court restore that of the Court of first instance with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

★ 1925 ALLAHABAD 768

SULAIMAN AND DANIELS, JJ.

Firm Shiam Lal Joti Prasad—Plaintiff—Appellant.

v.

Dhanpat Rai and *another*—Defendants—Respondents.

First Appeal No. 36 of 1924, Decided on 23rd April 1925, from an order of the D. J., Aligarh.

★ (a) *Civil P. C., O. 41, R. 20—Appellate Court cannot itself implead a party—It should remand the case for the purpose.*

Under O. 41, R. 20, the appellate Court has no power to implead a person who was no party to the original suit at all: 37 *All.*, 57 *Rel. on.*

If the appellate Court is of opinion that a certain person was a necessary party, and ought to have been impleaded, the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. [P. 768, C. 2]

(b) *Civil P. C., S. 105—Appeal from order impleading a person in appeal does not lie.*

An order impleading a person in appeal is not an appealable order, but can be challenged in the appeal from the order finally passed in the appellate Court.

Panna Lal—for Applicant.

Kailas Naih Katju—for Respondents.

Sulaiman, J.—This is an appeal arising out of a suit for accounts against the defendants on the ground that the amount claimed is due to the plaintiff on account of certain business transactions carried on with the defendants through the plaintiff's servant. The defence was that the plaintiff had nothing to do with those transactions at all, but that the business was carried on between Chhitar Mal and the defendants, and that accounts were settled between them. The defendants said that they subsequently discovered that the plaintiff claimed to be a partner. The defendants, however, pleaded that Chhitar Mal should be impleaded as a pro forma defendant in the suit.

The Court of first instance framed an issue (No. 4) as to whether Chhitar Mal was or was not a necessary party. After examining the evidence and the statement of Chhitar Mal, who was examined as a witness, the Court came to the conclusion that the story about Chhitar Mal's interest in the business had been concocted to defraud the plaintiff. It also remarked that the evidence shows that Chhitar Mal and the defendants had collusively divided the sale proceeds of the goods in dispute half and half between them in order to deprive the plaintiff of his money. Having come to this conclusion, it was of opinion that Chhitar Mal was not a partner of the plaintiff in the goods in dispute and was not a necessary party.

The claim was accordingly decreed against the defendant.

The defendants in their appeal to the District Judge inter alia took the ground that Chhitar Mal ought to have been impleaded. The learned District Judge first passed an order without giving any reasons in detail directing that Chhitar Mal should be impleaded as a respondent in the case. After this was done, notice was issued to him. When he appeared on the date fixed for hearing of the appeal, he naturally applied to the Court for permission to file a written statement in order to contest the claim. The learned Judge thought that, as he had had no opportunity to file a written statement and to produce his evidence, he ought to be given an opportunity to do so. He accordingly set aside the decree of the Court of first instance and remanded the case for re-trial.

We are of opinion that the trouble has arisen owing to the irregular way in which Chhitar Mal was impleaded. Under O. 41, R. 20, Civil P. Code, the appellate Court has power to implead in the appeal a person who was a party to the suit, but who has not been made a party to the appeal; but under that rule a Court has no power to implead a person who was no party to the original suit at all, vide *Pachkauri Raut* v. *Ram Khilawan* (1). The learned Judge seems to have invoked the aid of the general S. 107 (Civil Procedure Code), but that gives an appellate Court powers, generally speaking, as a trial Court. In our opinion, if the learned District Judge was of opinion that Chhitar Mal was a necessary party and ought to have been impleaded, the proper procedure for him was to remand the case to the Court of first instance with a direction that that Court should implead Chhitar Mal and then proceed to dispose of the case. It is obvious that by impleading Chhitar

(1) [1915] 37 All. 57=26 I. C. 25=12 A. L. J. 1277.

Mal in the appeal the inevitable result was that the case had to be tried de novo as Chhitar Mal had never had an opportunity to contest the claim.

On the merits we are of opinion that the order as it stands cannot be upheld. The plaintiff never admitted that Chhitar Mal had any concern in this business. The Court of first instance has distinctly found that he was not a partner at all and that the defendants had divided the sale proceeds between themselves and Chhitar Mal in order to defraud the plaintiff. If the defendants acted collusively, it is obvious that they cannot complain if a decree is passed against them on a finding that Chhitar Mal had no concern in the business at all. On the other hand it is conceded by Mr. Panna Lal that if the finding were that the defendants in the honest belief, that the only person with whom they had to deal was Chhitar Mal, had settled accounts with him, and paid over the amount due to him, then the plaintiff would have no case against the defendants. It seems to us, therefore, that this appeal ought to have been disposed of on the merits.

We may mention that the order impleading Chhitar Mal in the appeal was not an appealable order, but we think that it is open to the present appellant to challenge that order in the appeal which has been preferred from the order finally passed by the lower appellate Court. As we have already indicated, that order was wrong and should not have been passed.

We accordingly allow this appeal, and setting aside the order of the lower appellate Court send the case back for restoration to its original number and disposal according to law.

We direct that the costs of this appeal should abide the event. The costs in this Court will include fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 769

MUKERJI, J.

Bahoru and *others*—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision No. 711 of 1924, Decided on 6th January 1925, from an order of the S. J., Meerut, D/- 14th November 1924.

1925 A/97 & 98

Criminal Trial—Defence witness produced by one accused cannot be used by prosecution against others.

The evidence of a defence witness produced by one accused cannot be treated as prosecution evidence against other accused. [P 769 C 2]

G. W. Dillon—for Applicants.

Asstt. Govt. Advocate—for the Crown.

Judgment.—Three persons, Bahoru, Naharya, and Kehri have applied in revision against their conviction and sentence under S. 363 of the Indian Penal Code, which conviction was had in the Court of a Magistrate of the First Class and was upheld by the learned Sessions Judge on appeal.

The story for the prosecution briefly is this : A minor girl of 12 was living with her father-in-law and was removed from her home at the instance of one Mt. Khizani. The appellants and one Sis Ram were waiting for the appearance of the girl and Mt. Khizani had joined their company when they came out. The evidence, if believed, would, no doubt, be sufficient for conviction. But the learned Sessions Judge has found that there were two witnesses on the point, and they were Dhara Singh and Tikam Singh. The learned Judge was not disposed to believe these witnesses because he found that they were relations of Sis Ram and were inclined to shield him. But what to the mind of the Judge clinched the matter was the fact that a witness for the defence produced by Sis Ram swore that he saw all the three petitioners with Sis Ram and the kidnapped girl in a cart. It is contended, and I think rightly, that the evidence of the defence witness could not be treated as prosecution evidence against the petitioners. If we discard this evidence there is no reliable evidence to connect the petitioners with the kidnapping.

I accept the petition, set aside the conviction and sentence, and order that the petitioners be released forthwith.

Conviction set aside.

1925 ALLAHABAD 770

LINDSAY AND KANHAIYA LAL, JJ.

Shiam Lal—Defendant—Appellant.

v.

Radha Ballabh and *others*—Plaintiffs—Defendants—Respondents.

First Appeal No. 142 of 1922, Decided on 1st June 1925, against the decree of the Sub.-J., Muttra, D/- 30th January 1922.

(*a*) *Civil P. C., S. 11—Point left undecided is not res judicata.*

Where a point is expressly left undecided by the Court in a suit it can be agitated in subsequent suit. [P 771 C 1 & 2]

(*b*) *Co-sharers—One co-sharer making improvements bona fide in the interests of the property is entitled to compensation, though improvements were made without consent of other cosharers—Compensation how assessed, indicated.*

Where a co-tenant spends money and restores a property which is in ruins to a state in which it is of use and can bring in some profit, he is entitled to compensation at the hands of the other co-tenants, though he may not have made the improvements with the consent of the other cosharers, provided he has not made the improvements with a view to embarrass his cosharers at the time of partition. The co-tenant against whom the improvements are charged, will be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements. (Freeman on "Co-tenancy and Partition" *Ref.*) [P 773 C 2]

Asthana—for Appellant.

K. N. Katju—for Respondents.

Judgment.—The subject-matter of the dispute in this case is a three-storeyed house situated in the town of Muttra. On the 20th May 1911, the site of this house and certain materials were sold by two separate deeds of sale. The site of the house was sold to one Ram Chand or Ram Chander who is the own brother of the present appellant Shiam Lal. The materials were sold to a man named Jamna Das and were afterwards sold by him to Ram Chander the man whose name has has just been mentioned. The site was sold for Rs. 400 and the materials for Rs. 250.

Both these sale deeds are printed at pages 21 et seq. of our record. The vendors were Gopal Das and his son Piare Lal. The latter was acting for himself and for his two minor sons.

It appears that after these sales took place Ram Chander re-built the house. Then in the year 1914 a suit was filed by Mitthu Lal and others who were members of the family of Gopal Das. This suit was brought in the Court of the Additional Subordinate Judge of Muttra, on the allegation that the sales made by Gopal Das, his sons and grandsons were not binding inasmuch as the property which had been sold was joint family property. The plaintiffs alleged themselves to be members of a joint family with Gopal Das, and they, therefore, asked that the deeds of the sale might be cancelled and that Ram Chander might be ejected from the premises.

Ram Chander defended this suit and raised a variety of pleas. He denied that the family of the plaintiffs and Gopal Das, his vendor, was a joint family. He denied that property was joint family property and pleaded that he had acquired the whole of these premises from Gopal Das. He set up a defence under S. 41 of the Transfer of Property Act and pleaded moreover that in no case could he be ejected without payment by these plaintiffs of the sum of Rs. 5,000, the amount which he had spent on the re-erection of the house.

This suit was decreed in the Court of the Subordinate Judge of Muttra to this extent, namely, that the plaintiffs were given a decree for joint possession of the premises. That decree was upheld in appeal in this Court by the judgment in First Appeal No. 199 of 1916 which was delivered on the 2nd of January 1919.

Mitthu Lal and his co-plaintiffs having thus got a decree for joint possession, the suit out of which this appeal has arisen was instituted in November 1920 by Radha Ballabh and others, some of the successors-in-interest of the plaintiffs in the earlier suit. The suit is a suit for partition. The learned Subordinate Judge has ordered the sale of the premises and has directed distribution of the sale proceeds according to the shares of the parties. We gather from the judgment of the Court below that Shiam Lal, the defendant-appellant now owns 45/72 of the house. Shiam Lal, it may be mentioned, alleged that in a partition arrived at between himself and his brother Ram Chander this house had fallen to his share.

It further appears that since the date of the earlier suit Shiam Lal or his brother Ram Chander had been buying in some of the shares of the other co-tenants.

One of the claims made by the defendant-appellant Shiam Lal in this suit for partition was that he was entitled to claim from the plaintiffs a sum of Rs. 5,500, on account of improvements which he had made on the property. The Subordinate Judge came to the conclusion that it might be inferred that he had spent a sum of Rs. 5,000 on re-building these premises. Compensation, however, was refused to Shiam Lal on the ground that he and his predecessor Ram Chander were only trespassers and that he laid out the money at his own risk.

It is this finding which is contested here and it is argued on behalf of Shiam Lal that the judgment of the Court below is erroneous. It is said that in these partition preceedings he is entitled in equity to compensation for the money he laid out in restoring these premises.

On the other side it has been argued that this question of compensation is no longer open in view of the findings which were come to in the earlier suit of 1914, to which we have referred.

A copy of the judgment of the Additional Subordinate Judge in that earlier suit is to be found at page 27 of our record. In that case the learned Subordinate Judge was asked to hold that the plaintiffs could not recover possession of the premises without paying to Ram Chander the money which he had laid out in re-building the house. The learned Subordinate Judge refused to decide this question. He stated that at that stage it was not necessary to decide this issue but that subsequently in a partition suit, if the rules of equity would allow, Ram Chander would be entitled to receive compensation for repairs and improvements effected by him.

When the case came up to the High Court the same plea was again raised on behalf of Ram Chander ; and this Court, agreeing with the judgment of the Court below, was of opinion that Ram Chander could not demand that the plaintiffs in that suit should pay him money for compensation as a condition precedent to their getting a decree for possession.

We have considered carefully the judgments in this earlier suit, and we are of opinion that there is no solid foundation for the argument that the question of this claim to compensation as now raised is res judicata between the parties. All that was held in the earlier case was that Ram Chander, who was then in possession of the house, could not insist that the plaintiffs should pay him compensation before they were entitled to get joint possession. It seems to us that the question of any compensation which might be allotted at the time of partition was left open in these earlier proceedings.

We have now to consider what the law is regarding a claim of this kind. We have been referred in the course of argument to a treatise by a learned American author, Freeman on Co-tenancy and Partition. According to this learned author the law is as follows: We quote from para. 509 at page 678 of the book :

"The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a Court charged with the duty of making a partition ..... The law declines to compel one co-tenant to pay for improvements without his authorization : but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises the fruits of his expenditure and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners (whose labour and money have been thus inseparably fixed on the land) so far as can be done consistently with an equitable partition."

Continuing in para. 510 the learned author quotes the opinion of the Supreme Court of the States of New York in the following language :

"Where one tenant-in-common lays out money in improvements on the estate, although the money so paid does not in strictness constitute a lien on the estate, yet a Court of equity will not grant a partition without first directing an account and a suitable compensation. To

entitle the tenant-in-common to an allowance on a partition in equity for the improvements made on the premises it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part, to contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements and their refusal. The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants or encumbering their estate or hindering partition. But if one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made the tenant making the improvements would not be entitled to compensation therefor notwithstanding they may have added greatly to the value of the land because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case the improver stands as a mere volunteer and cannot without the consent of his co-tenant lay the foundation for charging him with improvements."

From the above statement of the principles which govern the award of compensation on partition it is apparent that the real difficulty arises in those cases where, as here, the property is not susceptible of physical division. In the present instance we find that the house in dispute, although of three storeys, is not a large house, and as the cosharers are many it would be quite impossible to make any physical division of the premises and so the learned Judge has been obliged to resort to the provisions of the Partition Act of 1893 and to direct a sale with the further direction that the sale-proceeds are to be divided between the interested parties.

It is laid down in the above statement of the law that it is essential that the person claiming compensation should have acted in good faith. In the present case we think it may fairly be said on behalf of Shiam Lal or his predecessor that he acted in good faith in the sense contemplated; that is to say, he made the "improvements" honestly for the purpose of improving the property and not in order to embarrass the other co-tenants or to encumber their estate or to hinder partition. He had no such object in view: for apparently he was under the impression that by the purchase made in the year 1911 he had become the owner of the whole of the estate. The law as stated in the quotation made above, relates to claims for compensation on account of "improvements." In this present case it is we think possible to say that the matter stands on a somewhat different footing for if carefully examined it seems to us that what have been called improvements in the course of the trial were really repairs. It is clear on all hands that when the appellant's predecessor bought these premises the property was in ruins. There is evidence to show that a long time before the purchase was made the house had been a three storeyed house. When Ram Chander bought in the year 1911 the two upper storeys had disappeared; there was only the lowest storey and that was in ruins; and it is quite clear that as matters then stood, the property was quite useless and unprofitable. It may be mentioned here that Gopal Das and the other members of the very large family to which he belonged did not reside in Muttra; some of them we are told resided in the Aligarh district and others of them at Calcutta; and it seems reasonable to suppose and there is evidence to that effect, that these people, being absentees had neglected these premises and allowed them to fall into decay. We find then that Ram Chander buys these premises in a state of ruin and thereby becomes a co-tenant. He spent a sum of money in reinstating the premises and making them fit for occupation. Having regard to all these circumstances we think that he may fairly be held entitled to some compensation for re-instatement. He has, by the money he has laid out converted this building into something which is of use and which can bring in profit. In the state it stood when he purchased it it was worth little or nothing at all.

We have decided, therefore, that in the circumstances to which we have referred, the defendant-appellant is entitled to some compensation, and we now proceed.

to determine what the amount of that compensation should be.

There is no very definite evidence on this point on the record, but in his own statement, which is to be found at page 11 of the record Shiam Lal stated that he had spent Rs. 5,000 or Rs. 6,000 in restoring these premises. This restoration he said had taken place some ten years before the date on which he was giving his evidence. That would fix the date of the restoration in or about the year 1912. Obviously Shiam Lal was not able to produce any detailed account of his expenditure on these particular premises. It seems from his deposition that at that time he built three other houses as well, and that he had spent some Rs. 25,000 in erecting all four. He called two witnesses, Parbhu Lal and Munshi Abdullah, one of whom is a contractor and the other a sub-overseer, and these men were examined with reference to an estimate which is printed at page 38 of our record and marked Ex. A. It may be mentioned here that both these men were called as witnesses in the earlier suit of 1914 and that this very estimate was produced in that case. Both these men who have some pretensions to be experts, and who drew up this estimate jointly, fixed the costs of re-building these premises at Rs. 5,480. Of course, when all is said and done this is an estimate only. They themselves have no direct knowledge of the money that was actually spent in re-building the house. It was on these materials that the Court below came to the conclusion that in all probability Shiam Lal's predecessor Ram, Chander, had spent about Rs. 5 000 in re-instating the property now in dispute and all things, considered, we are of opinion that the conclusion of the Subordinate Judge is substantially correct. We should therefore be prepared to allow Shiam Lal a sum of Rs. 5,000 by way of compensation, but there is another fact which is to be taken into account and that is that Shiam Lal and his predecessor, so far as we can see have had the exclusive use of these premises for a considerable period. We do not know on the present state of the record whether the plaintiffs who are now seeking partition have received from Shiam Lal any profits accruing since the time when they were admitted to joint possession under the decree of this Courtt. We may refer in this connection again to para. 510 of Freeman's book where, dealing with the question of compensation for improvements, the author says :

" The co-tenant against whom the improvements are charged will, therefore, be charged not with the price of the improvements but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum of which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

We feel, therefore, that we must allow these plaintiffs some set-off on account of the use and occupation of these premises by the appellant and his predecessor. No definite material is to be found on the record ; but we think, having regard to the value which is put upon the premises and to the probable rent which a building of this description would bring in, we shall not be doing the defendant any injustice if we hold that during the period of his occupation he has recouped himself to the extent of Rs. 1,000. Deducting this sum of Rs. 1,000 from the Rs. 5,000 just mentioned, we come to the conclusion that the appellant is entitled to compensation to the extent of Rs. 4,000 from the sale proceeds. The decree of the Court below, therefore, is modified andit is now declared that on sale of these premises the defendant-appellant will be entitled to deduct Rs. 4,000 out of the sale-proceeds. The balance can then be distributed amonst the various co-owners in proportionate shares. As regards costs we leave the parties to pay their own costs in both the Courts.

Decree modified.

★ 1925 ALLAHABAD 773

SULAIMAN AND DANIELS, JJ.

Ganesh Prasad—Applicant.

v.

Bhagelu Ram and *others* — Opposite Party.

Civil Revision No. 65 of 1924, Decided on 4th May 1925, from an order of the Munsif of Azamgarh.

★ *Civil P.C., Ss.* 141, 151 *and O.* 9—*Restoration applica ion dismissed for default — Application to restore is entertainable—Civil P. C., S.* 151.

Where an application for setting aside dismissal of a suit for default was itself dismissed for default and a subsequent application was made to restore it :

Held ; *Per Daniels, J.*—That O. 9 read with S. 141, applied to the case, and that if there was no other remedy left to the applicant, S. 151 applied. [P. 774, C. 1 & 2]

Per Sulaiman, J.—That though it could not be said that the case came under O. 9 read with S. 141, S. 151 applied and the Court could entertain the application under its inherent jurisdiction. [P. 775, C. 1]

Peary Lal Banerji—for Applicant.

Narain Prasad Asthana—for Opposite Party.

Daniels, J.—This is an application in revision against an order restoring an application for restoration dismissed for default. I need express no opinion as to whether a revision lies, because we consider that in any case the application fails on the merits but I may note that in *Sheik Kallu* v. *Nadir Baksh* (1) a Bench of this Court held that no revision lay against an order restoring the case, because the order was not a final order. The suit had been dismissed for default. The plaintiffs applied to have it restored. That application was also dismissed for default. They then presented an application to the effect that they had been prevented from attending on the date fixed and asked for their restoration application to be restored. It was restored on payment of Rs. 5 costs to the opposite party. The defendant in revision contends that if such an application has been dismissed ex parte more than thirty days after the date of the decree, the plaintiffs are left without a remedy. He relies on the decision *Pitambar Lal* v. *Dodee Singh* (2). I notice that in the case relied on, though the learned Judges held that O. 9, R. 9, did not apply they nevertheless refused to interfere. In Oudh I have followed the view which is also taken by the Calcutta and Punjab High Courts, that O. 9 read with S. 141, Civil P. C., can be applied to these proceedings. I may refer to the following authorities : 9 O. L. J. 627 ; 44 Cal. 950 ; and 1 Lah. 329. There may be special reasons why O. 9 should be held inapplicable to execution proceedings, but I can see none for not applying to a proceeding of this kind. The question of appeal is not to my mind an objection. If O. 9 does not apply then as *Pitambar Lal* v. *Dodee Singh* (2) and the judgment which it follows show the Courts have great difficulty in devising a suitable remedy. S. 151 provides an emergency power which it ought not to be necessary to resort to in a class of cases which are of every day occurrence as these are. But even if O. 9, R. 9 does not apply, I am not prepared to hold that, if a party prosecuting a restoration application is genuinely prevented from appearing, he is left without a resource. To hold this might be to work great injustice. A man might, for instance, accidentally break his leg on the way to Court.

If the view contended for by the applicant is correct, this accident would lead to his suit remaining irrevocably dismissed. The attention of the learned Judges who decided *Pitambar Lal* v. *Dodee Singh* (2) was not directed to S. 151, Civil P. C. If there is no other remedy we think that that section will apply in a case such as this.

We accordingly refuse to interfere and reject this application with costs including fees on the higher scale.

Sulaiman, J.—I concur in the proposed order. I would only like to add a few words with regard to the cases which have been cited before us. In the case of *Bipin Behari Shaha* v. *Abdul Barik* (3) the learned Judges of the Calcutta High Court considered that a second application for restoration of a case dismissed for default could be treated as an original application for setting aside the dismissal. If the decision merely meant that such an application for setting aside a dismissal can be filed regardless of the fact that a previous application has been dismissed, then all that I would say is that point does not arise before us. If, however, it was intended to be laid down that an application for the restoration of an application for setting aside the dismissal does for all purposes come under O. 9, then it would be difficult to accept that view ; for that may give the person whose application is dismissed a right of appeal under O. 43 which is not expressly provided. In the case of *Chandar Sahai* v.

(1) 1922 All. 441=19 A.L.J. 907.
(2) 1924 All. 503=46 All. 319=22 A.L.J. 191=5 L.R.A. Civ. 226.
(3) [1916] 44 Cal. 950=21 C. W. N. 30=35 I.C. 613=24 Cr. L. J. 446.

Durga Prasad (4), I have held that no such appeal lies. The Patna High Court in the case of *Ramgulam Singh* v. *Sheo Deonarain Singh* (5) held that an application for restoration of an application under O. 9 for setting aside an ex-parte decree, which had been dismissed for default, did not lie under that order. That view is correct. But when the learned Judges go on to say that the only remedy open to the aggrieved party was to appeal against the original order made under O. 9 it is difficult to accept that view; for it seems to me that there would be a remedy by applying to the Court to invoke its inherent jurisdiction to set aside the dismissal of that application. S 151, Civil P. C., was not considered by those learned Judges. I fail to see why a Court cannot, on good cause shown, restore an application for setting aside a dismissal for default or an ex parte decree, which application itself has been dismissed for default. In the case of *Pitambar Lal* v. *Dodee Singh* (2) it was conceded O. 9, R. 9, was not applicable to such an application, but that application was treated as being itself an original application for setting aside the ex parte decree. This last point does not arise in this case. I would not say that an application dismissed for default falls directly under O. 9 because of the provision of S. 141; but I would say that such an application is entertainable under the inherent jurisdiction which the Court possesses under S. 151, Civil P. C. It is easy to conceive of great hardship if this view is not to be accepted; for the dismissal of the application may take place long after the period fixed for getting the dismissal of the suit set aside has expired, in which case no useful purpose would be served by treating a fresh application as being itself an original application under O. 9. I am accordingly unable to hold that the Court below had no jurisdiction in restoring the application or that there has been any material irregularity in the exercise of its jurisdiction.

Application rejected.

---

(4) 1924 All. 682=46 All. 538=22 A.L.J. 427=5 L. R. A. Civ. 331.
(5) [1919] 4 P.L.J. 287=51 I.C. 152.

1915 ALLAHABAD 775

SULAIMAN, J.

Dungar—Defendant--Appellant.

v.

Jahangir and *others*—Plaintiffs--Respondents.

Second Appeal No. 886 of 1923, Decided on 16th January 1925, against a decree of Addl. D. J., Meerut, D/- 17th February 1923.

(a) *Agra Tenancy Act*, (2 *of* 1901), *S.* 10 (1)—*Gift of sir land—No ex-proprietary rights are created.*

Under S. 10 (1) no ex-proprietary rights are created where there is an alienation by gift whether the gift is between the co-sharers or in favour of a stranger. If the transfer is by way of a gift the sir must retain its character in the hands of the donee. [P 776 C 1]

(b) *Agra Tenancy Act* (1901), *S.* 194—*Sir and khudkhast in exclusive possession of a cosharer and let out by him—Suit to eject the sub-tenant—Other cosharers are not necessary parties.*

Where certain plots of land have been the exclusive sir and khudkhast of a cosharer for more than twelve years and are let out to a sub-tenant who is the exclusive co-tenant of such cosharer, the latter is by himself entitled to eject the sub-tenant without impleading persons who though cosharers in the khewat of the mahal have no interest in the particular plots. [P 776 C 1]

(c) *Hindu Law—Joint family — Maternal uncle and sister's son do not form one.*

There is no rule of Hindu Law under which a daughter's son and his maternal grandfather are deemed to be members of a joint Hindu family. [P 776 C 2]

A. Sanyal, P. L. Banarji and *G. S. Apte*—for Appellant.

N. C. Vaish—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for ejectment. The Courts below have decreed the claim.

The lower appellate Court has found that the plots in suit were sir and khudkhast of more than 12 years standing belonging to Man Singh exclusively, and that the defendant who is a daughter's son of Man Singh was recorded in the papers as a sub-tenant and has actually been paying rent as such to Man Singh. Man Singh gifted these plots to the plaintiffs-respondents who according to the Judge obtained mutation of names in their favour on the 3rd of August 1921.

The first point raised is that after the transfer in 1921 Man Singh became ex-proprietary tenant and that, therefore, the plaintiffs have no right to eject the

defendant, a sub-tenant, but that the only person who can eject would be the ex-proprietary tenant. This point was never raised in either of the Courts below at all. The reason obviously is that the point is altogether futile. The transfer in question was by way of a gift to the plaintiffs. Under S. 10, sub-Cl. (1) no ex-proprietary rights are created when there is an alienation by gift. It has been contended before me that that exemption is confined to cases where the gift is between cosharers in the mahal. I am unable to accept this contention. Gift is not confined to that between cosharers, but it is only exchange which is so confined. This was the view expressed by the Board of Revenue in the case of *Elahi Bux* v. *Nand Kishore* (1). I fully agree with the view expressed in that case. If the transfer is by gift the sir must retain its character in the hands of the donee.

The next point taken is that the plaintiffs have no locus standi to sue alone. It is urged that under S. 194 of the Tenancy Act the other cosharers in the village ought to have been impleaded. There is absolutely no force in this contention. The learned Judge has pointed out that these specific plots belonged to Man Singh and that the plaintiffs-respondents have acquired these specific plots from the person who had exclusive possession of them as his sir and khudkasht for more than 12 years, and that the plaintiffs-respondents are the owners of these plots. The mere fact that there are other cosharers in the same mahal does not give them any right or interest in these specific plots. The defendant is the exclusive tenant of the persons to whom these specific plots belong and these latter persons by themselves are entitled to eject him. It is wholly unnecessary to implead persons who though cosharers in khewat or the mahal, have no interest in these specific plots. There was, therefore, no defect of non-joinder in the suit.

The third point raised is that the learned Judge was wrong in finding that the defendant and Man Singh were not members of a joint Hindu family. I am unable to appreciate the significance ofthis plea. Dungar is the son of a daughter of Man Singh. The daughter of Man Singh cannot in law be deemed to belong to Man Singh's joint family after she has been married away to another family. Her son does not belong to Man Singh's joint family. There is no rule of Hindu Law under which a daughter's son and his maternal grandfather are deemed to be members of a joint Hindu family.

Lastly it is urged that there is no evidence to support the finding of the learned Judge that these specific plots were transferred by Man Singh to the plaintiffs. There was no plea taken in the grounds of appeal that there is no such evidence on the record. Had such a plea been taken it would have been the duty of the counsel for the appellant to examine the record beforehand and certify that such a plea was well-founded. The respondents' counsel cannot be taken by surprise at a late stage when the appeal is called on for hearing. I cannot allow this plea to be taken. I may also mention that Mr. Sanyal is not even at this moment prepared to certify that such a ground is well-founded. What he really asks is that he may be given half an hour's time to inspect the record to enable him to certify the plea. I cannot allow this.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) [1915] 31 I. C. 906.

1925 ALLAHABAD 776

MUKERJI, J.

Lodai Ram—Plaintiff—Appellant.

v.

Sukhdeo Koeri and *others*—Defendants—Respondents.

Second Appeal No. 1139 of 1923, Decided on 6th March 1925, from a decree of the Sub.-J., Jaunpur, D/- 12th April 1923.

(a) *Agra Tenancy Act, S. 79—Grove is not a holding—Dispossession by zamindar for 6 months does not take away grove-holder's right.*

A grove is not a holding within the meaning of S. 79 and, therefore, dispossession of the grove-holder by the zamindar of a portion of the grove for six months cannot take away the grove-holder's right. [P 777 C 1]

(b) *Landlord and Tenant—Grove—Grove-holder does not lose his right simply because of falling down of trees which occupied a portion.*

Ordinarily, a grove-holder does not lose his title as grove-holder on a portion of the land which was once occupied by trees simply because the trees have fallen down. 32 *I. C.* 368; 42 *All.* 634, *Foll.* [P 777 C 1]

Haribans Sahai—for Appellant.

Manmohan Banerji—for Respondents.

Judgment. — This appeal must be allowed. The plaintiff and the Defendants Nos. 2 to 4 were the holders of a grove bearing number 311. The zamindars, by a partition among themselves, divided the site of the grove, and a portion of it described in the patwari's papers as No. 311/2/2 was given to a cosharer. He leased out this portion of the land to the Defendant No. 1 who has since died and is now represented by his heirs. The plaintiff brought the suit, out of which this appeal has arisen, for recovery of possession from the lessee.

The Court of first instance decreed the suit. The lower appellate Court held that although Plot No. 311 was undoubtedly the grove of the plaintiff the trees had been, for a long time, falling down, and ultimately only 14 trees were left standing on the land, and that a portion of the grove having been leased out by the zamindar to the principal defendant, and the principal defendant having occupied the land for more than six months, the plaintiff's right to the land had become extinguished.

On this finding the learned Judge dismissed the suit.

The learned Judge's judgment goes counter to the Privy Council case of *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (1). A grove is not a holding within the meaning of S. 79 of the Tenancy Act and, therefore, dispossession of the grove-holder by the zamindar of a portion of the grove for six months cannot take away the grove-holder's right,

It is nobody's case that the grove-holder gave up his rights in that portion of the grove on which no tree any longer stands and a separate engagement came into existence between the grove-holder and the landlord. Ordinarily, a grove-holder does not lose his title as a grove-holder on a portion of the land which was once occupied by trees simply because the trees have fallen down. This was held by me in Second Appeal No. 794 of 1923 [*Chedan* v. *Mahbub Ali*] following an Oudh case decided by Mr. Justice Kanhaiya Lal as Judicial Commissioner of Oudh, vide *Har Sahai* v. *Dhanpal Singh* (2). The same principle follows from the case of *Chokhey Lal* v. *Behari Lal* (3).

Assuming, therefore, that the principal defendant was in possession of the land in suit for nine years, the plaintiff-appellant's right had not been extinguished, the period being less than 12 years.

I allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The respondents must pay the appellant's costs in this Court and in the Court below.

Appeal allowed.

(1) 1924 P. C. 247=46 All. 831=51 I. A. 381=23 A. L. J. 168=27 Bom. L. R. 130=40 C. L. J. 461=47 M. L. J. 824=21 M. L. W. 295=6 L. R. P. C. Rev. 1=29 C. W. N. 606 (P. C.).

(2) [1916] 2 O. L. J. 589=32 I. C. 368.

(3) [1920] 42 All. 634=60 I. C. 115=18 A. L. J. 820.

1925 ALLAHABAD 777

SULAIMAN AND DANIELS, JJ.

Mt. Saliman and *another*—Defendants—Applicants.

v.

Abdul Aziz and *others*—Plaintiffs—Opposite Parties.

Civil Revision No. 101 of 1924, Decided on the 6th May 1925, from an order of the Judge, Small Cause Courts, Allahabad.

(a) Civil P. C., O. 47, R. 3—In revision against order granting review of judgment plea that review application was not accompanied by copy of decree and Court-fee was insufficient is not valid.

Where in revision against an order granting a review of judgment it was objected that the review application was not accompanied by a copy of the decree and the Court-fee paid was insufficient.

Held: that after the whole matter had been gone into and finally decided the High Court would not treat the proceedings as a nullity in revision on either of the grounds. [P. 778, C. 1]

Ambika Prasad—for Applicant.

Anant Prasad and *Sehat Bahadur Lal*—for Opposite Parties.

Daniels, J.—This is an application in revision from an order granting review of judgment. The facts of the case are as follows: The application was originally presented to the Munsif as an application under S. 151 of the Code of Civil Procedure and was allowed. The application was presented immediately after the decision of the case. The Munsif informed the vakil of the present applicants of the application but he said that as his clients had gone away he could not make any submission with regard to it. The application was, however, as already stated, allowed and the

decree modified. The defendants went in appeal to the District Judge. The District Judge considered that the application was not really one under S. 151 but was in substance an application for review of judgment. He directed that it should be treated as an application for review of judgment, and sent it back to the trial Court for decision according to law. The matter was then heard in presence of both parties and eventually the review was granted in favour of the plaintiffs. The defendants have now come in revision to this Court.

There is a certain preliminary difficulty in the way of this application in that it cannot be said that the learned Judge acted without jurisdiction or with material irregularity or illegality in the exercise of his jurisdiction and while the order of the Munsif which is attached has merged in the order of the appellate Court. The applicants, however, contend that this question is concluded in their favour by the Full Bench decision in the case of *Badami Kuar* v. *Dinu Rai* (1). Assuming, however, that the revision lies it cannot in our opinion succeed. The first contention of the applicants is that they had no notice of the application. It is difficult to say how this contention can be seriously maintained in view of the fact that the order that the application should be treated as one for review, was passed on an appeal filed by themselves. Their second objection is that if the order of the application is treated as being an application for review only from the date of the appellate Court it would be time-barred. The answer to this is that the appellate Court directed that the application should be treated as having been from the beginning in substance an application for review and not an application under S. 151. The third and last objection is that the application was not accompanied by a copy of the decree and that sufficient court-fee was not paid upon it. When the whole matter has been gone into and finally decided this Court will not treat the proceedings as a nullity in revision on either of these grounds. We accordingly dismiss the application with costs.

Appeal dismissed.

(1) [1886] 8 All. 111=(1886) A.W.N. 28 (F. B.)

★ 1925 ALLAHABAD 778

SULAIMAN AND DANIELS, JJ.

Mt. Sarvi Begam—Objector—Appellant.

v.

L. Ram Chander Sarup—Decree-holder—Respondent.

First Appeal No. 109 of 1924, Decided on 23rd April 1925, from an order of the Sub. J., Meerut.

★ (*a*) *Civil P. C., O.* 21, *Rr.* 89 *and* 90—*Application under R.* 89 *heard and disposed of—Application under R.* 90 *is not barred.*

The proposition that an application under O. 21, R. 89, having been heard and disposed of an application under O. 21, R. 90 is not maintainable does not necessarily follow from sub-Cl. (2) of R. 89. [P. 779, C. 1]

★ (*b*) *Lim. Act., S.* 18—*Execution proceedings concealed from judgment-debtor from the beginning—Right to apply to set aside the sale accrues only when he becomes aware of the proceedings.*

If owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale is withheld from the judgment-debtor, then so long as he does not come to know of the sale the effect of the fraud continues and the only conclusion which can be drawn is that he had been kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. It is only after he becomes aware of the sale that he comes to know of his right to apply. [P. 779, C. 2]

Kailas Nath Katju—for Appellant.

Kailas Chandra Mital—for Respondent

Daniels, J.—This is an appeal from an order refusing to set aside a sale on the ground of fraud. The learned Judge has dismissed the application on two grounds : (1) that in view of a previous application under O. 21, R. 89, having been made and pressed, the present application was not maintainable ; and (2) that the allegations contained in the application were not sufficient to bring the case within S. 18 of the Indian Limitation Act. The learned Subordinate Judge without allowing the appellant any opportunity to prove the allegations made by her in the application has dismissed the application after hearing arguments only.

In execution of a decree, as well as for some further amount of which the decree-holder claimed that he was entitled to a refund, the property in question was put up for sale and sold on the 21st of January 1924. No application under O. 21, R. 90, was made by the judgment-debtor

within 30 days of this date ; but, on the 19th of Feburary 1924, she put in an application under O. 21, R. 89, praying that the sale be set aside on payment of the decretal amount, the costs etc. It so happened that the amount deposited by her was short by a few rupees. The matter was argued, and on the 1st of March 1924, she filed a supplementary application offering to make good the balance. This application was refused. While the application was still being argued another application under O. 21, R. 90, was filed which was registered after the application under O. 21, R. 89, had been dismissed.

The learned Subordinate Judge was of opinion that inasmuch as the applicant did not withdraw her application under O. 21, R. 89, but pressed it seriously, and as it was ultimately dismissed on the merits, it must be presumed that she had withdrawn her application under O. 21, R. 90. This is based on the provision contained in O. 21, R. 89, sub-Cl. (2), under which it is provided that where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under R. 89. It seems to us that the Court ought to have called upon the applicant's counsel to make his election either to withdraw her application under R. 90 or not. If he declined to do so the Court should not have allowed him to press his application under O. 21, R. 89. But from the fact that he was not called upon to make his choice it would be too much to presume that he withdrew his application under R. 90, particularly when the order sheet shows that the application was argued at length and the judgment was not pronounced on that date merely because it was too late. In our opinion the converse proposition that an application under O. 21, R. 89, having been heard and disposed of, an application under O. 21, R. 90, is not maintainable does not necessarily follow from sub-Cl. (2) of R. 89.

As to the second point the learned Judge says that the allegations of fraud in the application are too general, and it is not alleged that the decree-holder kept the judgment-debtor from the knowledge of the fraud entitling her to make an application under O. 21, R. 90. This in our opinion is not at all correct. In para. 2 of the application the judgment-debtor alleged that the decree-holder cunningly and fraudulently kept all the execution proceedings concealed from the petitioner from the very beginning, and all the notifications to the petitioner were caused by the decree-holder to be issued to her under a wrong address which was deliberately and intentionally filed in order to conceal the proceedings, and entirely fictitious reports of service, with names of fictitious persons as witnesses were caused to be made in collusion with the process-server. She repeats the allegation as to false address in para. 3. and she repeats her allegation of the concealment of these proceedings in para. 4, and finally in para. 12 she says that the petitioner had no knowledge whatsoever of the proceedings till the 15th of February 1924, and that she remained in the dark owing to the deception practised by the decree-holder.

It is urged by the learned vakil for the respondent that, even if there was a fraudulent concealment of the proceedings by the decree-holder up to the time of sale, this does not entitle her to claim the benefit of S. 18 of the Limitation Act. The contention before us has been that it is necessary for the petitioner to allege and prove that after the sale, when the right to apply accrued, there was some fraud practised by the decree-holder, which kept her right to apply concealed from her. It seems to us that this contention is not sound. If it be assumed that, owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale was withheld, from the petitioner, then, so long as she did not come to know of the sale, the effect of the fraud continued, and the only conclusion to which we can come is that she had been kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. It is only after she became aware of the sale that she came to know of her right to apply. Her case is that she did not come to know of this right earlier because of the fraud originally practised by the decree-holder.

We accordingly allow this appeal, and, seting aside the order of the lower Courts send the case back to that Court for

disposal according to law. Costs of these proceedings will abide the result. The costs in this Court will include fees on the higher scale.

Appeal allowed.

1925 ALLAHABAD 780

MUKERJI, J.

Durga Prasad-Badri Prasad—Applicant.

v.

The Bombay Baroda and Central India Railway—Opposite Party.

Civil Revision No. 204 of 1924, Decided on 16th February 1925, from an order of the Small Cause Court Judge at Cawnpore.

Limitation Act, Art. 31—Non-delivery of goods by Railway—Limitation starts when delivery is expected.

When in a suit for compensation for non-delivery of goods brought against a Railway company there is nothing to show that the plaintiff was being put off from seeking his remedy on account of any conduct of the defendant, Art. 31, applies to the case. 33 *All.* 543, *Foll*; 1923 *All.* 22, *Dist.* [P 780 C 2]

St. C. Thompson—for Applicant.

Ladli Prasad Zutshi—for Opposite Party.

Mukerji, J.—This application in revision arises out of a suit instituted in the Court of Small Causes at Cawnpore for recovery of compensation for non-delivery of goods consigned. The suit was dismissed on the ground of limitation and the question is whether the decree of the Court below was incorrect. It appears that on the 27th July 1922, a bale of cotton goods was consigned to the opposite parties for delivery at Cawnpore. The plan recites that on the 21st of Agust 1922, the plaintiffs sent their man to take delivery of the goods who paid the freight, handed over the railway receipt and obtained a gate pass in order that he might remove the goods. When, however, the goods were to be actually removed they were found missing. On these allegations the suit was brought for compensation. In paragraph 7 of the plaint the cause of action was stated to have arisen on the 21st August 1923. It appears to me that this date viz., 21st August 1923, is merely a slip for 21st August 1922, the date mentioned in paragraph 3 of the plaint. It is, however, immaterial for my purpose whether the date given in paragraph 7 of the plaint is the correct one or not. It is common ground that Article 31, Schedule 1 of the Limitation Act applies to the case. If that be so, the limitation begins to run from the date when goods ought to be delivered on the 21st August 1922 the date mentioned in paragraph 3 of the plaint. The suit was not filed till the 10th December 1923, that is to say, some sixteen months after the date on which the parties expected the goods to be delivered. On the face of it, therefore, the suit was barred by time. The learned counsel for the applicants has relied on a two Judge case decided by this Court viz., *Jugal Kishore* v. *G. I. P. Railway* (1). On the facts of that case the learned Judges of this Court held that the defendant Company had been putting off the plaintiff with assurances that they were making an enquiry for the goods and were hoping to find them and to deliver them. The learned Judges, therefore, found that they were unable to say that the goods ought to have been delivered more than one year before the institution of the suit. The case was really decided on the peculiar facts involved therein and does not lay down any general rule of law.

Mr. Thompson sought to argue that in this case also correspondence was going on between the parties and that some subordinate officers of the opposite parties were making reports to their superior officers. Most of the documents referred to by the learned counsel are not on the record and there is nothing in the judgment of the Court below to show that the plaintiffs were being put off from seeking their remedy by suit on account of any conduct of the opposite parties. In the circumstanees the plain rule of law as laid down in Article 31 of the Limitation Act and as laid down in the two Judge case of *G. I. P. Railway* v. *Ganpat Rai* (2) applies. The application is dismissed with costs.

Appeal dismissed.

---

(1) 1923 All. 22=45 All. 43=20 A. L. J. 792.
(2) [1911] 33 All. 544=10 I. C. 122=8 A. L. J. 543.

1925 ALLAHABAD 781

MEARS, C. J. AND PIGGOTT, J.

Ranjit Singh--Plaintiff--Appellant.

v.

Ramman Singh and *another*--Defendants--Respondents.

Letters Patent Appeal No. 4 of 1923, Decided on 2nd January 1925, against the judgment of Ryves, J., D/- 5th December 1922.

Hindu Law—Alienation—Father-Joint family property sold in execution of decree against father —Son can avoid sale only by proving debt, for which decree was passed, to be immoral.

Where joint family property is sold in execution of a money decree obtained against the father alone, the son cannot get rid of the sale without proving that the debt in respect of which the decree was obtained had been incurred by his father for what the Hindu Law would call an immoral purpose. 13 *Cal.* 21 and 1924 *P. C.* 50, *Foll.* 1924 *All.* 11 and 1924 *All.* 169 *Ref.*

[P. 781, C. 2]

Tej Bahadur Sapru, J. M. Banerji, K. N. Katju and *Shiva Prasad Sinha*—for Appellant.

St. C. Thompson—for Respondents.

Judgment.--The suit out of which this appeal arises was one, the essential purpose of which, as rightly remarked by the learned District Judge before whom the suit came in first appeal, was to set aside an alienation of joint family property. This alienation had taken place by way of a sale in execution of a simple money decree obtained against the father alone. It is true that the son endeavoured to improve his position by bringing his case into Court in the form of a suit for partition of joint family property; but he asked the Court to treat the property sold at auction as part of the joint family property still capable of division between him and his father, and to assign the whole of it to the father's share. In effect this was asking the Court to hold that the auction-sale was void as against the son, or, at any rate, to the extent of the share which he would take on partition in the property sold. Now, it has been conceded before us in appeal that, on the principles laid down by their Lordships of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohan* (1) re-affirmed recently in the case of *Brij Narain Rai* v. *Mangla Prasad* (2), the son could not succeed in this suit without proving that the debt in respect of which a decree was obtained and the joint family property brought to sale had been incurred by his father for what the Hindu Law would call an immoral purpose. The Court of first instance seems to have held on the evidence that the father had borrowed this money for an immoral purpose; but the learned Subordinate Judge went on to hold that the auction-purchaser defendant had taken the property in good faith for valuable consideration and without any knowledge of the immoral taint attaching to the father's transaction. On this ground the trial Court passed a decree for partition, but in a form which virtually negatived the claim of the plaintiff to have the sale set aside. The learned District Judge in appeal re-considered the evidence regarding the immoral nature of the debt. It has been one of the principal matters of controversy in this Court as to what the learned District Judge intended to find, and actually did find, on this point. At the end of its judgment, however, the lower appellate Court definitely agrees with the trial Court that the auction-purchaser had no notice of the immoral nature of the debt, if it was in fact immoral, and had acted in good faith. On this express ground the learned District Judge dismissed the appeal before him and affirmed the decision of the trial Court. There was a second appeal which came before a single Judge of this Court for disposal, and the learned Judge of this Court has based his decision wholly upon the view taken by him as to the meaning and effect of the judgment recorded by the lower appellate Court. We do not think it necessary to go into detail as to the precise circumstances of the case. There was evidence produced which, if believed, would warrant a finding that this debt had been incurred by a Hindu father for immoral purposes; that is to say, in furtherance of immoral relations which he had contracted with a woman who was an actress and a courtesan. The learned

(1) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P. C.).

(2) 1924 P. C. 50=46 All. 95=51 I. A. 129=21 A. L. J. 934=5 L. R. P. C. 1=28 C. W. N. 253=46 M. L. J. 23=5 P. L T. 1=2 Pat. L. R. 41=(1924) M. W. N. 68=19 M. L. W. 72=33 M. L. T. 457=26 Bom. L. R. 500=11 O. L. J. 107=1 P. L. R. 1924 (P. C.).

District Judge says that the oral evidence on this point had not greatly commended itself even to the opinion of the trial Court, and that, in his opinion, it was definitely worthless. He then goes on to remark that the finding of the trial Court as to the immoral nature of the debt was based mainly on the evidence of the plaintiff's father. He adds the following words :

"Under the circumstances I would be inclined to demur to this finding."

Now, the expression " under the circumstances" does seem to us to refer back to certain remarks at the beginning of the judgment, where the learned District Judge, rightly or wrongly, expresses a definite opinion that the suit was collusive in its nature, the father and his son scting together in order to recover certain property from the hands of a bona fide purchaser for value. In this view of the judgment as a whole the learned Judge of this Court held that he had before him a definite finding that the debt which was the foundation of the entire transaction was not tainted with immorality; and he has accordingly dismissed the second appeal. He expressly remarked that he would have remitted the case to the lower appellate Court for a specific finding on the issue regarding the immoral nature of the debt, if he did not feel perfectly satisfied from the judgment of that Court what its finding on such an issue must inevitably be. In the appeal which comes before us under the Letters Patent there are certain pleas which seem to suggest a contention that the plaintiff in this suit was not necessarily bound to prove the immoral nature of the debt. In so far as any such pleas appear in this memorandum of appeal, we are content to say that they have nct been pressed in argument and are clearly unsustainable. There is a plea taken to the effect that certain admitted facts regarding the purposes for which the father had contracted the debt would be sufficient in themselves to warrant a finding that the purpose for which the loan was taken was an immoral one in the eye of the Hindu Law. This plea, again, has not been seriously pressed in argument and would not in our opinion, be sustainable. The main contention before us is that the learned Judge of this Court has misunderstocd and misinterpreted the judgment of the lower appellate Court and that the main issue in the case could not be determined against the plaintiff without a definite finding on the part of the lower appellate Court as to the alleged immoral nature of the debt. On behalf of the respondents it was contended that the trial Court and the lower appellate Court were after all right, and that the question is concluded against the plaintiff by the finding that the auction-purchaser acted in good faith and had no notice of the alleged immoral nature of the debt contracted by the father. In this connexion a number of authorities have been cited before us, and the real question is whether certain principles of law laid down by their Lordships of the Privy Council in the well-known case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (3) have or have not been modified by later pronouncements of their Lordships and in particular, by the two cases quoted at the beginning of this judgment. It has been suggested before us that there are two recent decisions of this Court, both reported in Volume 21 of the Allahabad Law Journal Reports, at pages 683 and 809 respectively [*Sitla Prasad* v. *Chameli Bahu* (4) and *Judubir* v. *Gajadhar* (5)] which show that three learned Judges of this Court have recently affirmed the principle apparently laid down in *Suraj Bunsi Koer's* case (3) in the sense in which it was understood by the trial Court and by the lower appellate Court in the present suit. On this point we desire only to make one comment, which is that the head-note on each of these two cases in the Law Journal Reports does, in our opinion, go beyond what the learned Judges actually decided, if the judgments themselves are carefully considered. We have come to the conclusion, however, that the learned Judge of this Court was substantially right in the manner in which he dealt with this case. The most that the plaintiff, coming before this Court in second appeal, could have asked this Court to do would have been to remit to the lower appellate Court a definite issue regarding the immoral nature of the debt, or rather to insist upon a clear and specific finding on the part of the learned District Judge upon this issue, which was considered and discussed by him. Un-

(3) [1880] 5 Cal. 148=6 I. A. 88=4 C. L. R 226=4 Sar. 1 (P. C.)
(4) 1924 All. 111=21 A. L. J. 683=4 L. R. A. Civ. 326.
(5) 1924 All. 169=21 A. L. J. 809=5 L. R. A. Civ. 53.

doubtedly, if such a finding had been called for from the learned District Judge who actually heard and disposed of this suit in first appeal his finding would have been against the plaintiffs, as the learned Judge of this Court has rightly remarked. We do not think that the plaintiff is entitled to be allowed an off chance of success upon this question which is after all, in substance, a question of fact, because an issue, if now remitted, might conceivably come up for determination before a District Judge other than the learned Judge who pronounced the decision of first appeal in the present suit in the year 1921. In our opinion this appeal should fail on this ground alone, and we dismiss it accordingly with costs, including fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 783

BOYS AND ASHWORTH, JJ.

Sundar Rai—Plaintiff—Appellant.

v.

Suraj Bali Rai—Defendant—Respondent.

Second Appeal No. 793 of 1923, Decided on 15th May 1925, against a decree of Dist. J. of Azamgarh.

Civil P. C., S. 100—Plea of law not raised in the grounds—Court can allow the plea to be raised.

In first appeal the Court upheld the finding of the trial Court that certain contract was voidable having been brought about by undue influence by the appellant and suggested to the appellant that he should get some consideration under S. 19-A, Contract Act, but after appellant's rejection of the suggestion upheld the dismissal. In second appeal no plea was raised that the 1st appellate Court had overlooked the second clause of S. 19-A.

Held: although the grounds of appeal did not raise any question as to the propriety of the lower appellate Court in not invoking this provision of law, High Court was entitled to allow the point to be raised. [P 784 C 1]

Sheo Dial Sinha—for Appellant.

Shiva Prasad Sinha—for Respondent.

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiff-appellant against the defendant-respondent for recovery of a half-share in certain property. The plaintiff and the defendant entered into an agreement, whereby, in consideration of the plaintiff standing all the expense of litigation, the defendant would bring a certain suit for obtaining the property in question, and, if ultimately successful, would give the plaintiff a half-share in that property.

The Munsif dismissed the suit on a finding that the plaintiff was in a position to dominate the will of the defendant and that the transaction was on the face of it unfair. He, accordingly, held that the contract was a voidable one as induced by undue influence. The District Judge, on first appeal, upheld this decision.

The first question is whether there was evidence to justify the finding that the plaintiff was in a position to dominate the will of the defendant. The Munsif based his finding on the fact that the defendant was only just over minority, was inexperienced, had no money himself to carry on the litigation and had appealed in vain to at least one other person who had refused to help him. The District Judge supported this finding merely on the facts that the respondent was young and inexperienced, and did not, as a matter of fact, obtain independent advice. We are not disposed to hold that there was nothing in fact on which the finding could be based, though if we were trying the case originally we should not be disposed to agree with the finding. As to the finding that the transaction was an unfair one, the District Judge has based his finding on the fact that the defendant had so good a chance of obtaining the property that there was little risk in financing him and that the agreement to give half the property, that is a half worth Rs. 600, for an expenditure which in fact only amounted to Rs. 200 was unfair. Here again we are not disposed to hold that there was no basis whatever for the finding.

It has, however, been urged by the appellant that the Courts below should at least have awarded him something under the second clause of S. 19-A of the Contract Act. That clause provides that when an agreement is liable to be set aside on the ground of undue influence, the Court may annex such terms and conditions as may seem just to any order for the contract being set aside. Our attention has been drawn to the last paragraph of the judgment of the District Judge. In this it appears that the District Judge suggested that the appellant should

get the sum of Rs. 400 in consideration of the amount spent by him and the risk taken by him. The appellants rejected this suggestion and so the District Judge appears to have considered that there was no course open to him but to uphold the dismissal of the suit. We are inclined to think that the District Judge must have overlooked the second clause of S. 19-A of the Contract Act which enabled him, without the consent of the parties, to impose the suggestion which he made to the parties. Although the grounds of appeal in this case do not raise any question as to the propriety of the District Judge in not invoking this provision of law, we consider that we are entitled to allow the point to be raised.

Accordingly we allow this appeal in part and decree that the defendants shall pay to the plaintiff within three months the sum of Rs. 400. In the event of such payment, the plaintiff's suit shall stand dismissed. In default of such payment, the plaintiff's suit shall be decreed with costs. We make no other order as to costs.

Appeal allowed in part.

1925 ALLAHABAD 784

DANIELS, J.

Tej Singh and *others* — Plaintiffs—Appellants.

v.

Mitter Sen—Defendant—Respondent.

Second Appeal No. 1537 of 1924 Decided on 2nd January 1925 against the decree of the Sub.-J., Budaun, D/. 4th July 1924.

(*a*) *U. P. Land Revenue Act* (3 *of* 1901), *S.* 233 (*k*)—*Imperfect partition.*

Section 233 (k) applies also to an imperfect partition.

(*b*) *U. P. Land Revenue Act*, (3 *of* 1901), *S.* 111 —*All disputes as to ownership should be finally decided in partition proceedings.*

The policy of the law is that all disputes as to ownership of the mahal or patti to be partitioned should be finally disposed of in the partition proceedings. [P 784 C 2]

K. N. Katju—for Appellants.

Judgment.—The two points pressed in this appeal are both points of law, but as, in my opinion, the view of the Court below is correct, I propose to dismiss the appeal.

The suit has been dismissed on the ground that it offends against S. 233 (*k*) of the Land Revenue Act. The plaintiff claimed a fifth share of a grove in patti Tara Singh. He is a recorded cosharer in that patti but the share which he now claims is not recorded in his name. An application was made by the respondent for imperfect partition of that patti. Notice was issued to the plaintiff and he applied to have his own share separated off. In that partition that share in dispute was allotted to the defendant. On the face of it this is a clear case for the application of S. 233 (*k*). The pleas urged are :

(1) That S. 233 (*k*) does not apply to an imperfect partition.

(2) That though the plaintiff is a recorded cosharer in the patti he is not recorded in respect of the particular property which he claims.

On the first point no authority has been shown to me nor has any substantial reason been advanced why the section should not apply. The section is perfectly general in its terms. Both kinds of partition are dealt with in the same chapter of the Land Revenvue Act and the same provisions of law apply to both. I can see no reason why the bar of S. 233 (*k*) should apply to one and not to the other. The substantial difference between the two kinds of partition is that in an imperfect partition the joint responsibility for payment of land revenue is not done away with, but subject to this joint responsibility the shares are just as much allotted in separate ownership in the one kind of partition as in the other.

The second objection is obviously futile. The policy of the law is that all disputes as to ownership of the mahal or patti to be partitioned should be finally disposed of in the partition proceedings. In practically every case in which objection is taken under S. 111, the objector's case is that he is not but ought to be recorded as proprietor of the land which he claims.

Agreeing with the Court below I dismiss the appeal under O. 41, R. 11.

Appeal dismissed.

1925 ALLAHABAD 785

SULAIMAN AND DANIELS, JJ.

Fakir Muhammad—Appellant.

v.

Brij Narain Mahrotra—Respondent.

First Appeal No. 21 of 1924, Decided on 22nd April 1925, from an order of the D. J., Cawnpore.

Guardians and Wards Act, (8 *of* 1890)—*S.* 45—*Order to remove guardian directing delivery of possession of certain property to new guardian—Fine for disobedience—Appeal against order of fine—High Court can take notice of the fact—Order for delivery was passed without enquiry of minor's title.*

Where the guardian of a minor was removed from the guardianship and was ordered by the Court to deliver possession to the new guardian of a certain house which was not included in the list of the minor's properties filed by him (the old guardian), and to which a third person laid claim and where he (the old guardian) was fined for disobedience of the order:

Held: *Per Sulaiman, J.*— In appeal against the order of fine it was open to the High Court to revise the previous order for delivery of possession if it found that it had been passed without any enquiry as to the title to the house.

Held, further that the District Judge could not in the proceedings under the Guardians and Wards Act compel the former guardian to hand over to the new guardian the house over which he never obtained possession as guardian of the minor and which he never admitted to belong to the minor. [P. 786, C. 2]

Per Daniels, J.— Though the order for delivery of possession was not directly before the High Court and could not therefore be revised, the High Court was not precluded from taking notice of the fact that the order had been passed without any evidence on the record to show that the appellant was in possession on behalf of the minor. [P. 786, C. 2]

Iqbal Ahmad—for Appellant.

Saila Nath Mukerji—for Respondent.

Sulaiman, J. This is an appeal arising out of a guardianship matter. The appellant Faqir Muhammad was appointed guardian, on his own application, of a minor, Muhammad Islam. Along with the application for guardianship he filed a list of the property said to belong to the minor and that list did not contain a house in Cawnpore which has been the subject-matter of much dispute. Subsequently he was removed from the guardianship and the respondent was appointed guardian of the minor. On the 28th of September 1922, the respondent put in an application to the District Judge praying that the former guardian had deliberately omitted from the list the house aforesaid of the rent of which he had given no account whatsoever. We have had the record examined and it is curious that, without any formal enquiry having been made as to the title to this house, and in spite of the fact that there is third party, Mt. Janno, who rightly or wrongly is asserting her title to it an, order was passed on the 8th of February 1923, that the former guardian should hand over possession of the said house to the new guardian and that he should pay over the rent which he collected in respect of it. This order apparently was based on the supposition that inasmuch as the former guardian was actually in possession of the house he was bound to account to the minor.

When an Amin was deputed to go and hand over possession of the house to the new guardian he was resisted by Mt. Janno who had got the house locked from inside. Formal delivery of possession therefore could not be effected. The appellant has also not made good any rent which he had collected from the tenants though professedly not on behalf of the minor. The learned Judge accordingly has fined the appellant for his disobedience of the previous order. The date of the order given in the judgment under appeal is wrong; the correct date, being the 18th of February 1923.

It is true that so long as an order passed by a competent Court with jurisdiction stands any disobedience of it would be an offence under S. 45 of the Guardians and Wards Act, The mere fact that there was some irregularity in passing it would not be a good defence. But as we find in this case that the previous order directing the appellant to deliver possession of the house to the new guardian and pay over the rents realized by him had been passed without any enquiry into the matter we can revise it. It is not suggested by the learned vakil for the respondent that Faqir Muhammad entered into possession of the house originally on behalf of the minor, nor is it anywhere suggested that at any time during the period of his guardianship he admitted that he was holding possession over it on behalf of the minor. The attitude of Faqir Muhammad all along had been that the house did not belong to the minor. It therefore, seems to me that Faqir Muhammad should not have been

compelled to hand over possession of the house to the new guardian or to pay over its rent when he was not put in possession of the house on behalf of the minor. If the house really belongs to the minor it will be open to the new guardian to take legal steps to recover its possession. The learned District Judge cannot in the proceedings under the Guardians and Wards Act compel the former guardian to hand over possession of the house which he does not admit to belong to the minor and over which he never obtained possession as guardian of the minor. The order previously passed had therefore been passed with a material irregularity in the exercise of jurisdiction inasmuch as there had been no proper enquiry made at all. As that order was not appealable it is open to the High Court to set it aside on the revisional side. I am, therefore, of opinion that it must be held that previous order was passed with material irregularity and is not binding on the appellant Faqir Muhammad and that therefore, his conviction for disobedience of it was not a proper one. It seems to me that the question of the title to the house should be litigated in a regular suit brought by the new guardian if so advised, against Faqir Muhammad or Mt. Janno or whoever else may be in possession. I would, therefore, allow this appeal and setting aside the order of the District Judge, dated the 9th of August 1923, and conviction of the appellant direct that the fine, if paid, should be refunded.

Daniels, J.—I concur in allowing the appeal. I am not prepared in these proceedings to revise an order which is not directly before us and against which no revision has been filed. I am not satisfied that in this appeal we are precluded from taking notice of the fact that the order for disobeying which the appellant has been fined was passed without there being any evidence whatever on the record to show that the appellant was in possession of this house on the minor's behalf. On this ground I concur in allowing the appeal.

By the Court.—The order of the Court is that this appeal is allowed and the order of the District Judge, dated the 9th of August 1923 and also the conviction of the appellant are set aside and it is ordered that the fine, if paid, be refunded.

Appeal allowed.

1925 ALLAHABAD 786

MUKERJI, J.

Ramrup Pande and *others*—Defendants—Appellants.

v.

Sarju Pande and *others*—Plaintiffs—Respondents.

Second Appeal No. 986 of 1923, Decided on 5th February 1925, against a decree of the 2nd Addl. D. J. Gorakhpur, D/- 1st May 1923.

Hindu Law—Succession—Sons of pre-deceased son are entitled to succeed along with surviving sons even to the tenancy rights of the deceased—Agra Tenancy Act (2 of 1901) S. 22.

On the death of a separated Hindu zamindar his property must be divided among his sons and his grandsons by a pre-deceased son, the latter being entitled to the share to which their father would have been entitled had he been alive. The same rule applies to the devolution of the tenancy rights possessed by the deceased by virtue of S. 22 of the Agra Tenancy Act. In S. 22 the word "Descendants" would imply that there may be more than one descendant and they also may be in different degrees. No particular principle is involved in the rule which may indicate that the remote descendants were to be excluded by the nearer ones. [P. 787, C. 1]

Shiva Prasad Singh—for Appellants.

U. S. Bajpai—for Respondents,

Judgment.—These two Appeals Nos, 986 and 987 of 1923 arise from similar circumstances, the only difference being that in one case the property in dispute is zamindari property and in the other case it is a tenancy.

One Kanhaiya had six sons, one of these being Ramjas. The respondents in these appeals, who were the plaintiffs in the Court of first instance, are sons of Ramjas. They are suing to recover a sixth share in the property left by their grandfather Kanhaiya. It has been found as a matter of fact, that Kanhaiya died separate from his sons and grandsons. The question raised is whether Kanhaiya's property would go only to his sons or also to his grandsons by a deceased son.

So far as zamindari property is concerned it is conceded that the defendants-appellants have no case. The property is bound to be divided into six shares and one share must go to the sons of Kanhaiya's deceased son Ramjas.

So far as the tenancy is concerned it is contended that the nearer male descendant must exclude the more remote ones. The law on the point is laid down in S. 22 of the Tenancy Act, 1901, and is as follows :

"When.....a tenant dies, his interest in the holding shall devolve as follows :

(*a*) On his male lineal descendants in the male line of descent."

According to the language of the law the tenancy is to go to the male lineal descendants in the male line of descent. The word "descendants" would imply that there may be more than one descendant and they also may be in different degrees. No particular principle is involved in the rule which may indicate that the remote descendants were to be excluded by the nearer ones. In the circumstances the letter of the law and the spirit of the law are one and the same and the nephews and the sons all must share.

The result is that the appeals fail and they are hereby dimissed with costs which will include Counsel's fees in this Court on the higher scale.

Appeals dismissed.

★★ 1925 ALLAHABAD 787

SULAIMAN AND BOYS, JJ.

Chunni Lal and *others*—Defendants—Appellants.

v.

Sheo Charan Lal Lalman and *others*—Plaintiffs—Respondents,

S. A. No. 1097 of 1924, Decided on 20th April 1925.

(*a*) *Court-fees Act* (7 *of* 1870), *S.* 5—*No reference made under S.* 5—*Court hearing appeal must decide question of insufficiency of Court-fee paid on memo of appeal.*

Where there has been a reference to the Taxing Officer or the Taxing Judge the question of insufficiency of the Court-fees as paid on the memorandum of appeal cannot be raised again at the time of the hearing of the appeal; for S. 5 of the Court-fees Act would clearly be a bar to any such re-consideration. But where no reference under S. 5 has been made at all the Court hearing the appeal must decide it. 37 *Cal.* 914, and 39 *Mad.* 725, *Foll.* [P. 787, C. 1.]

★★(*b*) *Court-fees Act* (7 *of* 1870), *S.* 7 (4) (*f*)—*Appeal from preliminary decree for accounts—Appellant is not bound by plaintiff's valuation of suit and can have his own valuation.*

In an appeal from a preliminary decree in a suit for accounts, the appellant is entitled to fix his own value for the relief he claims and is not bound by the valuation put by the plaintiff's on the suit. 39 *Mad.* 725 and 23 *Mad.* 490 *Diss.*

[P. 790 C. 1. P. 791 C. 1]

(*c*) *Contract Act, S.* 253 ; (7)—*One partner neglecting partnership business is not enough to dissolve partnership.*

There is no provision in law for a dissolution of the partnership being brought about merely by one partner neglecting to do anything further towards the carrying on of the objects of the partnership. A partner can retire, but that retirement can only be by and upon notice to the other side. [P. 793, C. 2]

(*d*) *Interpretation of Statutes—Headings should be ignored.*

In construing a statute headings should be ignored and it is only the sections which the Courts are called upon to interpret as being the substantive part of the enactment. [P. 789, C. 1]

(*e*) *Interpretation of Statutes—Fiscal Acts.*

Fiscal Acts should be construed strictly against the Government. [P. 790, C. 1]

Kailas Nath Katju and *Saila Nath Mukerjee*—for Appellants.

B. K. Mukerji and *I. B. Banerji*—for Respondents.

Sulaiman, J.—The preliminary question raised on behalf of the respondents is that the valuation of this appeal is improper. The appeal arises out of a suit for dissolution of partnership which was valued by the plaintiffs for purposes of jurisdiction at Rs. 4,500. The plaintiffs claimed that the partnership may be dissolved and that the defendants may be made to render an account and they asked for a decree for Rs. 4,500 and interest thereon or for any sum which may on account be found due. The Court of first instance found that the partnership had been dissolved more than three years before the suit and the claim was barred by limitation. It accordingly dismissed the suit in toto. The plaintiffs appealed to the District Judge who took the view that the partnership had not been dissolved on the date of the filing of the suit. He also found that all the defendants were liable as partners. He accordingly reversed the decree of the first Court and directed that a decree be drawn up under O. 20, R. 15, declaring that the partnership shall stand dissolved on the date of his judgment and declaring the shares of the parties as proved and directing the defendent Chunni Lal to render accounts on or before the 15th of July 1924. The appeal before the Judge was valued by the plaintiffs at their original valuation.

Chunni Lal and two other defendants have appealed to this Court from the preliminary decree. They have valued the appeal at Rs. 550 and paid a Court-fee of Rs. 41-4-0.

The learned vakil for the respondents has urged before us that the appeal has been wrongly valued. We may note that at the time when the appeal was pre-

sented the stamp reporter of this Court took no objection to the valuation, nor to the amount of Court-fee paid, and that there has been in this case no referenoe to the Taxing Officer or the Taxing Judge at all.

The first point to see is whether it is open to the respondents to raise such an objection. I think that the plaintiffs-respondents can raise this objection at the hearing of the appeal because the valuation affects not only the jurisdiction of the Court, but also the amount of costs and legal fees which would be taxable in a case. Where there has been a reference to the Taxing Officer or the Taxing Judge the question of insufficiency of the Court fees as paid on the memorandum of appeal, cannot be raised again at the time of the hearing of the appeal: for S. 5 of the Court-fees Act would clearly be a bar to any such re-consideration. But where no reference under S. 5 has been made at all the Court hearing the appeal must decide it. This was the view clearly expressed by the Calcutta High Court in the case of *Jugal Pershad Singh* v. *Parbu Narain Jha* (1) with which I fully agree. A similar question arose before a Full Bench of the Madras High Court in the case of *Dhupati Srinivasa Charlu* v. *Perindevamma* (2) and the Bench itself decided it.

The main question is whether it was open to the defendants to put a valuation different from that fixed by the plaintiffs in their plaint. The question is not free from difficulty because there is a clear conflict of opinion between the various High Courts. The Madras High Court has clearly laid down that the valuation once fixed by the plaintiff must be adhered to at subsequent stages, unless, of course, the identity of the subject-matter is different, vide the cases of *Samiya Mavali* v. *Minammal* (3) and *Dhupati Srinivasa Charlu* v. *Perindevamma* (2). The Punjab High Court in the case of *Kunjimal* v. *Panna Lal* (4) and the Calcutta High Court in the case of *Bunwari Sal* v. *Daya Sunker Misser* (5) had inclined towards the same view.

On the other hand there is an observation of Tudball, J., in the case of *Bhola Nath, In the matter of* (6) which supports a contrary view, though it was not necessary to decide that point in that case. But in the case of *Kanhaiya Lal* v. *Seth Ram Sarup* (7), Piggott, J., was of opinion that the view of the Full Bench of the Madras High Court was not correct. The case of this High Court has been followed by the Patna High Court in the case of (4 P. L. T. 638).

I may point out that the cases in I. L. R. 44 Allahabad, p. 542, and 4 Patna Law Times, p 638, are slightly distinguishable because in those cases the defendants, when appealing, had not appealed from the whole decree, but had admitted their part liability. Thus the identity of the subject-matters in the first Court and in the Court of appeal was not the same. It may, therefore, be said that as there was no valuation by the plaintiff of the subject-matter in dispute in appeal it was open to the defendant to value it according to his own estimate, whereas in the present case the subject-matter in the suit and in the appeal is identical. In the appeal the relief claimed is that the decree of the Court of first instance dismissing the suit in toto should be restored.

The difficulty is really due to the circumstance that the amendments of the Court-fees Act have not kept pace with the amendments of the Code of Civil Procedure. In 1870, when the Court fees Act was passed, Act No. VIII of 1859 as amended by the Act of 1860 was in force. Under those Acts there was no such thing as a preliminary decree distinct and separate from a final decree. Thus although in a suit disputes might arise as regards the valuation, the matter was bound to have been determined by the time the decree came to be passed. Thus for purposes of appeals it was sufficient to say "according to the amount of value of the subject-matter in dispute." And that is why, although there were elaborate provisions as regards the valuation of suits, there were very few for valuation of appeals. There was not even any general section under which principles applicable to suits were made applicable to appeal. Since then the

(1) [1910] 37 Cal. 914=8 I. C. 1145.
(2) [1916] 39 Mad. 725=33 I. C. 602=30 M. L. J. 402.
(3) [1900] 23 Mad. 490=10 M. L. J. 240.
(4) [1915] 7. P. R. 1915=28 I. C. 262=15 P. L. R. 1916.
(5) [1909] 13 C. W. N. 815=1 I. C. 670.
(6) [1910] 32 All. 517=6 I. C. 832=7 A. L. J. 546.
(7) 1922 All. 228=44 All. 542=20 A. L. J. 416.

Code of Civil Procedure has undergone a marked change. In some cases there can be a preliminary decree followed by a final decree and an appeal is allowed from the preliminary decree even before any final decree is passed and thus the true value of the subject-matter in dispute may remain unascertained while appeals from preliminary decrees are preferred. The language of the old Court-fees Act is now to be applied to a state of things which could not have arisen in the same acute manner when the Act was passed. Furthermore, the drafting of some of the sections was not quite happy, as a number of anomalies have crept in which I may briefly point out. Chapter II has the heading "Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns" This obviously applies to all High Courts, as S. 5 of this chapter is invariably applied to the High Courts other than those at the Presidency towns. Chapter III has the heading "Fees in other Courts and in Public Offices." If these headings were to be accepted as accurate it would seem that Chapter III does not relate to matters pending in High Courts at all; but we find that Chapter III contains many important sections which have invariably been applied to appeals filed in the High Courts. I may refer to the methods of calculating amounts payable under Ss. 7 and 8 of that chapter, the decision of question as to valuation under S. 12, the power to order refund of fee paid on memorandum of appeal under S. 13 as well as other sections of Chapter III. Courts have invariably applied these sections contained in Chapter III to appeals pending in High Courts though there is no specific provision in the Act under which those sections are made applicable to appeals in the High Court and though the heading of that Chapter points to a contrary direction.

But it is well-known that in construing a statute the headings are to be ignored and it is only the sections which the Courts are called upon to interpret as being the substantive part of the enactment. I must, therefore, in accordance with the uniform practice of all High Courts hold that the principles contained in S. 7 of Chapter III are applicable also to appeals before the High Courts.

Another anomaly is that the opening portion of S. 7 relates to suits and yet there is no other section in the Act which says that principles governing suits will also govern appeals.

A further anomaly is that although in S. 7, sub-clauses (1), (2), (3), (5) (7), (8), (9), (10) and (11) there is no mention of a memorandum of appeal, sub-clause (4) of that section specifically mentions plaint or memorandum of appeal.

And lastly, although sub-clause (4) refers to plaint or memorandum of appeal the last two lines of that sub-clause refer to the plaintiff and do not expressly mention the appellant.

The view of the Madras High Court is that in cases where the subject-matter in dispute is not capable of being valued exactly the plaintiff's valuation must be accepted and the defendant should not be allowed to alter it at subsequent stages. This of course cannot be accepted in its widest scope for it is well known that if the plaintiff has valued his claim at a certain figure but the decree passed by the first Court is for a smaller amount the defendant in appeal is not bound by the valuation in the plaint. The other view of the Madras High Court that the valuation by the plaintiff in his plaint and by the defendant in appeal ought to be the same where the subject-matter in dispute is identical has certainly some force. After all it is the plaintiff who puts forward a claim, whether it is a true one, a false one or an exaggerated one. The subject-matter in dispute is the amount claimed by the plaintiff no matter whether that claim is just or unjust. It would therefore seem quite reasonable to say that when the subject-matters are identical the defendant ought to value his appeal according to the valuation put by the plaintiff in his plaint which really represents the amount claimed by him whether the defendant admits it or not.

On the other hand it must be conceded that in cases coming under S. 7, sub-clause (4) the valuation made by the plaintiff of the subject-matter in dispute is often an arbitrary one and particularly in a case falling under sub-clause (4), (*f*) the valuation is a tentative one, it not being known at the time what would be the exact amount found due to either party after the accounts are taken. If under such circumstances the plaintiff

fixes a figure arbitrarily and haphazardly which he considers may be found due on account being taken, there is no just ground why the defendant when appealing should be tied down to this haphazard estimate when on the face of it the valuation is merely tentative.

It is a sound rule of interpretation that Fiscal Acts should be construed strictly against the Government. The present defendants cannot be called upon to put a higher valuation on their appeal and consequently to pay a larger sum of Court-fees unless the provisions of the Court-fees Act clearly require it. Schedule I, Art., requires an ad valorem fee on the amount or value of the subject-matter in dispute on a memorandum of appeal not otherwise provided for in the Act. The present appeal falls under S. 7, sub clause (4) (*f*) and therefore the amount of fee payable is to be computed according to the "amount at which the relief sought is valued in the plaint or memorandum of appeal." Taking the words literally the defendants have valued the relief which they seek in their memorandum of appeal at Rs. 550. They can, therefore, be called upon to pay Court-fees on that amount only. The question remains whether there is anything else in this section which justifies a contrary conclusion. The last words "In all such suits the plaintiff shall state the amount at which he values the relief sought" do not entitle us to import into the section words to the following effect "and the amount stated by the plaintiff shall be the amount for purposes of memorandum of appeal." It is true that the legislature has omitted to say that the appellant shall state the amount at which he values the relief sought in the appeal and has merely required the plaintiff to state it although sub-clause (4) clearly refers both to the plaint and the memorandum of appeal. But this omission does not justify an inference that the memorandum of appeal must necessarily have the same valuation as the plaint. It is unnecessary to speculate as what might possibly have been the reason for omitting the word 'appellant' from the last two lines. It is sufficient to say that the defendant cannot be called upon to pay Court-fees on the amount of valuation given by the plaintiff when the language of the section does not clearly so demand. The statute must be construed in favour of the defendant who has to pay the Court-fees. If the legislature considers that the language is defective it is for the legislature and not the Court to cure the defect. The words must be interpreted as they stand.

It follows that in cases where the valuation has of a necessity to be arbitrary and tentative the person who has to present a petition of plaint or appeal and who is called upon to pay the necessary Court-fees will have to fix the valuation, and unless the Court is of opinion that the valuation has been put down fraudlently it will be difficult not to accept the valuation so made.

I am conscious of the fact that in some cases this interpretation of the section will be unsatisfactory and may lead to inconvenience, e. g., the plaintiff may value his suit for accounts at a certain figure in the first Court and may succeed, the defendant when appealing may value it at another figure and then the plaintiff in coming up in second appeal will have to re-value it at the original figure. The absence of uniformity is likely to be embarrassing but the result is due to the drafting of the section as it stands.

I am accordingly of opinion that although it was not absolutely necessary for Piggott, J., in the case before him to go to the extent to which his remarks point, because in that case the defendant was appealing from part of the decree only, the view taken by him as to general principles governing valuation was quite correct. I am, therefore, unable to accept the view expressed by the Full Bench of the Madras High Court in I. L. R. 39 Madras, p. 725 and must hold that the valuation made by the defendants cannot be challenged, and that accordingly there is no deficiency in the amount of the Court-fee paid.

Boys, J.—This was a suit for dissolution of partnership and accounts. The plaintiff valued the suit at Rs. 4,500. The defendant pleaded limitation and that nothing was due. The trial Court dismissed the plaintiff's suit on the ground that it was barred by limitation. In his appeal the plaintiff again valued his appeal at Rs. 4,500. The lower appellate Court held that the suit was not barred by limitation, and passed a preliminary decree for accounts.

The defendant has appealed here against the whole decree of the lower appellat

Court and asks for restoration of the decree of the Court of first instance. He has valued his appeal not at Rs. 4,500, the valuation put on the suit and on his own appeal by the plaintiff, but at Rs. 550 and has paid Court-fee thereon. On behalf of the plaintiff-respondent objection is taken that the valuation of the appeal should be Rs. 4,500.

We have then under S. 12 of the Court fees Act VII of 1870, to determine the question of right valuation. I may note here that the heading to Chapter III suggests that it does not apply to High Courts, but there is internal evidence in the chapter itself that some of the sections at any rate do so apply: and of course, the headings have no binding force in interpreting the sections. The case is admittedly governed by S. 7, sub-S. 4, Clause (*f*) of the Court-fees Act. That section runs as follows, so far as is material for the present purposes :

"The amount of fee payable under this Act shall in suits for accounts be computed accordingly to the amount at which the relief sought is valued in the plaint or memorandum of appeal; in all such suits the plaintiff shall state the amount at which he values the relief sought."

In 39 Madras 725 Full Bench case, there was a preliminary decree for accounts followed by an appeal against the whole preliminary decree. The Full Bench following 23 Madras 490 and 13 Calcutta Weekly Notes 815, held that the defendant was bound by the plaintiff's valuation. I note here that Wallis, C. J., who delivered the very brief judgment of the Court was one of the Judges who had referred the case to the Full Bench on the ground that they felt some doubt about the correctness of the decision in 23 Madras 490; and further that the Full Bench was chiefly influenced apparently by the consideration that the decision in 23 Madras 490 had been consistently acted on. Further it may be noted that 23 Madras 490 was a case under S. 7 IV (*c*) while 13 Calcutta Weekly Notes 815 was a case under S. 7, sub-section (*i*). The next case is a judgment of Mr. Justice Piggott, reported in 44 All. 542, in which the appeal was only against a portion of the decree. The defendant did not deny his liability to render accounts, which liability he had all along admitted, but he took exception to the decree and contended that it ought to have contained specification of the period over which the liability to render accounts should extend and the adjudication of a question which the defendant had raised as to the period of limitation applicable to the portion of the plaintiff's claim. Mr. Justice Piggott held that it was open to the defendant-appellant to fix his own valuation and this decision was followed in 4 Patna Law Times 638; 75 Indian Cases 871. In this latter case the defendant appealed against only so much of the preliminary decree for accounts as gave the plaintiff a right to examine and criticize the accounts. It was held that the relief sought by the defendant was not capable of an exact estimate and that the Court-fees Act, S. 7, sub-S. IV, Clause (*f*), left the defendant-appellant free to fix his own valuation. This brings to the year 1923; since when the matter does not appear to have come before the Courts.

It will be seen that the decision of Mr. Justice Piggott and that note in the Patna Law Times did not cover the exact point before us. The question in those cases was as to the correct valuation and who should make it when the defendant had appealed only from a portion of the preliminary decree. The case we have before us is an appeal from the whole decree. Such a case is to be found in 39 Madras 725, in which the decision was adverse to the defendant-appellant and he was held bound by the plaintiff's valuation; but I have already discussed that case, and am unable to obtain much assistance from it.

A consideration of all the sub-sections of S. 7 would suggest that there is distinction to be found between the suit mentioned in sub-S. IV and the other sub-sections of S. 7 in that in the other sub-sections, the suit is of a nature that permits of some measure of valuation being fixed upon which is independent of the sole volition of one of the parties, while in sub-S. IV it would be very difficult, probably impossible to find any such measure of valuation; and it is probably with this in mind that the legislature inserted in sub-S. IV the provision that "the plaintiff shall state the amount," merely in order to give a starting-point and not with any intention one way or the other that it should not or should govern

the appeal whether from the preliminary or the final decree. As to the valuation for the purposes of appeal, the legislature did not then intend to say, and has not said, anything as to how the valuation should be arrived at. If this view of what was and what was not present in the mind of the legislature be correct, it may be the answer to the doubt expressed by Piggott, J., in 42 All. 542 at 545 where he said, "It is no doubt a little difficult to understand why the legislature should have felt it necessary to add this proviso in respect of the plaintiff without in express terms laying any analogous obligation upon the appellant".

I do not, therefore, in deciding by whom and how the appeal is to be valued feel myself influenced one way or the other by the omission in the section of words which Mr. Justice Piggott rightly says might in a certain view have been expected; and I have merely to consider what is an equitable decision in face of the silence of the statute, basing my decision on general principles, if I can find any such.

At first sight what appear to be three distinct cases present themselves for consideration:

(a) Where the defendant appeals against only a part of the preliminary decree; and

(1) the plaintiff has not separately valued the two liabilities;

(2) the plaintiff has separately valued the two liabilities;

(b) where the defendant appeals against the whole preliminary decree.

I will consider first the case (a) where the defendant appeals against only a part of the preliminary decree; and will then consider whether there is any distinction in the principles applicable between it and case (b) is not case (a) analogous to the case where a decree in a suit for money having declared his liability in regard to determined amounts under two heads X and Y, the defendant is content as regards X to accept the decree; but as regards Y he appeals. He has to pay Court-fee only as to Y. He accepts one ascertained liability and objects to another. Similarly, where he appeals against only one condition affecting his alleged liability under a preliminary decree and temporarily accepts the other, there appears no reason why the same principle should not be applicable? Why should he not be made to pay on the valuation of the liability to which he objects and absolved from paying on the valuation of the liability which he temporarily accepts?

The next question for determination is how is the valuation of the liability to which he objects to be made separately? Here again two cases may arise:

(1) Where the plaintiff has not separately valued the two liabilities;

(2) where the plaintiff has separately valued the two liabilities.

In case (1) i. e., where the plaintiff has not separately valued the two liabilities, just as in the cases included in S. 7, sub S. IV, the legislature had, in the absence of any other available measure, to leave it to the plaintiff to value his suit, so in the absence of any other measure it must be left to the appellant to value the liability against which he appeals. And therefore I find myself in agreement with Mr. Justice Piggott who had this particular case before him. This course further gives a meaning and scope to the words "memorandum of appeal" at the end of S. 7, sub-S. (IV).

Case (a) (2), where the defendant appeals against only a part of decree and the plaintiff has already in his suit separately valued the two liabilities; and case (b) where the defendant appeals against the whole preliminary decree (and this last is the present case before us) remain. Is there any real distinction between the principles applicable to these two cases and t that in which, as I have already held in agreement with Mr. Justice Piggott, the defendant must be allowed to put his own valuation?

I can find no reason for any variation in principle, if I am right in the view that I have already expressed that no conclusion of any sort on this point can be drawn one way or the other from the last two lines of S. 7, sub-S. IV.

Again, it is not difficult to see that it might not be easy to determine in every case whether the appeal is to be regarded as an appeal against the whole preliminary decree or an appeal against part only of the decree. The appellant might easily refrain from appealing against an entirely negligible

portion of the decree against him solely with the deliberate intention of evading the rule if such rule were found to be law, that he must value at the total valuation made by the plaintiff if he appealed against the whole decree. I do not find in principle any marked dividing line.

Further, with the law as now worded, the desirability of uniformity reinforced by the equitable consideration referred to by Mr. Justice Piggott in 44 All. 542 would suggest that the appellant should be allowed to pu his own valuation on his appeal in these two cases also.

The result is that I hold that the defendant-appellant is entitled to put his own valuation on the relief that he seeks.

Sulaiman and Boys, JJ.—This is a suit for dissolution of partnership and accounts. The trial Court held that, as a matter of fact, the defendants were joint in family, mess and estate, and that the family was also joint in business, and in this business in particular. It further held that the partnership had, in fact, dissolved by the closing up of the partnership business more than three years before the date of suit and therefore dismissed the plaintiff's claim. But the lower appellate Court, while agreeing with the other findings of the first Court, decreed the plaintiffs' appeal relying chiefly on Exhibits 1 and 2 in which it was stated, according to the lower appellate Court's reading that the partnership was not to an end until all accounts, etc., had been settled up. It, therefore, held that the mere cessation of the business did not amount to the dissolution of the partnership and that the suit was not barred by limitation. We have been addressed really on only two points.

The first of these is as to whether the partnership was really dissolved or not at the time the business closed. The words used in the notice given by the plaintiff himself were that 18 months before the date of the notice which was given on the 19th of June 1919, "*dukan utha di gai*" and '*karobar band ho gaya.*" It has been much pressed upon us that this was an admission of a dissolution of the partnership. We are of opinion that such an interpretation is justified in view particularly of the special contract as set out in Exhibits 1 and 2. The notice in view of those exhibits was really nothing more nor less than an allegation that all new dealings had, in fact, ceased. Now, if the partnership had dissolved it must have dissolved in one way or another recognized by and known to the law. It is admitted that a partnership existed. The plaintiff alleged that it continued to exist it, clearly did continue to exist, until it was in some way or another dissolved. In the circumstances the burden was heavily on the defendant to show that it had dissolved. He would in any circumstances have found this burden very difficult to discharge in face of the express terms of Exs. 1 and 2 in which it is in so many words declared that the defendant shall not leave the business until all accounts, etc., have been settled up. Apart even from this, we find that there is no provision in law for a dissolution of the partnership being brought about merely by one partner neglecting to do anything further towards the carrying on of the objects of the partnership. That is all that appears to have happened in this case. A partner can retire; but if so, it is clear that that retirement can only be by one upon notice to the other side. In face of the particular terms of Exs. 1 and 2 it may be doubted whether the defendant could even have retired until he had settled up all accounts. In any case it is clear that in this case no notice of his desire to retire from the partnership was even given by the defendant. We hold therefore, that both on the general circumstances of the case, and in view of the terms of Exs. 1 and 2, it is clear that the partnership had not dissolved and that the suit was not barred by limitation. The second point that was urged before us, and is supported by a certificate, is that there was no evidence that the family was joint or that the business of partnership was entered into by the father as the head and manager of the family. Both the lower Courts seem to have read the evidence as if it did establish the fact that the business was on behalf of the family. But we have had the only evidence which has been referred to by the lower Courts or pointed out to us,

here read to us, and it does not appear to us to go further than to suggest that the defendants said to the plaintiff: "You see our family, and that we are people of substance." We need not, however, enter further into this matter as Mr. B. K. Mukerji, on behalf of the plaintiffs respondents, says that he will be content to have a decree passed against the father alone. We do not in any way decide the question of the liability of the son of Chunni Lal under the Hindu Law in respect of his father's debt. For the above reasons we allow the appeal to this extent, that we modify the decree of the lower appellate Court by dismissing the suit against the defendants other than Chunni Lal. The appeal of Chunni Lal is dismissed. The parties will bear their own costs of this appeal. No Court-fees are necessary.

Appeal allowed.

★ 1925 ALLAHABAD 794

MUKERJI, J.

Lallu Singh and *others*--Defendants—Appellants.

v.

Raghunandan and *others*—Plaintiffs and Defendants--Respondents.

Second Appeal No. 578 of 1923, Decided on 1st August 1924, against a decree of the Sub.-J., Jaunpur, D/- 2nd January 1925.

(a) *T.P. Act, S. 63—Mortgagee planting trees on the land mortgaged—Mortgagee can remove them.*

If the mortgagee in possession of the land planted any trees he would be entitled to remove the trees before handing over the land to the mortgagor. [P 794 C 2]

★ (b) *Civil P. C., S. 11—Issue not arising on pleadings and so indistinct as not to show that parties were required to adduce any evidence—No res judicata arises.*

Where a particular issue does not arise on the pleadings, or in any case is so indistinct that it does not indicate that the parties knew that they had to adduce any evidence on it, any finding on such issue does not operate as res judicata. [P 795 C 1]

(c) *Agra Tenancy Act, S. 22—Succession to tenancy—Tenancy in possession of mortgagee at the time of tenant's death—Prospective heir of the tenant can be said to share in cultivation.*

Although where, when the mortgagor dies, the land constituting the holding is held by the mortgagee, the next heir of the mortgagor at the date of his death can be said to have been sharing in the cultivation of the holding. [P 795 C 1]

Kumuda Prasad—for Appellants.

S. A. Haidar—for Respondents.

Judgment.—This appeal raised somewhat important questions of law. The plaintiffs are the Respondents Nos. 1-4. The remaining respondents were more or less pro forma defendants in the suit, out of which this appeal has arisen. The principal defendants are the appellants. Plaintiff sued for redemption of a mortgage made in 1889, which was supplemented by a mortgage of 24th July 1895. The total mortgage-money for the two mortgages is a sum of Rs. 100. The original mortgagors were two persons Sahai and Jokhu. Sahai's line is extinct. The plaintiffs are the son and grandson of Jokhu. The mortgage was made in favour of one Shiv Kumar, whose son and grandsons are the defendants Nos. 1 to 3.

Various defences were raised. It has been found by the Court below that the plaintiffs are entitled to redeem, but the appellants are entitled to cut away the trees that they have planted after the mortgage. The defendants contended that they being the zamindars, the tenancy which was mortgaged has lapsed to them and that no right of redemption is left. For the respondents it is contended that the trees should be handed over with the land. Taking the respondents' case first, it seems clear that the mortgagees were entitled to make any use they liked of the land they had in their possession. If they grew any crop they could cut it away before handing over the land. Similarly, if they planted any trees, they would be entitled to remove the trees before handing over the land to the plaintiffs. The cross-objection, therefore, has no force.

Coming to the defendants' appeal the facts seem to be these. Jokhu and Sahai were the original mortgagors, and Sahai's line is extinct. It appears that in 1915. Jokhu's sons, Raghunandan and Rama, took forcible possession of the lands from the mortgagee. The mortgagee, Shiv Kumar, brought a suit for possession. The defendants, Raghunandan and Rama, being sons of Jokhu, thought it best to raise a plea of want of legal necessity for the mortgages. The case was heard by a learned Munsif and he framed the following issue among others :

" Is the mortgage dated 1889 genuine ? What was the necessity for which it was made ? "

In deciding this issue he came to the conclusion that Sahai was the sole tenant of the holding mortgaged and, therefore, the sons of Jokhu could not impeach the mortgage made by Sahai. As to Jokhu's mortgage the learned Munsif remarked that the mortgage had been made by two persons and it is not likely that it would be made for any immoral purposes or as a reckless transaction. It will be noticed that there is no issue as to whether Jokhu or Sahai was the sole tenant of the land. No such issue arose on the pleadings. It does not appear from the judgment that Shiv Kumar in any way had denied in the suit the right of Jokhu to the tenancy. The issue quoted in any case does not indicate that the parties knew that they had to adduce any evidence as to whether Sahai was the sole tenant or Sahai and Jokhu were both tenants of the land. Under the circumstances the finding of the learned Munsif does not operate as res judicata. The learned Subordinate Judge was wrong on this point. Such being the case, it follows that we must take it that Sahai and Jokhu were both tenants of the land. Further, it is to be noted that the mortgage was taken from both and it does not lie in the mouth of the mortgagee or his descendants to dispute the title of the mortgagors at the date when mortgage was made.

The next point urged is that Sahai having died, his tenancy lapsed to the zamindar, ' for, it appears that the mortgagee was also the landholder of the land mortgaged to him. It is urged that, on the death of Sahai, his brother's son Jokhu, who died after him, could not succeed to the tenancy as he was not sharing in the cultivation of the holding at the time of Sahai's death. It has been found that Jokhu and Sahai died before the present Tenancy Act came into force. When Sahai died the land constituting the holding was held by the mortgagee. It is, therefore, argued that at the date of the death of Sahai Jokhu cannot be said to have been sharing in the cultivation of the holding. In my opinion this contention is not correct. It is true that even Sahai himself was not cultivating the tenancy at the time he died. But the possession of the mortgagee was the possession of both Sahai and Jokhu. It must, therefore, be taken that at the time of Sahai's death Jokhu was sharing in the cultivation of the holding with the deceased. In this view, there would be no difficulty in the way of Jokhu's suceeding to the interest of Sahai.

In my opirion there is no substance in this appeal, and it must fail.

The appeal and the cross-objection are both dismissed with costs which will include counsel's fees in this Court on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 795

SULAIMAN AND BOYS, JJ.

Girdhari Lal and *others*—Plaintiffs—Appellants.

v.

Khare Prasad and *others* — Defendants—Respondents.

Second Appeal No. 69 of 1925, Decided on 9th April 1925, against the decree of D. J., of Cawnpore.

Civil P. C., O. 2, R. 2—Suit for profits under Agra Tenancy Act for particular year—Cause of action arising on date on which suit for profits for previous years was instituted—New claim also should be included in suit.

On the 1st of August 1916, the plaintiffs first instituted a suit for arrears of profits for the years 1321 and 1322 Faslis. The 1st of August 1916 was also the date on which, according to the notification by the Local Government under S. 163 of the Agra Tenancy Act, the profits for the year 1323 Fasli were divisible.

Held; that the cause of action for a suit for profits for the year 1323 Fasli arose on the 1st of August 1916, and as the claim was not included in the suit instituted on that day for profits for the years 1321 and 1322, no suit could be brought subsequently for the profits for 1323 Fasli. [P 795 C 2; P 796 C 1]

Haribans Sahai—for Appellants.

Sulaiman, J.—This is a plaintiffs' appeal arising out of a suit for profits which has been dismissed on account of the provisions of O. 2, R. 2, Civil Procedure Code.

On the 1st of August 1916, the plaintiffs first instituted a suit for arrears of profits for the years 1321 and 1322 Faslis. That suit was decreed and we are not now concerned with its merits. Subsequent to the 1st of August 1916, the present suit was instituted for arrears of profits for the year 1323 Fasli, The plaintiffs themselves in the plaint alleged their cause of action to have

arisen on the 1st of August 1916. The Courts below have held that, as the right to sue had accrued on the 1st of August 1916 it was the duty of the plaintiff to include their present claim in the previous claim, and that they, not having done so, have rendered their subsequent suit liable to be dismissed under O. 2, R. 2, Civil Prccedure Code.

Under the fourth schedule, group (b), of the Agra Tenancy Act, the time from which limitation begins to run for a suit for arrears of profits is " when the share of the profits becomes payable. " Under S. 163 of the Act, profits are divisible on dates notified by the Local Government. In the present case it is not disputed that the date so notified was the 1st of August 1916, and that the profits for the year 1323 Fasli became divisible on the 1st of August 1916. But the learned vakil for the plaintiffs contends that inasmuch as it would have been open to the lambardar to pay up the profits in the course of the day, in fact, up till the end of that day, the plaintiffs' right to sue had not accrued on that day, and that it must be deemed to have accrued on the second day, namely, the 2nd of August 1916. It is impossible to accept this contention. All that we have to consider is the date when the profits became payable or when they became divisible. As soon as the 1st of August 1916 commenced the profits became divisible. It must, therefore, be held that they became divisible even in the early part of the morning. Had the plaintiffs brought a suit for the year 1323 Fasli, on the 1st of August 1916, it would have been impossible to throw it out on the ground that it was premature. It is clear, therefore, that they, could very easily have included the present claim in the former claim and they not having done so, have rendered their suit liable to be dismissed on the technical ground of O 2, R. 2, Criminal Procedure Code. The result therefore is that we dismiss the appeal under O. 41, R. 11, Civil Procedure Code.

Appeal dismissed.

1925 ALLAHABAD 796

MUKERJI, J.

Peerji Mohib Ali Shah — Plaintiff — Appellant.

v.

Ram Chander — Defendant — Respondent.

Second Appeal No. 751 of 1923, Decided on 1st December 1924, against a decree of the D. J., Bulandshahr, D/- 31st January 1923.

(*a*) *Civil P. C., S. 100—Inference of law from admitted facts—High Court can interfere if inference is wrong.*

If from admitted facts, logical inference, drawn by lower appellate Court which is an inference of law and not of mere fact, be wrong, High Court can interfere. [P 797 C 2]

(*b*) *Agra Tenancy Act (2 of 1901), S. 88—Occupancy tenancy—Trees cannot be planted without landlord's consent.*

Under Tenancy Act 1901 trees are mere improvements. But an occupancy tenant cannot plant trees without the consent of the zemindar. The provision that tenants would be entitled in future to plant trees with the zamindar's permission does not, by any stretch of reasoning, amount to a grant by the zamindars of a right to occupancy tenants to sell trees standing on the occupancy. [P 798 C 1]

P. N. Sapru and *K. N. Laghate*—for Appellant.

Panna Lal—for Respondent.

Judgment.—The question involved in this second appeal is what is the character of the grove in suit and whether the same is saleable in execution of a mortgage decree obtained by the Respondent No 1 against one Toria's widow, the Defendant No. 2.

The plaintiff's case was that he was the zamindar and lambardar of the village, that Toria was an occupancy tenant of 8 and odd bighas of land within his zamindari, that the grove in question was a part of Toria's said occupancy holding, that Toria made a simple mortgage of the grove in favour of the respondent who obtained a decree for sale, that Toria died and his widow re-married, that the widow was ejected from the entire holding except the grove, and that the grove was excepted from the ejectment suit because the plaintiff was in possession of the same. The plaintiff asked for a declaration that in execution of the decree obtained by the respondent the grove was not liable to be sold.

The Court of first instance decreed the suit, but the learned District Judge on appeal has reversed the decree and dismissed the plaintiff's suit.

In this Court it is urged that the lower Court was wrong in law in coming to the conclusion that the grove was not saleable.

The learned District Judge has not found whether the grove was planted on a portion of an existing occupancy holding or whether the grove was planted on a piece of land expressly leased to Toria or his ancestor for the purpose of planting a grove. He said that there was no evidence on the point. The appellant's contention is that the learned Judge has overlooked the admission of the parties and the actual evidence that is there on the record. I have accordingly looked into these matters and have come to the conclusion that the grove was planted on a plot of what was already an occupancy holding of Toria or his ancestor. Briefly the reasons are these :

In paragraph 1 of the plaint the plaintiff stated that Toria was an occupancy tenant of 8 bighas and 17 biswas of land. This statement was admitted in paragraph 1 of the written statement. In paragraph 2 of the plaint the plaintiff expressly stated that during the subsistence of the occupancy tenancy Toria planted mango trees on the plot in question. The respondent stated as to this paragraph of the plaint that it was not admitted "as set forth." He added that or the other hand the grove was planted by the ancestors of Toria. Although the respondent stated that the statement in paragraph 2 of the plaint was not admitted as set forth he made no statement in the 'additional statements' contained in the written statement to show that the land was taken by Toria's ancestor for the express purpose of planting a grove. Indeed, this was not a part of the respondent's case at all. The respondent was examined in the Court below, and he stated that the grove in question stood in the occupancy holding of Toria. In addition to these pleadings and statement of the respondent there is the evidence of the patwari and other documentary evidence to show that the grove has all along been treated as a portion of the occupancy holding.

Then the fact is that the grove was planted on a portion of an occupancy holding.

The learned District Judge thought that, although he did not find that the land had been obtained for the express purpose of planting a grove, he had sufficient material before him to find that the grove had been planted in such circumstances as to entitle the tenant Toria to mortgage the trees. On behalf of the respondent it has been contended that this is a finding of fact. But I cannot agree with this contention. If the learned District Judge had not stated the admitted facts from which he drew his inference, the matter might have been different. If, from admitted facts, his logical inference, which is an inference of law and not of mere fact, be wrong it cannot be claimed for his finding the immunity from scrutiny by this Court. The learned Judge drew the inference that the trees had been planted with the permission of the zamindar from the fact that the wajib-ul-arz of the year 1268 contains certain provisions. I shall consider the provisions later on; but I am not at all disposed to differ from him in this that the grove must have been planted with the zamindar's express or implied permission. The very fact that the grove was allowed to stand and the zamindar did not contest the right of the tenant to plant the trees would go to show that he was agreeable to the planting of the trees. Then the learned Judge infers from the entries in the wajib-ul-arz that there was a grant of a permission to the planter of trees to transfer the grove. The wajib-ul-arz relating to the trees planted by tenants is to the following effect. It states what particular groves planted by tenants stood at its date in the village. Against the list of these trees occurs the remark that the rents paid for those groves were entered in the jamabandi and the planters had a right either to cut or to sell the trees. Then comes a statement that in future tenants would be entitled to plant trees only with the permission of the zamindars. Now, it is nobody's case that the grove in question finds mention in the wajib-ul-arz of 1268 F. The statement, therefore, contained in the wajib-ul-arz that particular tenants had a right to sell or cut their trees do not apply to any of the trees in suit. The provision that tenants would be entitled in future to plant trees

with the zamindar's permission does not, by any stretch of reasoning, amount to a grant by the zamindars of a right to occupancy tenants to sell trees standing on the occupancy holding. Under the present law (Tenancy Act, 1901) trees are mere improvements. But an occupancy tenant cannot plant trees without the consent of the zamindar. Under the old law also trees could be planted on occupancy holdings by the tenants with the permission of the zamindars. But I am not aware of any rule of law by which the tenant could sell the trees which he planted with the permission of the zamindars on his occupancy holding. The provisions of the wajib-ul-arz, therefore, do not justify an inference that the implied permission of the zamindar to plant trees gave, by itself, to Toria a right to mortgage them. The next matter on which the learned Judge has relied is the fact that in the ejectment suit brought against Toria's widow the grove was not included. But the plaint did not mention the grove and the statement was made that the grove was in the occupation of the zamindar himself. It was not the case that the grove was omitted from the suit for ejectment simply because it had ceased to be a part of the occupancy holding. It is clear, therefore, that the learned Judge had no material whatsoever from which to draw the inference that the character of occupancy holding had changed by mutual agreement between Toria and the landholder and what was once part of an occupancy holding had become a separate tenure, viz., a grove-holder's tenure.

The finding being that the grove was planted on an occupancy holding, the character of the holding would continue. This was held by a single Judge of this Court and his decision was upheld by two other learned Judges of this Court [see the case of *Daya Kishen* v. *Muhammad Wazir Ahmad* (1).] The learned District Judge has relied on the case of *Jalesar Sahu* v. *Raj Mangal* (2). In that case Walsh, J., summarized the existing law, and on the facts found came to the conclusion that the original occupancy holding had been converted into something else, viz., a grove-holder's tenure. The learned District Judge thought that the materials before him were sufficient to justify him to come to a conclusion that the character of the original holding had been changed. But he came to that conclusion on facts from which the inference he wanted to draw could not be drawn.

If the grove stands on an occupancy holding, and is a part of it, it follows that Toria had no right to make a simple mortgage of it. The mortgage was indeed made before the passing of the Tenancy Act of 1901. But the mortgage is a simple one. If the mortgage had been with possession the mortgagee would have been entitled to continue in possession till the mortgage was redeemed. But those considerations do not arise here. The result is that the plaintiff-appellant must have his declaration that Toria had no right to make the mortgage, and the grove is not saleable in execution of the decree which the respondent obtained against the Defendant No. 2.

I allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs throughout, and the costs will include counsel's fees in this Court on the higher scale.

Appeal allowed.

(1) [1915] 13 A. L. J. 833=30 I. C. 565.
(2) [1921] 43 All. 606=63 I. C. 437=19 A. L. J. 616.

1925 ALLAHABAD 798

BANERJI, J.

Charan Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Reference No. 237 of 1925, Decided on 28th April 1925 made, by S. J., of Benares.

(a) *Penal Code, S. 279—Offence under Motor Vehicles Act, S. 5 falling within S. 279—Trial under either is legal.*

The facts which have to be proved in both cases, i. e., under S. 279, I. P. C. and Motor Vehicles Act, S. 5, are substantially the same, and the offence comes equally well under either definition; and there can be no question of prejudice to the accused whether the conviction is under the one or the other. [P 499 C 2]

(b) *Motor Vehicles Act* (1914), *S. 5—Accused seeing another car approaching in addition to the one passing in his direction and trying to force his way on, such conduct comes within S. 5 and conviction is proper—Penal Code, S. 279.*

Where the accused saw another car approaching him on its proper side of the road and where he ought to have drawn in behind the

water-cart passing in the same direction as the accused and not have attempted to force his way past it in front of the oncoming car.

Held; that such conduct on the part of the accused came within the purview of S. 5 of the Motor Vehicles Act, and that the conviction was a proper one. [P 800 C 1]

(c) *Motor Vehicles Act*, (1914,) *S. 5.—Driver driving for many years—Many certificates for good driving—No previous conviction for bad driving — Conviction of cancelling license is too severe.*

Where the accused had been driving cars regularly for about 13 years and had obtained a large number of good certificates from a variety of masters, and where he had never before had a conviction for bad driving.

Held; that the verdict that he was unfit to hold a license because he was not a good driver was ridiculous in view of his record and must be cancelled. [P 800 C 1]

Referring Order.— Charan Singh, applicant, was convicted under S. 5 of the Motor Vehicles Act, fined Rs. 50 or two months' simple imprisonment in default, and had his license cancelled for the remaining portion of the year 1925; that is to say, about nine months from the date of the order. The facts of the case were that the Superintendent of Police personally saw the accused driving in what he regarded as a grossly negligent and dangerous manner. He stopped him and took his address, directing him to appear for examination in driving. The Reserve Inspector reported that applicant was not qualified to hold a license, and the license was, therefore, cancelled by the Superintendent of Police.

Thereupon Charan Singh put in an application to the District Magistrate stating the facts, and asserting that the cancellation of the license without conviction was illegal. The District Magistrate sent the application to the Superintendent of Police with the following remark: "For favour of report. Paragraph 18 appears to be the only section applicable. Do you want to prosecute;" The Superintendent of Police replied that, in the circumstances, the best plan was to let the case go to Court, when he would ask for the cancellation of the license. The papers were then sent to the City Magistrate "for necessary action." The City Magistrate tried the case summarily, recording the offence complained of under S. 279, Indian Penal Code, and convicting under S. 5 of the Motor Vehicles Act.

It is first urged that, in effect, there being no complaint or police report on the record, the City Magistrate took cognizance on his own initiative under S. 190 C. He did not, however, give the accused the opportunity prescribed by S. 191 of trial by another Court, and, therefore, the conviction is bad. In my opinion this is an incorrect view of what took place. Although the proceedings preliminary to prosecution were very informal, I take it that the District Magistrate's order: "To City Magistrate for necessary action," was in effect an order taking cognizance of the case, and transferring it for trial to the City Magistrate.

The second ground of the application is that when the offence complained of was entered under S. 279 of the Indian Penal Code, a conviction under S. 5 of the Motor Vehicles Act was bad. No very serious attempt has been made to argue this ground, and I cannot see that there is any substance in it. The facts which have to be proved in both cases are substantially the same, and the offence alleged comes equally well under either definition. Whether the conviction is under the one or the other, there is no question of prejudice to the accused.

The third ground was on the merits. I am loath to go into questions of fact in a revision application; but as the disputed facts are in the present case mixed up inextricably with the question of whether any or all of those facts constituted the offence, it is desirable that I should do so. The evidence of the Sub-Inspector was that, as he was passing the Imperial Bank, accused was coming in the opposite direction in a Ford car at about 20 miles an hour, and swerving from side to side of the road. A Municipal water-cart was also coming towards the Superintendent of Police, and applicant tried to get between the water-cart and the Superintendent's car, with the result that the latter was forced on to the "patri" and obliged to stop dead There were a large number of foot passengers about.

The road is fairly wide at this point, but its surface is indescribable. Only an optimistic municipality would venture to describe it as a pakka road at all. If applicant was really going 20 miles an hour in a Ford, it is inevitable that he

must have been swerving about the road a good deal. On the other hand, it is necessary for any form of motor traffic to take a more or less serpentine course on a road of this description, in order to avoid the engulfment of the car in the deeper potholes. I do not necessarily take this swerving as a sign of reckless driving. What is to my mind absolutely clear proof of bad and dangerous driving is the fact that the Superintendent of Police was forced on to the patri of a broad road, and compelled to stop in order to avoid an accident. What applicant has been guilty of is the old and dangerous game of "three abreast." Clearly, when he saw another car approaching him on its proper side of the road, he ought to have drawn in behind the water-cart and not have attempted to force his way past it in front of the oncoming car. I am in entire agreement that such conduct comes within the purview of S. 5 of the Motor Vehicles Act, and that the conviction was a proper one.

In my opinion, however, taking everything into consideration, the sentence is too severe; at any rate as regards cancellation of of the license. Applicant has been driving cars regularly since 1912, and has obtained a large number of good certificates from a varity of masters. He has never before had a conviction for bad driving, and I regard the Reserve Inspector's verdict that he is unfit to hold a license because he is not a good driver as ridiculous in view of his record. I have no doubt that in passing his order the learned City Magistrate must, to some extent, have been influenced by this opinion after examination of the Reserve Inspector.

I, therefore, order that the record be sent to the Hon'ble High Court, with a recommendation that the order cancelling applicant's license be quashed. A fine of Rs. 50 I regard as quite adequate punishment for the offence which has been committed.

Banerji, J.—I have read the record and I agree with the views of the learned Sessions Judge. I set aside the order of the Magistrate directing the license of the accused to be cancelled.

Reference answered in the affirmative.

1925 ALLAHABAD 800

STUART, J.

Manohar—Defendant—Applicant.

v.

Mangal Das—Plaintiff—Opposite Party.

Civil Revision No. 125 of 1924, Decided of 4th February 1925.

Civil P. C., S. 115—Order of revenue Court or District Judge, original or appellate, in reference to questions under Local Tenancy Act—Revision does not lie.

The High Court has no power to interfere in revision under S. 115 of the Civil P. C., or otherwise, with any order that has been passed originally or in appeal by a revenue Court or by a District Judge in reference to questions decided under the provisions of the Agra Tenancy Act, No. 2 of 1901. 42 *All.* 83 *Foll.*

T. B. Sapru, P. N. Sapru and *J. N. Chak*—for Applicant.

P. L. Bannerji—for Opposite Party.

Judgment. — The main question raised in these two applications in revision was whether in the particular circumstances of the revenue suit the District Judge had jurisdiction to hear the appeals. But, as a preliminary, it is necessary to decide in the first place. Has this Court any right to interfere with his order in revision?

There have been several decisions in this Court upon the latter point. The only Bench decision which has been placed before me is the decision in *Gaj Kumar Chander* v. *Salamat Ali* (1). I was a member of the Bench which passed that decision. That decision laid down that this Court has no power to interfere in revision under S. 115 of the Civil P. C., or otherwise, with any order that has been passed originally or in appeal by a revenue Court or by a Dt. J. in reference to questions decided under the provisions of the Tenancy Act, No. II of 1901.

Ordinarily this would conclude the matter; but it has been argued by the learned counsel for the applicant that this decision would not affect a case in which the District Judge had patently no jurisdiction at all. It would not be proper for me to decide one way or another as to the District Judge's jurisdiction in this matter; it is enough to say that, in my opinion, the Bench ruling which I have quoted precludes me from entering into the matter.

I must, therefore, dismiss this application with costs on the higher scale.

Application dismissed.

---

(1) [1920] 42 All. 83=52 I.C. 756=17 A.L.J. 1057

★ 1925 ALLAHABAD 801

SULAIMAN AND DANIELS, JJ.

Shiva Nath Prasad--Appellant.

v.

Tulsi Ram—Respondent.

Ex. First Appeal No. 500 of 1924, Decided on 20th May 1925, from a decree of the Addl. Sub.-J., Gazipur.

★ *Hindu Law (Mitakshara)--Joint family—Mortgage by father for immoral purposes—Personal money decree passed against father—Joint ancestral estate attached in execution—Father's share cannot be released.*

Where in a mortgage suit a personal money decree is passed against a Hindu father, the debt for which the mortgage was executed being tainted with immorality and the whole joint ancestral estate is attached in execution, the son is entitled to get his interest in the joint property exempted, but he is not entitled to prevent the attachment and sale of the interest of his father against whom a decree is in force. 3 *Cal.* 198 (*P. C.*) : 5 *Cal.* 148 (*P. C.*) and 16 *All.*449, *Rel.on.* 27 *All.* 16 (*F. B.*) and 1925 *All.* 327 *Ref.* 1921 *P. C.* 50, *Not Appl.* [P. 801, C. 2]

B. Mullik and *Gulzari Lal*—for Appellant.

Peary Lal Benerjee—for Respondent.

Sulaiman, J.—This is an appeal by a Hindu son from a decree passed in execution against him. His father had made a mortgage in favour of the plaintiff decree-holder and a suit was instituted against him impleading his minor son. On behalf of the son it was pleaded that the debt was tainted with immorality and, therefore, the mortgage was bad and the son was not liable to pay the debt. The Court found that the debt was proved to have been tainted with immorality and therefore declined to pass a decree for sale on the basis of the mortgage-deed, but simply passed a money decree against the father personally. The decree-holder put the decree for money against the father in execution and attached the whole of the ancestral property including that which had been mortgaged. The Court below has allowed the objection of the son, so far as the attachment of his interest in the property is concerned, but has ordered execution against the interest of the father in the joint property. The son appeals to this Court, and on his behalf it is contended, in the first place, that the effect of the previous decision was to make the entire family property free from all liability ; and in the next place it is contended that in the face of the finding that the debt was tainted with immorality, it is not open to the decree-holder to attach any portion of the joint ancestral property. We think that there is absolutely no substance in the first contention. All that the Court held was that in view of the finding on the question of immorality the mortgage was bad and therefore there had been no transfer of the property and no charge created. It passed a simple money decree against the father, but it did not in any other way hold that any ancestral property would never be liable to be sold in execution of the decree against the father.

The next contention also has no force. It was held by their Lordships of the Privy Council in the case of *Deendayal Lal* v. *Jugdeep Narain Singh* (1) that the right, title and interest of one cosharer in a joint ancestral estate might be attached and sold in execution to satisfy a decree against him personally under the law of Mitakshara. This principle was re-affirmed by their Lordships in the case of *Suraj Bansi Koer* v. *Sheo Prasad Singh* (2), where at page 174 their Lordships observed that the previous decision had recognized the seisable character of an undivided share in a joint property. This case has been followed by this Court in the case of *Lachhmi Narain* v. *Kunji Lal* (3) and in the case of *Chandra Sen* v. *Ganga Ram* (4). It seems to us that if the interest of the father alone can be seised in execution of a decree against him, the question of the immorality of the debt does not arise. The son is not called upon to pay his debt, nor is his property said to be attached and sold. He is entitled to get his interest in the joint property exempted. But it does not follow that he is also entitled to prevent the attachment and sale of the interest of his father against whom a decree is in force. In the Full Bench case of *Karan Singh* v. *Bhup Singh* (5) reference was made to an earlier Privy Council case, and it was pointed out that if the

(1) [1877] 3 Cal. 198=4 I. A. 247=1 C. L. R. 49=3 Suther. 468=3 Sar. 730 (P. C.).
(2) [1880] 5. Cal. 148=6 I. A. 88=4 C. L. R. 226=4 Sar. 1 (P. C.).
(3) [1894] 16 All. 449=(1894) A. W. N. 169.
(4) [1904] 2 All. 899.
(5) [1904] 27 All. 16=1 A. L. J. 310=(1904) A. W. N. 151 (F. B.).

son sought to escape from having his interest affected by the sale, he had to establish that the debt he desired to be exempted from paying was of such a character that he as a Hindu son could not be under the pious obligation to discharge it. In a recent case of *Abdul Karim* v. *Ram Kishore* (6) the above mentioned Full Bench case was followed.

It is lastly contended that the observations of their Lordships of the Privy Council in the case of *Brij Narayan Rai* v. *Mangla Prasad Rai* (7) conclude this point and make the entire estate free from liability in case the debt is contracted for immorality. We think that the propositions laid down by their Lordships do not cover the point now before us. The question whether the interest of one coparcener can be attached and sold in execution of a decree against him was not a matter before their Lordships. The previous cases referred to above therefore still hold good. We are of opinion that this appeal has no force. It is accordingly dismissed with costs including fees.

Appeal dismissed.

(6) 1925 All. 327=47 All. 421=23 A. L. J. 196.

(7) 1924 P. C. 50=46 All. 95=51 I. A. 129=21 A. L. J. 934=5 L. R. P. C. 1=28 C. W. N. 253=46 M. L. J. 23=5 P. L. T. 1=2 Pat. L. R. 41=(1924) M. W. N. 68=19 M. L. W. 72=33 M. L. T. 457=26 Bom. L. R. 500=11 O. L. J. 107=1 P. L. R. 1924 (P. C.).

1925 ALLAHABAD 802

BOYS AND BANERJI, JJ.

Amar Singh—Decree-holder — Appellant.

v,

Mt. Ram Dei—Judgment-debtor—Respondent.

Ex. Second Appeal No. 1376 of 1924, Decided on 1st May 1925, from a decree of the Additional Judge of Saharanpur.

Civil P. C., O. 21, R. 2.—Payment made within three years of last starting point of limitation but certified after 3 years had expired takes effect from the date when it was made.

Where a payment has been made within three years of the last starting point of limitation for an execution application, but is certified under O. 21, R. 2 after the expiry of the 3 years the certification makes the payment entitled to recognition as a payment made on the date on which it was actually made and not as a payment on the date it was certified. (*Case law discussed.*) [P. 804, Cs. 1 & 2]

S. A. Haidar—for Appellant.

K. C. Mittal—for Respondent.

Boys, J.—In this case, on the 10th of April 1920, the decree-holder obtained a final decree for Rs. 2,338 on a mortgage. On the 6th of April 1923, the decree-holder is said to have received Rs. 50 from the judgment-debtor towards satisfaction of the decree. On the 3rd of July 1923, the decree-holder applied under O. 21, R. 2, certifying the payment of Rs. 50, and this was duly recorded by the Court. On the 19th of September 1923, the decree-holder applied for execution. Without issuing notice to the judgment-debtor the first Court summarily rejected the application as barred by limitation. It will be seen that the date of the alleged payment of Rs. 50 was a few days within the period of limitation, whereas the certificate was some three months after the period of three years from the date of the decree had expired. The first Court then held that the application for execution was barred by limitation in that payment was certified under O. 21, R. 2, after the period of three years from the date of the decree, and that the "certification cannot revive the decree." The lower appellate Court, relying upon the case reported in 12 A. L. J. R., 825, dismissed the appeal.

The question for final decision in the case will be whether the application for execution was barred by limitation and the preliminary questions that we have to decide may be stated as follows :

(1) Assuming that a payment has been made within three years of the last starting point of limitation for the execution application (in this case the date of the final decree) must that payment, in order to avoid exclusion from recognition by the terms of O. 21, R. 2 (3), be certified under R. 2 within any particular period of limitation ?

(2) If the answer is in the affirmative, (*a*) does the period of limitation for the certification commence from the last starting point for the execution application or from the date of the payment ? and (*b*) was the certification within the period ?

(3) If the certification was not barred by any rule of limitation, does the certification make the payment entitled to recognition as a payment made on the date on which it was actually made or as a payment made on the date when it was certified ?

We have endeavoured to state these questions in unmistakable terms because it appears to us that the ruling of this Court by which the lower appellate Court has considered itself bound has been misunderstood not only by that Court, but that that case and others of this Court, to which we shall refer have been misappreciated in several subsequent cases of other High Courts.

It is necessary to be clear that there are two distinct aspects of the law of limitation to be distinguished, namely, the law of limitation, if any, applicable to the certification of a payment and the law of limitation applicable to an application for execution. We shall have at present to discuss only the law of limitation, if any, applicable to certification. If we find that there is no impediment in the way of certification, the materials before us are not complete for a decision as to whether the application for execution is within the period of limitation applicable to applications for execution. The case will for that purpose, should the necessity arise, have to be remanded for findings as to whether a payment was in fact made ; if so, on what date, and was the payment, if made, such as to constitute within the meaning of S. 20 of the Limitation Act a fresh starting point for limitation so as to make the present application for execution within time. At present the only finding by the lower Courts has been that the certification could not be made.

We have been referred to several cases of this Court : 12 A. L. J. R., 387 ; 13 A. L. J. R., 825 ; I. L. R., 38 All., 204 ; 22 A. L. J. R., 581. We do not consider that any of these cases are material to the point that we have to decide. The certification set up, and the validity of which is questioned, may be prior to, contemporaneous with and part of, or subsequent to the application for execution. In the case before us it was prior ; in the cases to which we have just referred it was contemporaneous ; and in 52 I. C., 804 it was subsequent. It is clear that there is a difference between the practice in this Court and that of some other Courts, including that of Calcutta, in the matter of whether an application under O, 21, R. 2 (1), must be made by a separate and prior proceeding to an application for execution, or whether it can form part of and be contemporaneous with the application for execution and whether the manner of making it must be in any particular form. We are not concerned here with this difference in practice. It is clear that in the present case application under O. 21, R. 2 (1), was made by a distinct and prior proceeding. All that was held in the cases of this Court, to which we have referred, was that because there was no prior and separate proceeding, there was in fact no certificate such as is required. The question, therefore, of limitation did not really arise at all. On the other hand, we have, on behalf of the appellant also, been referred to I. L. R.. 46 Cal., 22 ; I. L. R., 45 Bom. 91 and I. L. R. 41 Mad. 251. The case at 41 Madras 251 has no bearing on the question before us. The Court decided merely that a contemporaneous certifying was a good certification within O. 21, R. 2 (1), and remanded the case for a finding as to whether a payment had in fact been made ; and if so, whether it operated to save limitation. The finding on remand was that no payment had been made, and that concluded the matter. Very similar was the case at I. L. R 45 Bom., 91.

The case reported in I. L. R., 46 Cal., 22, is, however, directly in point and in favour of the decree-holder. It was held that the alleged payment being within three years of the date of the decree and the application under O. 21, R. 2 (1), being again within three years from the date of payment the decree-holder would have a fresh starting point for limitation. The case was, therefore, remanded for evidence to be taken as to the payment. To the same effect is the case reported in 29 M. L. J. 669 ; 31 I. C. 318.

On behalf of the respondent reliance was placed without any justification on 30 I. C. 51. We say " without justification ; " for though the case is in respondent's favcur the two learned Judges who decided it themselves repudiated it later in the case reported in

52 I. C., 804. We have no hesitation in holding that the certifying of the payment before the application for execution sufficed to remove the bar contained in O. 21. R. 2 (3), and to make it necessary for the trial Court to take evidence in regard to the payment, if it was denied, and if it was admitted or denied and proved, to determine the effect of such payment in view of S. 20 of the Limitation Act. It is clear at least that there is no provision that the payment must be certified on the day that it is made. Is there any provision that it must be certified within any particular period? The only possible limitation to be found is in Art. 181 of the Limitation Act. It is not necessary for the purposes of this case to determine whether or not that article is applicable; for, even if it is applicable, the certifying was in this case within three years of the payment. If then the certification was not barred by any period of limitation, what is to be the effect of such certification? Sub-S. 3 of R. 2, O. 21, merely declares that the payment shall not be recognised until it has been certified. That is merely a rule of procedure, and the contrary proposition may reasonably be inferred that when the payment has been certified it can be recognized. If it can be recognized, is it to be recognized as having been made on the day on which it was certified? We think that the former is clearly the correct proposition. If the date of payment, and the date of certifying, were both dates within a period of three years from the last starting point of limitation, in this case the date of the final decree, it appears to us that it could not be reasonably suggested that the Court in subsequently executing the decree would consider the date of payment to be not that on which the actual payment was made, but the date on which the actual payment was certified. If that rule would apply, as we think it must be applied where both the payment and the certificate were within a period of three years from the date of the last starting point of limitation, there appears to be no possible reason for holding that some different rule should apply where the date of certifying was beyond the period of three years from the date of the last starting point of limitation.

We hold, therefore, that assuming that the alleged payment was made on 6th April 1923, a certification of that payment on 3rd July 1923, is not barred by any law of limitation; that the certification was, therefore, a vaild certification; and that, assuming the payment to have been made on 6th April 1923, any effect which it may have by reason of S. 20 of the Limitation Act will be the effect of a payment made on 6th April 1923, and not as if made on the date of certification, 3rd July 1923.

The result is, that we set aside the orders of the Courts below, and direct the Subordinate Judge to restore the case to its original number, to take the evidence as to whether the payment was in fact made and to decide the case according to law. The costs of this appeal will be costs in the cause with Counsel's fees on the higher scale.

Appeal allowed.

★ 1925 ALLAHABAD 804

BOYS AND BANERJI, JJ.

Ram Baran Chaube and *another*—Plaintiffs—Appellants.

v.

Bhagwati Pandey and *others*—Defendants—Respondents.

Second Appeal No. 648 of 1923, Decided on 15th April 1925, from a decree of the Additional Judge of Gorakhpur.

★ (*a*) *Civil P. C., O. 47, R. 2—Transfer of judge to another Court ousts his jurisdiction to grant review.*

Rule 2 declares that in cases other than those excepted therein an application for review can only be made to the Judge who is not only sitting as the same Court, but is further the individual Judge who passed the decree. If in such cases the individual Judge is transferred to another Court he has no jurisdiction to entertain the review application. [P. 806, C. 1]

(*b*) *T. P. Act, S. 74—Equity of redemption vesting in prior mortgagee—Right of prior mortgagee as owner of equity of redemption to redeem is preferred to that of puisne mortgagee.*

Where the mortgagor's equity of redemption is vested by purchase in a prior mortgagee and that person as owner of the equity of redemption wants to redeem a puisne mortgagee while at the same time the puisne mortgagee wants to redeem the prior mortgagee the claim of the former, not as prior mortgagee but as owner of the equity of redemption, will be preferred. 20 *A. L. J.* 401, *Foll.* [P. 807, C. 1]

Surrendra Nath Sen—for Appellants.

Shiva Prasad Sinha—for Respondents.

Boys, J.—This is a plaintiff's appeal. It was a suit for a declaration of title that the plaintiff was mortgagee in possession of Plot No. 118 and that he was not a tenant of the defendants, and he also prayed for redemption of two simple mortgages. It appears that the original owners were Dharam Dut and Aman Dut whose heirs were Defendants Nos. 10 to 16. A simple mortgage was executed by Dharam Dut and Aman Dut in February 1876, in favour of one Debi Dayal whose heirs were represented by Defendants Nos. 1 to 8. A second mortgage, similar in all respects, was executed on the 28th of September 1876. Finally Dharam Dut and Aman Dut executed in favour of one Pabaru Sunar a usufructuary mortgage on the 22nd of May 1879. The grandson of Pabaru Sunar, Ram Nath, who was really a pro forma defendant 3rd party, sold his rights, on the 7th of August 1909, to Ram Baran Chaube and Hazari Chaube, the present plaintiffs, and got possession. On the 17th of April 1888, the heirs of Debi Dayal, the prior mortgagees, obtained a decree in respect of their two simple mortgages, but did not in their suit make the usufructuary mortgagee, the predecessor of the plaintiffs' party. Having obtained a decree for sale the heirs of Debi Dayal, whom we shall henceforward call the defendants, themselves, purchased the mortgaged property. In 1921 they sued in the revenue Court to eject the present plaintiff describing him as a tenant, and on the 4th of March 1921, the plaintiff objected that he was really a mortgagee and he was referred by the revenue Court to the civil Courts. He duly went to the civil Court and the present proceeding is the result. The defendants pleaded that they not in their capacity as prior mortgagees but by right of their purchase of the equity of redemption at the auction sale were entitled to redeem the plaintiff. They pleaded that they had obtained decrees which extinguished their own mortgages and therefore no suit by the plaintiff for redemption was possible.

The trial Court, the Munsif (B. Grish Chander), on the 16th of February 1922, granted a preliminary decree for redemption to the plaintiff on the basis that all accounts should be taken as to what was due to the defendants on their mortgages at the date of the auction purchase. Subsequent to the passing of this preliminary decree B. Grish Chander was transferred to another Court to act as Subordinate Judge in the same district. On the 16th of February 1922 he had written the judgment in the case, but his successor, B. Raghunath Prasad, on the same day, the 16th of February 1922, pronounced it. The next step was an application by the plaintiff, on the 18th of February 1922, to the Court of the Subordinate Judge, which was then presided over by B. Grish Chander, to amend his judgment, so that the decree should read that account should be taken up to the date of the decree obtained by the defendants in accordance with the Privy Council ruling to that effect. It would appear that on the 4th of March 1922 the defendants appealed from the original preliminary decree to the Court of the District Judge. On the same day B. Grish Chander allowed the application for review and passed a fresh decree. It is clear that though these two proceedings took place on the same date the appeal of the defendants was in fact filed before the order allowing the review was passed; for there is a reference to it in the order granting the review. On the 22nd April 1922 the defendants also appealed against the order allowing the amendment. The two appeals were heard together by the District Judge. He dismissed the plaintiff's suit for redemption, holding that the defendants' mortgages had ceased to exist as a consequence of the decrees obtained by them, and he held that the defendants were entitled to redeem the plaintiff. The plaintiff, at the hearing of the appeal, objected unsuccessfully that the appeal should have been against the preliminary decree as passed by the Subordinate Judge B. Grish Chander, an appeal against which was barred by time. The District Judge further held the order of B. Grish Chander, allowing the review, to be without jurisdiction, and the District Judge gave to the defendants a decree allowing them to redeem the plaintiff's mortgage on payment of Rs. 85.

The plaintiffs have now applied to this Court in Revision No. 65 of 1923 against the order of the District Judge by which he held that B. Grish Chander had no jurisdiction and in the S. A. No. 648 of 1923, against the order by which he reversed the decree of the Munsif and gave the defendants right to redeem

It will be convenient to dispose of both matters in the same order.

As to the Revision No. 65 of 1923, it is again contended before us that the appeal of the defendants should have been directed against the preliminary decree as amended by B. Girish Chander after he had ceased to be Munsif. To establish this contention it is necessary for the plaintiff to contend, and it has been contended with much verbal play on the wording of Rr. 1 and 2 of O. 47, that the plaintiff was right in making to B. Grish Chander his application for review and that B. Grish Chander had power to entertain it. It is not necessary to follow counsel for the applicant in revision in the ramifications of his argument on this point. It is clear on the face of R. 1 that an application for review must in all the cases, in which it is allowed at all, be made "to the Court which passed the decree (or made the order)." If this R. 1 stood alone, then all such applications could be made to "the Court which passed the decree," whether the Judge presiding in that Court was the Judge who passed the decree or was a successor of that Judge. But R 1 is followed by R. 2 which adds a further condition that, except in certain cases of which the case before us is not one, the application must be made "only to the Judge who passed the decree." In the cases excepted the application must be made to the Judge who is presiding at the time in "the Court which passed the decree" and may be made to him whether he is the same Judge who passed the decree or the successor of such Judge, such cases being excepted from R. 2 and only controlled by R 1. In other cases than those excepted (and the present case is not one of these excepted) R. 2 declares that the application can only be made to the Judge who is not only, as required by R. 1, sitting as the same Court, but is further the individual Judge who passed the decree.

In other words R. 2 imposes in certain cases, of which this is one, a second condition in addition to that imposed by R. 1. In the present case owing to transfer of B. Grish Chander, there was no Judge who fulfilled both conditions. B. Grish Chander was not sitting as the same "Court," and his successor Babu Raghunath Prasad was not the same "Judge." The plaintiff should, therefore, have proceeded to his remedy by way of appeal.

The fact that under certain circumstances there may be, through no fault or act of the intending applicant, no Judge at all to whom application for review can be made as in the present case, or where the individaal Judge has died, would at first sight suggest a different interpretation of the section. This difficulty was incidently noticed in 7 Moo. I. A. at p. 304.

But in our opinion the terms Rr. 1 and 2 and particularly the nature of the cases included and excepted by particular mention in those rules puts it beyond doubt that the Legislature carefully considered the cases for which it was providing, and that the consideration was not absent from its mind that in certain cases there might be no Judge at all to whom application could be made. Be that, however, as it may be, and though the rules might have been more clearly worded, the effect of them is beyond doubt.

This is the only argument that was seriously pressed before us in this connexion aud there is clearly no force in it.

We hold, therefore, that the learned Additional District Judge was clearly right in holding that B. Grish Chander had no jurisdiction to allow the review.

The application in revision is dismissed with costs including fees on the higher scale.

Next, as to the S. A. No. 648 of 1923: it is urged that the prior mortgagee filed suits and got his decrees without making the plaintiff puisne mortgagee a party to his suit, and then himself purchased deliberately with the intention of depriving the puisne mortgagee of his right to redeem. This may be so; but how does it help the plaintiff? If, to mark our disapproval, the plaintiff were given the right to redeem which he claims, what would he gain thereby? The prior mortgagee has by his purchase of the mortgagor's rights secured the right to redeem the mortgage of the plaintiff, and if the plaintiff redeemed his mortgages, he would be able immediately in turn to redeem the plaintiff's mortgage. The case is in all essentials indistinguishable from that reported in 20 A. L. J. 401. We find ourselves in complete agreement with that decision and the reasoning to

be found therein. Some attempt was made by counsel for the appellant to distinguish that case on two grounds: firstly, that in that case the prior mortgagee who had become the owner of the equity of redemption had made a deposit under S. 83 of the Transfer of Property Act: and secondly that he had in his written statement put forward his claim to redeem. Neither argument has any force in face of the written statement in this case, in paragraph 10 of which the defendant declared himself ready to pay, and in paragraph 9 of which he asserted his right to redeem. The case was opened to us with the suggestion that it had been held that a prior mortgagee has a right to redeem. Of course, neither in the decision in 20 A. L. J. 401 was this really held, nor do we hold it in this case; but merely that where the mortgagor's equity of redemption happens to have vested by purchase in a person who is also a prior mortgagee, and that person as owner of equity of redemption wants to redeem a puisne mortgage, while at the same time the puisne mortgagee wants to redeem the prior mortgage, the claim of the former, not as prior mortgagee but as owner of the equity of redemption, will be preferred. There is no more force in the appeal than in the revision, and we dismiss it accordingly with costs including fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 807

BOYS AND BANERJI, JJ.

Shagun Chand—Plaintiff—Appellant.

v.

Asa Ram and *others*—Defendants—Respondents.

Second Appeal No. 731 of 1923, Decided on 12th May 1925, from a decree of the Additional Judge of Meerut.

U. P. Land Rev. Act, S. 233 K and S. 111 (b)—Partition proceedings—Parties referred to civil Court after framing issues—Order is not improper.

When objections based on a plea of title are taken in the revenue Court in partition proceedings, that Court must give the matter some consideration as to what are the questions it will have to decide, and it must inevitably hear something of the matter before it comes to a decision as to whether it would enquire into the matter itself under sub-Cl. (*c*) or whether it will refer it to the civil Court under an earlier sub-clause. There is therefore nothing whatever in the section to prevent the Court from referring the matter to the civil Court after it has gone to the length of framing issues, or even to the stage of evidence. [P 808 C 1, 2]

Surendro Nath Sen and *Surendro Nath Gupta*—for Appellant.

Kailas Nath Katju—for Respondents.

Boys, J.—In this case there were certain partition proceedings in the revenue Court, the applicants being defendants Nos. 1—5 in the suit before us. The plaintiff in the suit before us raised the question of proprietary title. On the 3rd of August 1921 the plaintiff was directed by the Assistant Collector to bring a civil suit. The present suit was the result. The fifth issue framed in the first Court was as to whether the civil Court had jurisdiction, objection being taken by the defendants that the Assistant Collector had framed issues and decided to try them himself and had then changed his mind, and that he had no power to so change his mind. The trial Court decided this issue and also all the other issues against the defendants and decreed the suit. The lower appellate Court dismissed the suit on the preliminary point that the revenue Court had no jurisdiction to change its mind and refer the matter to the civil Court.

For the appellant here it is pointed out that the revenue Court had not gone further than framing issues and fixing the date for final disposal, and that in fact no evidence or other enquiry was made. The lower appellate Court has based its decision on the principle of the decision in the case of *Jamna Prasad* v. *Balmukand* (1). That principle is that if the revenue Court has once referred the matter to the civil Court, it has no further power to deal with the matter at all until the matter has been decided by the civil Court. The case was decided before the amendment of the law, but that is quite immaterial to the present case. The principle of that decision clearly was that the revenue Court by having referred the matter to the civil Court has become functus officio and has no further jurisdiction to touch the case. That principle is wholly inapplicable to the present case. It cannot possibly be suggested that even

(1) [1904] 26 All. 225=1904 A. W. N. 2.

if the revenue Court had jurisdiction to pass the order complained against, that jurisdiction was wanting because it was functus officio. If it had no jurisdiction, the reason must be sought elsewhere.

For the respondents here it is again urged that the revenue Court having once framed issues and fixed a date for final disposal could not change its mind and refer the matter to the civil Court. We do not agree. It is clear that when objections based on a plea of title are taken in the revenue Court, it must give the matter some consideration in its own mind, as to what are the questions it will have to decide, and it must inevitably hear something of the matter before it comes to a decision as to whether it would enquire into the matter itself under sub-Cl. (c) or whether it will refer it to the civil Court under an earlier sub-clause. There appears to us to be nothing whatever in the section to prevent the Court from referring the matter to the civil Court after it has gone to the length of framing issues. After all the issues really are only a clear way of stating what is the question in dispute for determination. Further, we think that such action is not prohibited in any way by any rule of commonsense. If, after the Court has gone as far as framing issues, it becomes apparent to it that the question is of such complexity that it should not proceed to enquire into it itself, it is only commonsense that it should then refer the matter to the civil Court, and as we have said, we find nothing in S. 111 opposed to this course. For respondents it was urged that if a reference to the civil Court may be made at the stage at which it was in the present case, there is nothing to prevent the extension of the principle to permitting a revenue Court to refer the case even after it has taken evidence. We should be prepared to go as far as that. We think that the revenue Court may be trusted to make up its mind at an early stage of the proceeding. For these reasons we think that the order of the trial Court on this preliminary objection was correct, and that of the lower appellate Court was wrong.

Banerji, J.—I agree with my learned brother, and I only wish to add that a suit for a declaration like the one in this case, is cognizable by the civil Court, except where S. 233 K of the Land Revenue Act bars it. In this case the bar can be removed by the revenue Court by an order under S. 111, Cl. (b). I am of opinion that the order of the revenue Court directing the present plaintiff to institute the suit was a removal of the bar, and, therefore, the suit was entertainable.

By the Court.—The order of the Court is that the appeal is allowed and the order of the lower appellate Court is set aside, and the case is remanded to the lower Court for trial according to law. Appellant will get his costs.

Appeal allowed.

1925 ALLAHABAD 808

PIGGOTT, J.

Baldeo Ram and *another*--Appellants.

v.

Kunkun Ram--Respondent.

Second Appeal No. 1146 of 1923, Decided on 3rd April 1925 from a decree of the D.-J., of Ghazipur.

(a) *Practice—Judgment—Technical defect does not justify setting aside proceedings.*

The High Court refused to set aside the proceedings in the lower Court or order an appeal to be re-heard as a first appeal in that Court merely on the ground of a technical objection to the form of the judgment. [P 809 C 1]

(b) *Civil P. C., O. 41, R. 27—Additional evidence cannot be admitted merely because the evidence is such as to justify grant of review.*

An appellate Court as such has no jurisdiction to admit fresh evidence merely on the ground that it has been discovered by one of the parties to a litigation under such circumstances as would warrant an application for review of judgment under O. 47, R. 1. [P 809 C 2]

(c) *Evidence Act, S. 145—Report of police officer in connexion with enquiry is admissible only for refreshing memory.*

A report made by a police officer in connexion with an enquiry made by him in the exercise of his lawful jurisdiction is admissible in evidence in a judicial proceeding only for the purpose of refreshing his memory in case the police officer is examined as a witness. [P 810 C 1]

Uma Shanker Bajpai--for Appellant.

Haribans Sahai and *K. Varma*--for Respondent.

Piggott, J. — This is an appeal by two plaintiffs whose suit for possession of a certain house and recovery of rent has been dismissed by two Courts. The first question raised is whether the judgment of the lower appellate Court can

be accepted as one which complies adequately with the requirements of the law on the subject. Obviously the learned District Judge, having heard the arguments in the case, thought so little of the plaintiffs' claim that he could not be troubled to deal with the points taken in the memorandum of appeal before him systematically or in any detail. He did, however, apply his mind to the most crucial point in the case. The title of the plaintiffs came to them from one Chhedi, who claimed as heir under the Hindu Law of one Sukh Lal. The plaintiffs had to prove Chhedi's title, failing which their suit could not succeed. Now, the plaintiffs' case was that Chhedi was the son of one Khedu, and that Khedu and Sukh Lal were brothers, the sons of one Behari. On the other side evidence was produced that the name of Sukh Lal's father was Raghubar. The learned District Judge felt satisfied that the evidence on the record proved this point against the plaintiffs. He has produced a judgment which I do not consider commendable or altogether satisfactory, but I am not prepared to set aside the proceedings in the lower Court, or to order the appeal to be re-heard as a first appeal in that Court, merely on the ground of a technical objection to the form of the judgment. So far as this matter goes there is only one other point that is at all arguable on behalf of the appellants. The evidence that Sukh Lal's father was called Raghubar included a certain document, as to which objection was taken that it had not been proved in the manner required by law. It was not put forward as a document of title. What was put in evidence was simply a statement made in writing by one Sukh Lal, since deceased, that the name of his father was Raghubar. I am satisfied that, for the purpose for which it was used, that statement was duly proved against the plaintiffs. There is one other matter with which I must deal. Along with the petition of appeal the plaintiffs have tendered a petition supported by affidavit, asking this Court to admit further evidence. The evidence in question is documentary, and it falls under two distinct heads. In the first place, copies are tendered of certain proceedings in a former litigation, described as Suit No. 143 of 1887, the object of which is to prove that Sukh Lal's father was called both Behari and Raghubar. I have thought it expedient to examine these documents, without prejudice to the question, whether they ought or ought not at this stage to be admitted in evidence. It was pointed out long ago by a Bench of this Court (vide *In re Nand Kishore*, 32 All. 71) that the appellate Court, as such, has no jurisdiction to admit fresh evidence merely on the ground that it had been discovered by one of the parties to litigation under such circumstances as would warrant an application for review of judgment under O. 47, R. 1 of the Code of Civil Procedure. At the same time it must be admitted that the position which arises when a litigant alleges himself to have discovered facts such as warrant the invocation of the rule above-mentioned, at a time when an appeal against the decision complained of is actually pending, is a somewhat difficult one. On a strict interpretation of O. 47, R. 1, it would seem that the mere fact that an appeal has been preferred excludes the application of the said rule. This is not, of course, an answer to the contention that the powers of an appellate Court in the matter of the production of additional evidence are strictly limited by O. 41, R. 27 of the same Code. It may be that the particular question now under consideration was not adequately considered when the rules under the Code of Civil Procedure were framed, and that some addition to these rules might well be made to deal with cases of this sort, though they cannot be of frequent occurrence. Sitting as a single Judge I should consider myself bound, if the appeal before me could only be disposed of on this one ground, to follow the ruling laid down in *Nand Kishore's* case above referred to. If the matter were res integra, I would take leave to suggest that, in the absence of any rule dealing specifically with this point, a Court of appeal might in the interests of justice, stretch the words, "or for any other substantial cause," in O. 41, rule 27 aforesaid, so as to enable it to take action if the interests of justice clearly required it to do so. The present is not in my opinion such a case. To begin with, the adffidavit along with which this additional evidence is tendered is unsatisfactory and inadequate. One thing is certain that, if additional evidence is to be admitted at all under the

circumstances now before me, the principles laid down in O. 47, R. 1 of the Civil Procedure Code must be strictly applied, in order to determine the admissibility or otherwise of the additional evidence. On the affidavit before me I am in no way prepared to hold that the additional evidence which I am now considering could not have been produced by the present plaintiffs at the time when the decree under appeal was passed, if they had exercised due diligence. As I am dealing with this matter on broadly equitable grounds, I may add that, having looked through the documents relating to the proceedings in Suit No. 147 of 1887, I consider them quite inconclusive, and am not of opinion that they either would or should have affected the decision of the question in issue if they had been tendered in the trial Court. Strictly speaking, I doubt it if they were admissible at all. The plaintiffs had called Chhedi as their own witness, and Chhedi had deposed positively that the name of his father's father was Behari, and that the said Behari was never known by any other name. I doubt if the plaintiffs could have been permitted to contradict their own witnesses on this point.

There are two other documents tendered which are of the nature of reports made by police officers (presumably still alive) in connexion with an enquiry held by the said officers in the exercise of their lawful jurisdiction in the month of December 1920. This evidence, as it stands, is not admissible at all against the defendant in the present suit. If the plaintiffs had called one or both of the police officers in question as a witness and sought to examine such witness on the proceedings in question, the witness, could no doubt have been asked to refresh his memory with reference to these documents. They could not have been put in evidence in any other way. For these reasons I have rejected the application for the admission of additional evidence.

The result is that this appeal fails, and I dismiss it accordingly with costs including fees on the higher scale.

Appeal dismissed.

1925 ALLAHABAD 810

STUART, J.

Ram Sarup and *another*—Plaintiffs—Appellants.

v.

Gaya Prasad—Defendant—Respondent.

Second Appeal No. 1137 of 1923, Decided on 13th March 1925, against a decree of the Dt. J., Farrukhabad, D/- 12th April 1923.

Agra Tenancy Act (2 *of* 1901), *S.* 165—*Suit for profits against lambardar's heirs after his death—Heirs are not liable for uncollected profits.*

The successor-in-title of a deceased lambardar in a suit which was not brought against the lambardar but brought after his death are not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. In such a case profits can be awarded only on the basis of collections. 40 *All.* 246, *Dist.* [P. 811 C. 1]

K. N. Katju—for Appellants.

Gulzari Lal—for Respondent.

Judgment.—The suit out of which this appeal arises was brought under S. 165 of the Tenancy Act by certain zamindars for profits. During the period in which the profits have become due Ram Dayal was lambardar. Ram Dayal had, however, died before the suit was brought and it was sought to obtain the profits from his sons as his representatives. The trial Court awarded profits on a basis of demands. The lower appellate Court has awarded profits on a basis of collections.

In second appeal it is asserted that the profits should have been given on a basis of demands and in support of that proposition reliance is placed upon the authority of the Full Bench decision in *Bharat Singh* v. *Tej Singh* (1). That decision does not, however, support the appellant's contention. The suit out of which the appeal decided in *Bharat Singh* v. *Tej Singh* (1) arose was one brought under S. 164 against the lambardar and the Full Bench decided that, where a suit had been brought against a lambardar, and he had died during its pendency, the provisions of sub-S. (2), S. 164 had application, and that a decree should be given for sums which had not been collected owing to the negligence or misconduct of the lambardar as against the assets left

(1) [1918] 40 All. 246=43 I. C. 636=16 A. L. J. 193 (F. B.).

by him in the hands of his heirs. But this decision in no way overruled the previous decision of a Bench of this Court in *Dip Singh* v. *Ram Charan* (2) in which it was held that the successor-in-title of a deceased lambardar in a suit which was not brought against the lambardar, but brought after his death was not liable to account for profits which his predecessor had failed to collect or which he permitted to remain uncollected owing to negligence or misconduct. This was also a suit under S. 165. But there, it is to be noted that, the actual ambardar sued was not the lambardar who was guilty of the misconduct and negligence. In that case one lambardar had been negligent, and then died and the suit had been brought against another lambardar who had been guilty of no misconduct.

I read the Full Bench ruling to have application only to suit, under S. 164. This is a suit under S. 165. The descendants of the deceased lambardar are in no worse position than any other cosharer. The special provision by which a lambardar or his heirs, legal representatives, executors, administrators and assigns are liable for sums remaining uncollected owing to negligence and misconduct does not apply to the defendants here as cosharers in spite of the fact that they are also the heirs of the lambardar.

The learned District Judge arrived at a correct decision on the point. I dismiss this appeal with costs on the higher scale.

Appeal dismissed.

(2) [1906] 29 All. 15=1906 A. W. N. 252=3 A. L. J. 608.

1925 ALLAHABAD 811

BOYS AND ASHWORTH, JJ.

Bhikki Mal—Defendant—Appellant.

v.

Raghubir Singh and *another*—Plaintiffs—Respondents.

Second Appeal No. 790 of 1923, Decided on 15th May 1925, against the decree of the Additional Judge of Meerut.

(a) *Negotiable Instruments Act, Ss. 64 and 76 (d)—Hundi not presented for payment—Drawer withdrawing after many days money deposited for payment—Burden lies on payee to prove that drawer did not suffer any loss—Evidence Act, S. 101.*

Where a hundi is not presented for payment and the drawer withdraws the money after many days, the burden of proof lies heavily on the payee to prove that the drawer did not suffer any loss, and the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage and burden is certainly not discharged by the oral admission of the defendant drawer that some time or other subsequently he got back his money. [P. 811, C. 2]

Kailas Nath Katju—for Appellant.

Nehal Chand—for Respondents.

Boys, J.—This is a defendant's appeal. The suit was one to recover money on a hundi drawn in favour of the payee, the plaintiff, at Muzaffarnagar. It was drawn on the 5th of May 1920, and was payable at sight on Dina Nath Jasraj of Delhi.

Both the Courts below have held, as a matter of fact, that there was no presentation in fact. This, under S. 64 of the Negotiable Instruments Act, would have sufficed by itself for a dismissal of the suit. The lower appellate Court, however, added: "I am nevertheless of opinion that the plaintiffs are equitably entitled to recover their money. Admittedly the defendant-appellant had taken back his money from the firm of Dina Nath Jasraj and he could not therefore suffer damage for want of presentation." The learned Judge was presumably referring to S. 76 (*d*) of the Negotiable Instruments Act. We think that he is wholly wrong in assuming that the defendant could not have suffered any damage merely because many months afterwards he withdrew his money from the firm of Dina Nath Jasraj. It is clear that the burden of proof lies heavily on the plaintiff, and we agree that the circumstances will be very exceptional in which he could prove that the drawer could not possibly have suffered any damage. The burden is, however, on him and that burden is certainly not discharged by the oral admission of the defendant drawer that some time or other subsequently he got back his money. If it were necessary even to illustrate this, it is clear that the defendant might say

"my money for such and such a period was tied up in the hands of the drawee because I knew I had this hundi out against me. I was unable to employ that money profitably in certain ventures which offered themselves to me."

There is no evidence to this effect, but it is obvious that such consideration

might arise, and it is for the plaintiff payee to establish conclusively that they could not. As he failed to do this, his suit must fail. The appeal is allowd, the decree of the lower appellate Court is set aside and the decree of the Court of first instance dismissing the suit is restored. The appellant will have his costs throughout.

Appeal allowed.

1925 ALLAHABAD 812

KANHAIYA LAL, J.

Mata Din and *others*—Defendants—Appellants.

v.

Anand Madho—Plaintiff—Respondent.

Second Appeal No. 375 of 1923, Decided on 19th December 1924, against a decree of the D. J., Mainpuri, D/-6th December 1922.

Agra Tenancy Act (2 *of* 1901), *S.* 34—*Suit against person who came into occupation with consent of landlord—Section does not apply.*

Section 34 refers to suits brought against persons whose occupation began without the landlord's consent and not to a suit in which it is found that the defendant was initially in occupation with landlord's consent. 35 *All.* 123 and 8 *A. L. J.* 1087 *Ref.* [P 812, C 2]

A. P. Dube—for Appellants.

Baleshwari Prasad—for Respondent.

Judgment.—The dispute in this appeal relates to Plot No. 364 khasra measuring 72 in Mouza Iknaur and the question for consideration is whether the plaintiff is entitled to treat the said land as having been held by the defendants without the consent of the plaintiff within the meaning of S. 34 of the U. P. Act II of 1901.

The land in question appears to have formed a part of a large grove, of which a portion still exists on Plot No. 365 khasra and the rest has been denuded of trees. The allegation of the defendants was that they held the said grove land as a muafi tenure free from any liability for the payment of rent for over two generations and that they are not liable to ejectment. There is a finding that the land was held under a grove tenure but no finding as to when the portion in dispute was denuded of trees and brought under cultivation, and how long the defendants have been in occupation of the same, and in what capacity. In 1833 Grove No. 389 old khasra measuring 5 bighas 15 biswas was recorded in the name of Bishan Nath as a muafidar. There was also a reference to the grove in the wajib-ul-arz of that year. In the jamabandi of 1873 Fasli Grove No. 246 measuring 2 bighas 11 biswas was entered in the name of Kishori, son of Sobha Ram, and Mata Din, but it is not clear whether that plot was the same or formed a part of the old No. 389 khasra, and what became of the rest of the land, if it did so. In the khasra for 1317 Fasli Grove No. 246 measuring 2 bighas 11 biswas was again recorded in the name of Kuraru, Mehta and Gauri Shankar, sons of Kishori and Mehta Din and Chhotey Lal, sons of Munni. But it is not stated what happened to the rest of the land which was included in No. 389 old khasra. The evidence of the patwari shows that old No. 246/1 khasra measuring 72 is now represented by No. 364 and old No. 246/2 measuring 74 is now represented by No. 365, and that at the settlement of 1319 Fasli Plot No. 364 khasra was recorded as an occupancy holding under the cultivation of the defendants without any rent being assessed thereon. It cannot be said in these circumstances that the defendants were in occupation of Plot No. 364 khasra initially without the consent of the landlords, and as held in *Kamta Prasad* v. *Panna Lal* (1) and *Sheogopal Pande* v. *Baldeo Singh* (2), S. 34 of the U. P. Tenancy Act has no application. That section refers to suits brought against persons, whose occupation began without the consent of the landlord. But that is not so here.

The learned counsel for the plaintiff-respondent, however, contends that the word "land" as defined in the U. P. Tenancy Act means land let for agricultural purposes and his argument is that this land was never left for agricultural purposes and must, therefore, be deemed in law to have been occupied, i. e., brought under cultivation without the consent of the plaintiff. The complaint in other words is that the land, so held under a grove tenure and, therefore, not liable to rent, can, by reason of its having been brought under cultivation, become

(1) [1913] 35 All. 123 = 18 I. C. 575 = 11 A. L. J. 29.
(2) [1911] 8 A. L. J. 1087=12 I. C. 180.

now liable for the payment of rent. But before that matter can be decided it is necessary to ascertain when it was so brought under cultivation and what was the nature of the tenure under which it was held before that date. The lower appellate Court is, therefore, directed to determine after taking such additional evidence as the parties may adduce. (1) When was the land in dispute brought under cultivation ; (2) how long has it been held by the defendants or their predecessors-in-title and in what capacity and on what terms ?

Three months are allowed for the return of the findings. Ten days will be allowed for filing objections after the receipt of the findings.

[On return of findings by lower appellate Court the following judgment was delivered :]

The finding of the lower appellate Court on the issue remitted is in favour of the plaintiff-respondent To that finding no objection has been taken. The appeal is, therefore, dismissed with costs including fees in this Court on the higher scale.

Appeal dismissed.

★ 1925 ALLAHABAD 813

MEARS, C. J. AND MUKERJI, J.

Hazari Lal and *others*—Plaintiffs—Appellants.

v.

Ram Lal and *others*—Defendants—Respondents.

First Appeal No. 97 of 1922, Decided on 15th February 1925, from a decree of the Sub-J. of Shahjahanpur.

★ *Hindu Law—Joint family—Institution of partition suit, which was dismissed but not on merit does not remove presumption of all properties being acquired out of joint funds.*

A suit instituted by a member of a joint Hindu family for partition of the family property was dismissed by the Court on the ground that all the family properties had not been brought into the hotchpot. There was no subsequent division of the property by metes and bounds.

Held : that the presumption of jointness attached to all the properties, and unless it was established that any particular item was acquired with separate funds by any individual member, all the properties in the hands of the members were liable to be divided.

[P. 814, C. 2, P. 815, C. 1.]

G. W. Dillon—for Appellants.

Peary Lal Banerji, Uma Shanker Bajpai and *Durga Prasad*—for Respondents.

Mukerji, J.—These two connected appeals arise out of a suit for partition.

The parties are relations, and they are related in this way : Gobind Sahai had two sons, namely, the Defendant No. 1, Hazari Lal ; and Gur Sahai Mal, father of the Plaintiffs 1 to 3. The other plaintiffs are the sons of Plaintiffs 1 and 2. The defendants, other than Hazari Lal, Defendant No. 1, are the sons and grandsons of Hazari Lal.

The plaintiffs came into Court with the allegation that the family, consisting of all the parties, was still joint ; that the entire property was the joint property, the plaintiff's share being one half; and that owing to dissension in the family it was not possible for the parties to go on amicably. On these grounds the plaintiffs sought partition of the property.

The defence was that the family had already separated 30 years prior to the institution of the suit ; that although certain of the properties were still held jointly between the parties, certain other properties detailed in the written statement were their separate property and some were separate acquisitions of the defendants.

On these pleadings the learned Subordinate Judge framed several issues. One issue related to the status of the family. The other issues were concerned with the claim as to the separate property of the defendants. The suit succeeded except with respect to a small portion of the property, situate in the village of Khiria. This property was the subject-matter of Issue No. 5. The learned Subordinate Judge held that except some minor items in Khiria the rest of the property was joint family property. He made a preliminary decree and directed the Court Amin to effect an actual partition.

Both the parties have appealed, and Appeal No. 97 of 1922 is the defendants' appeal. Appeal No. 68 is the plaintiffs' appeal.

Although several points were taken in the memoranda of appeal only three questions require determination by this Court. The first question is one of status. The second question is about the property in Khiria, and the third question relates to certain indigo cakes claimed as joint property.

The presumption of Hindu Law is that the family, constituted as the parties are, is joint. As already stated Defendant No. 1, Hazari Lal, is the paternal uncle of the Plaintiffs Nos. 1 and 2. The nearness of blood relationship would indicate that the family is joint, until the contrary is established. The evidence, however, goes to show that there was a disruption in the family a few years before the institution of the suit. It appears that in 1923 a certain Suit No. 218 of that year, was instituted by Hazari Lal against his three nephews for division of the family property with the allegation that the family had divided in law about 25 years previous to the institution of the suit, but the business and properties were held jointly by way of partnership. The suit was met with the plea that the family was still joint. A further plea was taken that all the joint family properties had not been made the subject-matter of the suit, and that therefore, a suit for partition was not maintainable. The learned Subordinate Judge who heard the suit, came to the conclusion that the family was still joint, He, however, declined to make a decree for partition on the ground that all the family properties had not been brought into the hotchpot. The suit was accordingly dismissed.

It has been argued on behalf of the defendants that the institution of this suit operated as a disruption of the family, and the joint character of the family ceased to exist. This is in accordance with the Privy Council case of *Girja Bai* v. *Shadashiva Dhundiraj* (1). The plaint on which this suit was based has not been filed, and it would be material to find out what was the intention of the plaintiff Hazari Lal, in filing that suit, in order to see whether he wanted a disruption of the family. But although the plaint is not here it is clear from the judgment that Hazari Lal intended that the joint character of the family, if it existed, should disappear. Along with this evidence we have the evidence of witnesses of the parties and the statement of the plaintiff Ram Lal himself, to show that shortly after 1913 the parties began to make separate collections. At page 105 of our printed record a previous statement of Ram Lal is printed in it. Ram Lal said that from 1321 Fasli he began to make collections separately. Up to 1320 Fasli collections were made jointly. Several witnesses examined on behalf of the defendants establish the fact that only a few years before the institution of this suit (in 1919) the parties began to make collections separately. Gouri Shanker, the Income-tax clerk, produced his account books and showed that up to 1914-1915 the income-tax was paid jointly. The parties were separately assessed to income-tax for the first time in the year 1916-17. The witness Ram Singh said that he owed a debt to the family, and the parties agreed that he should pay them each one-half. The last instalment was paid on the 20th of July 1920. There were seven instalments, and this would go to show that in 1913, or a year later, the parties agreed to make collections separately. It is needless to multiply instances. The statement of Ram Lal, in our opinion, clinches the matter, and we must take it that shortly after 1913 the parties agreed to make collections separately. This agreement would create a separation in the family.

Thus we disagree with the decision of the Court below and hold that the family was not joint at the date of the suit, but that it had separated either in 1913 or about a year later.

As remarked in the argument by Mr. Bajpai the question of jointness or separation at the date of the suit is of little importance in this particular case. It has been established beyond doubt that there was no actual partition in the family. An attempt was made to prove that after the institution of this suit of 1913 a sort of arbitration took place: people gathered together and divided the property. But the evidence was so meagre that the learned counsel for the defendant-appellant made no attempt to draw our attention to that evidence. The position, therefore, is that although the family separated in law in 1913 or thereabout, there was no division of the family property. It would follow that unless it was established that any particular item of property was acquired with separate funds by any individual party, all the property in the hands of the par-

(1) [1916] 43 Cal. 1031=43 I. A. 151=20 C. W. N. 1085=14 A. L. J. 822=20 M. L. T. 78=12 N. L. R. 113=(1916) 2 M. W. N. 65=18 Bom. L. R. 621=4 L. W. 114=24 C. L. J. 297=37 I. C. 321=31 M. L. J. 455 (P. C.)

ties would be liable to be divided in equal shares.

Now we come to two other issues raised in the appeal. The property in Khiria consists of 3/4ths of admittedly joint property, and 1/4th of property in dispute in appeal. The defendants' case is that 6 out of 24 shares were acquired on the 8th of September 1913 by Hazari Lal. The learned Subordinate Judge thought that the very fact that the property was purchased two days after the institution of the suit of 1913 established it beyond doubt that this property had been acquired out of separate funds. The evidence, however, establishes that up to this time the parties had not begun to make separate collections. The presumption of jointness would, therefore, attach to this property. The fact that Hazari Lal was the head or manager of the family and kept the funds has been satisfactorily established by the plaintiffs' witnesses Lakhan Singh, Zalim Singh and Shama Charan. The very fact that he was the eldest member of the family and elder in point of relationship as well would point to him as the head of the family. The acquisition having been made by him, we are unable to agree with the learned Subordinate Judge that we should regard this property as his acquisition. To this extent, therefore, the plaintiffs' appeal must be allowed.

While on the question of the property in Khiria it is to be pointed out that by an oversight on the part of the office the decree that was prepared gave the entire property in Khiria to the defendants. The decree will have to be corrected in this office and the whole of the property will now be divided.

The indigo cakes are claimed as joint family property. In the plaint it is stated that 10 maunds of indigo were sent to Calcutta for sale and the price is given at Rs. 2,100. The question is whether this indigo was manufactured with joint funds or with separate funds. Hazari Lal, as already stated, was the head of the family, and he managed the family property. In the circumstances, unless there is something clear to show that the indigo was manufactured with his separate funds, it will be difficult for us to differ from the Court below and award it to the defendants alone. The evidence of Shama Charan, a witness examined on behalf of the plaintiffs, was pointed out as indicating that the produce of the factory was the sole property of the defendants. But the witness does not say anything like that, but simply says that there were two factories and the management of one of these factories was in the hands of Sita Ram and the management of the other in the hands of Sri Ram the latter being Hazari Lal's son and the former being one of the plaintiffs.

The result is that the defendants' appeal fails entirely and is hereby dismissed with costs which will include fees on the higher scale. The appeal of the plaintiffs succeeds wholly. As regards the costs of the plaintiffs, it appears that the defendants never disputed the fact that the decree of the Court below awarding 18 shares in Khiria was wrong. The plaintiffs were required to appeal so far as six shares were concerned. The decree in the Court below might have been set right by an application for amendment made to that Court. In the circumstanes we allow the plaintiffs only one-half of the costs of Appeal No. 68 of 1922.

1925 ALLAHABAD 815

MUKERJI, J.

Kharbar—Defendant—Appellant.

v.

Abdul Raoof and *others*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 746 of 1923, Decided on 26th November 1924, from a decree of the Dt. J., Allahabad, D/- 30th January 1923.

Agra Tenancy Act (2 *of* 1901), *S.* 83—*Tenant can surrender without landlord's consent by simply giving up lands—Liability for rent applies only to first year of non-occupation.*

A tenant may surrender his holding by actually giving up the lands. His liability in the circumstances would only amount to a payment of the rent for the first year of his non-occupation.

Ajudhia Nath—for Appellant.

M. Waliullah and *Sakhawat Ali*—for Respondents.

Judgment.—This appeal arises out of a suit for arrears of rent for the years 1325, 1326 and 1327 Faslis.

The plaintiffs claimed as mortgagees of a certain ex-proprietary holding. They sued two persons, the appellant Kharbar and one Baldeo on the allegation that they were the plaintiffs' tenants. Kharbar pleaded that he had ceased to be a tenant,

that he was ejected by Baldeo several years before the institution of the suit; and that Baldeo alone was in possession. Baldeo pleaded that he was not a tenant of the plaintiffs and that he had purchased the lands from the original tenants. He denied that the plaintiffs were mortgagees. He asserted his own possession and denied that Kharbar was in possession.

The learned Judge of the lower appellate Court found the following facts :

He found that Baldeo purchased the holding from the original mortgagors; that Baldeo obtained possession in 1323 Fasli and has been in possession since ; that Kharbar is not in possession ; and that Baldeo is not the plaintiffs' tenant. The learned Judge made a casual remark that Kharbar was in collusion with Baldeo. There was no allegation on either side to that effect, nor does there appear any evidence on the point. At another place the learned Judge opined that the possession of Baldeo was that of a sub tenant of Kharbar. This is an opinion on a point of law and I do not accept it as a finding of fact. The learned Judge agreed with the first Court as to the liability of Kharbar for rent on the ground that Kharbar not having served a notice of surrender he continued to be liable to pay rent.

The question is whether on the findings of the learned Judge the liability of Kharbar for the rent of the years 1325 to 1327 Fasli can be established in law.

Kharbar does not hold under any written lease. He did not hold for any particular term. He was only a sub-tenant from year to year. He could sever his connexion with the land by surrender or by an agreement with the landholder. In my opinion it is not necessary for a surrender, to be binding on the landholder, to be made with the consent of the landholder. S. 83, Cl. (1) of the Tenancy Act says that a tenant who is not bound by a lease or other agreement for a fixed period may, at the end of any agricultural year, surrender his holding. There is a proviso to the effect that he shall not surrender only a portion of his holding. The second clause of the section says that notwithstanding such surrender, he shall be bound to pay the rent of the following agricultural year if he has failed to give a notice of the intended surrender on the first day of April of the current year. This would imply that the penalty of not giving a notice is this that the tenant would pay the rent for one whole year following the date of his surrender. There is no other penalty. The second clause further implies that there may be a surrender without the consent of the land holder. This indication afforded by Cl. (2) of S. 83 is strengthened by Cl. (3) of the same section. That clause says that nothing in S. 83 shall affect any arrangement by which a tenant and his landholder may agree to the surrender of the whole or any portion of a holding. Here alone comes the question of surrender with the consent of the landholder. My opinion, therefore, is that a tenant may surrender his holding by actually giving up the lands. His liability in the circumstances would only amount to a payment of the rent for the first year of his non-occupation.

Applying this law to the facts of the present case we find that the appellant ceased to be in possession of the holding for the first time in 1323 Fasli. There was a suit for arrears of rent against him for the years 1322-1323 Faslis and that suit was decreed. Under the law as propounded above the claim for 1323 Fasli was, it seems, rightly decreed. But there seems to be no authority for the proposition that the tenants' liability extends further and is unlimited in time although he may not be actually in possession. The plaintiffs had notice of the fact that Baldeo has been in possession of the land. In the suit for the rents of the year 1322-1323 Faslis the appellant pleaded that he was not in possession and that Baldeo had taken possession of the land. This is mentioned by the learned District Judge himself. Then there remains the fact that Baldeo was impleaded as a defendant by the plaintiffs for the simple reason that they could not get over the fact that Baldeo was in possession. In my opinion the plaintiffs could not shut their eyes to the facts and continue charging the appellant with rent.

I hold that the appellant is not liable to pay rent for the years in suit.

The appeal succeeds ; and it is hereby allowed and the suit of the plaintiffs-respondents is dismissed with costs throughout as against the appellant.

Appeal allowed.

1925 ALLAHABAD 817

MUKERJI, J.

Muhammad Abdullah Khan—Plaintiff —Appellant.

v.

Kundan—Defendant--Respondent.

Second Appeal No. 1077 of 1923, Decided on 25th February 1925, against a decree of the Dt. J., Bulandshahr, D/- 6th April 1923.

Agra Tenancy Act, (2 *of* 1901), S. 194—*Lambardar is prima facie entitled to recover rent on behalf of all cosharers—If not so entitled, he cannot recover his share alone—Cosharers.*

In the absence of a clear indication to the contrary the lambardar is the person who would be entitled to recover the rent; 42 *All.* 414, *Foll.*

Where the record-of-rights gives the lambardar a right to recover the rent, the lambardar is the appointed agent of the cosharers within the meaning of S. 194. If the lambardar is not entitled to bring a suit for arrears of rent he cannot sue to recover only his share of it.

[P. 817 C. 2]

M. A. Aziz—for Appellant.

Panna Lal—for Respondent.

Judgment.—This appeal arises out of a suit for arrears of rent claimed by the lambardar in respect of the years Rabi 1324 to Kharif 1327 F. The sole question for determination is whether the lambardar is entitled to recover.

The history of the village has been given in detail by the learned Assistant Collector who decreed the suit. The learned District Judge, in his appellate judgment, writes that all the facts found by the learned Assistant Collector in his judgment were accepted before him. Indeed, the question is only one of inference to be drawn from admitted facts.

The admitted facts appear to be these The mahal Abu Bakar Khan was divided by an imperfect partition into two pattis, viz., patti Khudaija Bibi and patti Abdullah Khan. The plaintiff-appellant was recorded as the lambardar in the divided mahal as he had already been the lambardar of the undivided mahal. In the patti Khudaija Bibi, Khuadija Bibi herself had been making collections on behalf of herself and other cosharers. Abdullah Khan had no share in patti Khudaija Bibi. Khudaija Bibi collected rents up to the year 1324 F. Kharif. Thereafter, she having sold a large portion of her share to the defendants, ceased to collect rent. Abdullah Khan inherited a portion of the patti Khudaija Bibi from a cosharer. He came up on the scene and began to collect rent from tenants. So far as the present defendants are concerned they were sued by Abdullah Khan in the Settlement Court, for enhancement of rent. The rent was enhanced with effect from 1327 F. Abdullah Khan having brought the suit, it was contested on the ground that he had no right to recover. The defendants did not say that they would not pay rent to anybody and would appropriate it to themselves. But they said that they were paying rent to Khudaija Bibi and would pay rent to her alone.

The learned Assistant Collector found that, during the Settlement, a record-of-rights was prepared and the right to collect rent was expressly given to the lambardar in the patti of Khudaija Bibi. The other patti, it appears, belongs to Abdullah Khan in its entirety. The settlement took place in the course of the years 1324 to 1326 F. The Assistant Collector also found that the lambardar had been collecting rent from the other tenants of the patti. It has already been mentioned that the plaintiff-appellant successfully sued the defendants for enhancement of rent. Under these circumstances the question arose, whether the lambardar was entitled to recover rent or not.

It has been held in this Court that in the absence of a clear indication to the contrary, the lambardar is the person who would be entitled to recover the rent: vide *Mojiz Fatima* v. *Ali Akbar* (1). That is the usual law. In this particular case, the record-of-rights clearly gives the lambardar a right to recover the rent and thereby establishes the fact that the lambardar is the appointed agent of the cosharers within the meaning of S. 194 of the Tenancy Act.

The learned Judge has given the appellant a decree for his share only. This decree is entirely untenable. Either all the cosharers must join in bringing the suit or the lambardar alone should be entitled to bring it. If the lambardar is not entitled to bring a suit for arrears of rent he certainly cannot recover only his share of it.

(1) [1920] 42 All. 414=56 I. C. 112=18 A. L. J. 435.

I hold that, in the circumstances, and on the facts admitted, the appellant is entitled to recover the rent.

I allow the appeal, set aside the decree of the Court below, and restore that of the Court of first instance. The appellant will have his costs in this Court and in the Court below.

Appeal allowed.

1925 ALLAHABAD 818

MEARS, C. J. AND PIGGOTT, J.

Parsiddhan Rai and *another*—Appellants.

v.

Dhaneshar Rai—Respondent.

Letters Patent Appeal No. 179 of 1923, Decided on 15th January 1925, against a judgment of Stuart, J., D/- 26th November 1923.

(*a*) *U. P. Land Revenue Act*, (3 *of* 1901), *Ss.* 210 (2) *and S.* 110—*Assistant Collector refusing to entertain objection to partition on the ground of its being made not when notice was issued but when partition proceedings had commenced—Appeal lies to Collector.*

When the formal notice of the application for partition was issued, no objection was taken by the opposite party; but when the Assistant Collector sat down to prepare the partition proceeding under S. 114 of the Land Revenue Act a very definite and specific objection was presented to him. The Assistant Collector in the first instance held that this was an objection which ought to have been presented under S. 110 of the Land Revenue Act; and he refused to entertain it at the stage which had been reached.

Held: that against this order an appeal lay to the Collector under S. 210. The question whether a person should be permitted to raise the objection when he allowed the period limited by the proclamation under S. 110 of the Land Revenue Act to expire is essentially one for the revenue Courts to decide.

Where the nature of the application for partition had not put applicant's opponents on their guard as to the object which he was really pursuing in presenting that application and where injustice would be done if the objection were not heard on the merits.

Held: that the Collector had done very sensibly in directing the objection to be entertained notwithstanding it was not raised within the period limited by the proclamation under S. 110.

[P. 818, C. 1; P. 819, C. 2]

(*b*) *U. P. Land Revenue Act* (3 *of* 1901), *S.* 114—*Objector alleging private partition wherein he became owner in severalty—Question is one of proprietary title.*

When an objector says that he is himself not merely holding in severalty for convenience of enjoyment a portion of the lands appertaining to a certain mahal but is by virtue of a private partition the owner of the same in severalty, he is raising a question of proprietary title 38 *All.* 115. *Fell.* [P. 819 C. 2]

K Verma—for Appellants.

P. L. Banerji—for Respondent.

Judgment.—This appeal arises out of certain proceedings for the partition of a mahal. The applicant for partition was Dhaneshar Rai. There were two other cosharers, Parsidhan Rai and a certain lady, who held jointly. The two parties were in a sense proprietors of the mahal in equal shares. When the formal notice of the application for partition was issued no objection was taken by the opposite party; but when the Assistant Collector sat down to prepare the partition proceeding under S. 114 of the Land Revenue Act a very definite and specific petition of objection was presented to him. Parsidhan Rai on behalf of himself and his cosharer took this point. He said that there had been by mutual consent an informal partition a great many years ago, of a considerable portion of the lands of the mahal. He added that this partition had since been recognized in the revenue records, where the lands of the mahal were now recorded as falling into three distinct pattis: of one patti Dhaneshar Rai was the owner; of the other he (Parsidhan Rai) himself with his coparcener was owners; and the third was the shamilat patti consisting of the joint lands which alone remained to be divided between the parties. He said that when he received the notice of Dhaneshar Rai's application for partition, it never occurred to him that it was anything but an application for the separation of the shamilat patti (or joint lands) into two equal shares that he now wished to ask the Assistant Collector so to draw up the partition proceeding as to safeguard the rights to himself and his coparcener under the older partition by a mutual consent. Obviously what he wanted was that two mahals might be formed as desired by Dhaneshar Rai, that the lands respectively held in severalty by the two parties should be assigned to their respective mahals, and that the remaining joint lands, that is to say, those shown in the revenue records as belonging to the patti shamilat should be divided equally. To this Dhaneshar Rai's objection was that, while he had no objection to the lands enjoyed in severalty

by the parties being assigned to their respective mahals he wanted an enquiry into the area and value of the lands so held in severalty, maintaining that there would be found to be a deficiency in his lot, and he desired the shamilat patti to be divided, not into two equal shares, but in such a manner as to make up any deficiency in value which might be found to exist between his patti and the patti of his opponents. The Assistant Collector in the first instance held that this was an objection which ought to have been presented under S. 110 of the Land Revenue Act; and he refused to entertain it at the stage which had been reached, namely, in connexion with the preparation of the partition proceeding. Against this order there was an appeal to the Collector, and one of the points which has been strenuously argued before us to-day is that this appeal was incompetent. The question was not raised at the time; the point was argued out before the Collector and his decision was taken. We are quite satisfied that an appeal lay to the Collector under S. 210 of the Land Revenue Act. Clause (2) of that section seems to us to set the matter beyond dispute. The Collector held that the Assistant Collector had been wrong in refusing to entertain Parsidhan Rai's objection, and sent it back to him. The Assistant Collector then, having taken cognizance of the matter, held that he had before him an objection no matter how presented which did raise a question of proprietary title. He proceeded to consider whether he was to refer the parties to the civil Court, or whether he would decide the question himself. He expressly recorded his determination to proceed under Cl. (c) of sub S. (1) of S. 111 of the Land Revenue Act and to enquire into the merits of the objection himself. Having done so, he found clearly on the facts in favour of Parsidhan Rai, and he passed an order which gave effect to this finding. Against this Dhaneshar Rai appealed to the District Judge. The District Judge considered his appeal on the merits and affirmed the order of the Assistant Collector. There was a second appeal to this Court, and there Dhaneshar Rai raised the point that the original order of the Assistant Collector, refusing to entertain Parsidhan Rai's objection, was an order which should have been appealed from, not to the Collector, but to the District Judge. The learned Judge of this Court held that no question of proprietary title had been raised by Parsidhan Rai's objection. From this he went to hold that no appeal ought ever to have reached the civil Courts at all. On these findings he passed an order which purports to allow Dhaneshar Rai's appeal and which sends the record back to the Court of the Assistant Collector not with any imperative directions, for, according to the view taken by the learned Judge of this Court, he was incompetent to issue such directions, but with certain advice as to the course now to be followed. The view of the learned single Judge of this Court that no question of proprietary title was raised by Parsidhan Rai's objection is contrary to a decision of two Judges in the case of *Ram Narain* v. *Jagan Nath* (1). It seems to us that, when Parsidhan Rai said that he was himself, not merely holding in severalty for convenience of enjoyment a portion of the lands appertaining to a certain mahal, but was by virtue of private partition the owner of the same in severalty, along with his coparcener Mt. Sahodra Kunwar and that Dhaneshar Rai hed no interest whatsoever in the lands held by the other two under this private partition, he was raising a question of proprietary title. The appeal to the Court of the District Judge was, in our opinion, a competent appeal. The question whether Parsidhan Rai should have been permitted to raise the point, when he allowed the period limited by the proclamation under S. 110 of the Land Revenue Act to expire, was essentially one for the revenue Courts to decide. The Collector seems to us to have dealt with the matter very sensibly. He was clearly of opinion that the nature of Dhaneshar Rai's application for partition had not put his opponents on their guard as to the object which he was really pursuing in presenting that application, and that injustice would be done if Parsidhan Rai's objection were not heard on the merits. He was further of opinion, and we agree with him, that the wording of S. 114 of the Land Revenue Act was wide enough to admit of the Assistant Collector's entertaining the questions raised by Parsidhan Rai's petition and going into them. In our opinion the Collector, the Assistant Collector after the order of remand, and the learned

(1) [1916] 38 All. 115=32 I. C. 184=14 A. L. J. 23.

District Judge in first appeal handled this matter correctly, in the interests of justice and in accordance with the law on the subject. We set aside the decree of the learned Judge of this Court and restore that of the lower appellate Court. Parsidhan Rai and Mt. Sahodra Kunwar, the appellants in the present appeal, are entitled to their costs of both hearings in this Court.

Appeal allowed.

1925 ALLAHABAD 820

SULAIMAN, J.

Muneshar Tewari and *another*—Defendants—Appellants.

v.

Ram Narain Tewari—Plaintiff—Respondent.

Second Appeal No. 622 of 1923, Decided on 21st November 1924, from a decree of the Dt. J., Azamgar, D/- 19th January 1923.

(a) Hindu Law—Joint family—All property belonging to family is presumed to be joint.

A property can be presumed to be joint, when all the other property is joint and the family is also joint. [P 820, C 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 233 (k)—Hindu joint family—Family continuing joint—But some properties recorded in names of some members alone—S. 233 (k) does not preclude claim to these items as being joint.

The mere fact that the names of some of the members of the family were recorded would not show that those members owned the khatas exclusively. Where the family is joint it is immaterial whose name is actually recorded. The pattis must be deemed to be allotted to the family and not the individual members of it in whose names the pattis are recorded. When the family is joint and the partition proceedings are looked after by the head of the family, there is really no conflict of interest between the individual members of the family, their rights, therefore, cannot be said to be in any way prejudiced by the result of the partition. S. 233 (k), therefore, cannot bar a claim that the properties which were the subject-matter of the revenue partition are really joint family property: 1922 *All.* 158, *Dist.* [P 821, C 1]

K. N. Laghate—for Appellants.

P. L. Banerji—for Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for a declaration that the properties in dispute were the joint and family properties of the parties to the suit and that they were in joint possession of them. There was an alternative relief in the plaint that if the Court found that the plaintiff was not in possession a decree awarding him joint possession should be passed.

The Court of first instance gave the plaintiff a decree for joint possession and also specified his share as being half. The claim with regard to certain lands in certain tenancy in Jalalpur was, however, dismissed. On appeal the learned District Judge has decreed the claim in respect of the entire properties in suit and has declared that the respondent's share is half in those properties.

Two points have been urged by the learned vakil for the appellants. The first is that the finding of the Court below, with regard to the tenancy in Jalalpur is based on mere assumption and should not be upheld; and the second is that the claim is barred by S. 233 (k) of the Land Revenue Act.

The findings of the learned District Judge are that the two branches of Hanuman Tewari and Ram Harakh (the ancestors of the parties) never separated; that Ram Harakh was the head of the family, and that the properties in suit were acquired by and in the name of Ram Harakh for the benefit of himself, his sons and his nephew Nandgopal. With regard to the tenancy in Jalalpur he has specifically said that the family being joint and the residential house not being divided, the acquisition of the tenancy lands must be taken to have been for the family and the whole family consisting of Ram Harakh's sons and his nephew. On these findings he held that the entire property was joint family property and liable to be partitioned if necessary. I am of opinion that this conclusion cannot now be challenged in second appeal. It was open to the learned Judge to base his finding on the general presumption of jointness of all properties when all the other property was joint and the family was also joint.

With regard to the plea of S. 233 (k) I must say that if one cares to look to the language of S. 233 (k) literally it may seem difficult to say that the present suit is in any way an attempt to affect the partition by the revenue Court. Even if a declaration or joint possession is to be granted to the plaintiff the imperfect partition would remain as before and there would be no alteration in it. I am, however, aware of the rulings of this Court in which a stricter view of the section has been taken, and the questions

of title, if either raised and decided, or even if not raised in the partition Court, have not been allowed to be raised again in the civil Court. I am bound by the ruling in the case of *Ram Subhag Singh* v. *Dip Narain Singh* (1) and the cases referred to therein.

In this view the reasoning of the Courts below, by which they have held that the provisions of S. 233 (k) were inapplicable, would not be sound. But, in my opinion, the case is distinguishable from the previous cases on the following two grounds. In the first place the evidence with regard to the circumstances under which the partition took place is very meagre and it is difficult to say how the partition was brought about and in what way the position of the parties has been altered. In the second place the finding of the lower appellate Court is that the family is still joint and undivided and, therefore, was so at the time when the partition took place. All that happened at the partition was that certain khatas which had been entered in the names of the defendants were converted into a separate patti standing in their names, whereas certain other khatas, in which the names of the parties were jointly recorded, were converted into other pattis in their joint names. But the mere fact that the names of some of the members of the family were recorded would not show that those members owned those khatas exclusively. The family being joint it was immaterial whose name was actually recorded. Both these pattis must be deemed to have been allotted to the family and not the individual members of it in whose names the pattis were recorded. When the family was joint and, according to the first Court, the partition proceedings were looked after by the head of the family, there was really no conflict of interest between the individual members of the family : their rights, therefore, cannot be said to be in any way prejudiced by the result of the partition. Both these pattis, no matter in whose names they stand, must be deemed to be joint family property which is still undivided. The claim, therefore, is not barred by S. 233 (k). I accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 1922 All. 158=44 All. 74=19 A. L. J. 865.

1925 ALLAHABAD 821

MUKERJI, J.

Samir Khan and *others*—Defendants—Appellants.

v.

Basi Ram and *others*—Plaintiffs—Respondents.

Second Appeal No. 1425 of 1924, Decided on 8th January 1925, against a decree of the Sub-J., Moradabad, D/- 16th August 1924.

Prov. Sm. C. C. Act (1887), *S. 23—Suit based on contract—Question of title raised in defence—Suit does not cease to be small cause.*

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up. A suit on an allegation of pure contract is cognizable by a Court of Small Causes. But when an intricate question of title to property arises, a Court of Small Causes is authorized by S. 23 of the Act to return the plaint for presentation to a regular Court. But from this it does not follow that merely because a question of title is raised in defence the character of the suit is changed. 9 *All.* 591 and 6 *C. L. J.* 218, *Dist.* [P 822 C 1]

Hamid Hasan—for Appellants.

Judgment.—No second appeal lies in this case. The suit was brought by the plaintiffs-respondents on the allegation that they were the owners of certain groves, that they had sold the crop of the groves for a particular season to the defendants-appellants for a sum of Rs. 50, that they had paid Re. 1 as earnest money and had failed to pay the balance.

The suit succeeded partly in the Court of first instance and wholly in the Court of first appeal.

The defence was that the defendants were the occupancy tenants of the land and the grove, and they never purchased any crop.

The first question that struck me at hearing of the appeal was that no second appeal lay to this Court. The learned counsel for the appellants has relied on two cases : one decided by this Court and the other decided by the Calcutta High Court. The case of this Court was that of *Churaman* v. *Balli* (1). In this case the suit was for recovery of Rs. 25 per year as Malikana and the decision of the Court was that such a suit was not a suit cognizable by the Mofussil Small Cause Courts Act of 1865. That Act of 1865 is no longer in force and the Full

(1) [1887] 9 All. 591=(1887) A. W. N. 121.

Bench ruling was given on the language of that Act. The case of the Calcutta High Court was that of *Sitab Rai* v. *Dubal Nagesia* (2). The suit, as it was brought, contained a prayer for a declaration that a certain forest was a reserve forest. That itself would exempt the suit from the jurisdiction of a Court of Small Causes. The head-note shows that their Lordships laid down that no second appeal lay under S. 586 of the Civil P. C., where the original suit was of the nature cognizable in a Court of Small Causes.

The question whether a suit is cognizable by a Court of Small Causes or not must depend on the nature of the suit and not on the nature of the defence set up. Under S. 15 of the Provincial Small Cause Courts Act, 1887, all suits of a civil nature of value not exceeding Rs. 500 would be cognizable by a Court of Small Causes provided they are not specifically exempted from the cognizance of the Court. No clause in the second Schedule has been pointed out to me as showing that a suit of the nature of the present one was exempted from the cognizance of the Court of Small Causes. The suit was based on an allegation of pure contract and it was therefore, cognizable by a Court of Small Causes. It is true that when an intricate question of title to property arises, a Court of Small Causes is authorized by S. 23 of the Provincial Small Causes Courts Act to return the plaint for presentation to a regular Court. But from this it does not follow that merely becaue a question of title is raised in defence the character of the suit is changed.

Section 102 of the Civil P. C., is clear in its terms and lays down that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes where the amount or value of the subject-matter does not exceed Rs. 500. There is no proviso attached to the section such as would exempt cases, in which a question of title has been raised by the defendant, from the operation of the section.

I have no doubt, therefore, that no second appeal lies and the present appeal is accordingly dismissed under O. 51, R. 11, Civil P. C.

Appeal dismissed.

(2) [1907] 6 C. L. J. 218.

1925 ALLAHABAD 822

STUART AND DANIELS, JJ.

Hulasi and *another*—Defendants—Appellants.

v.

Baba Narain Das and *another*—Plaintiffs—Respondents.

Second Appeal No. 669 of 1923, Decided on 20th April 1925, from a decree of the Addl. Dist. J. of Bareilly.

(a) *Limitation Act, S.* 10—*Applicability.*

Section 10 does not apply to a suit against assigns for valuable consideration.

Peary Lal Banerji and *Saila Nath Mukerji*—for Appellants.

Uma Shankar Bajpai—for Respondents.

Daniels, J.—This appeal arises out of a suit by Mahant Baba Narain Das, to recover waqf property alienated in the time of his predecessor, Baba Bajrang Das. The sole question argued before us is one of limitation. There were a number of different transfers, some made by Bajrang Das himself and some by two persons, Ram Dayal and Gulab, who are said to have been close intimates of Bajrang Das and to have effected certain sales and mortgages of the waqf property with his permission. The various transfers that have taken place are all set out in the judgment of the Court below. All of them except one are within twelve years of the date of suit, which was 7th June 1919. The first transfer was a usufructuary mortgage of property including the shop in suit by Ram Dayal and Gulab in favour of Inayatullah. Inayatullah's successor-in-title was Sewa Ram, and the defendants are the successors-in-title of the latter. On the 26th of June 1907, within 12 years of suit, this mortgage was redeemed by Ram Dayal and Gulab by the execution of a sale-deed of property other than the property in suit.

The learned Judge of the Court below has decreed the suit on the ground that S. 10 of the Limitation Act applies and that there is no period of limitation.

The learned Judge cannot have read carefully the section on which he relies, for S. 10 does not apply to a suit against assigns for valuable consideration such as the defendants are. The respondent,

however, supports the decree of the Court below on the ground that the suit is within the period of twelve years' limitation under Art. 144, which article the Privy Council declared to be applicable in such cases by their decision in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1). The appellants contend that they are entitled to date their possession from the (*sic*) August 1906. The answer to this contention is that their mortgagee possession under the deed of 1906 was put an end to by the sale-deed of 26th June 1907.

The separate usufructuary mortgage of the same shop executed on 26th June 1907 is the real starting point for limitation in this case; and that mortgage was executed within twelve years of the suit. We, therefore, uphold the decree of the Court below, though on a different ground, and dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 1922 P. C. 123=44 Mad. 831=48 I. A. 302=41 M. L. J. 346=(1921) M. W. N. 449 =30 M. L. T. 66=15 M. L. W. 78=26 C. W. N. 537=20 A. L. J. 497=3 P. L. T. 245=24 Bom. L. R. 629 (P. C.).

★ 1925 ALLAHABAD 823

STUART, J.

Sri Newas--Applicant.

v.

E. I. R. Co. and *another*--Opposite Party.

Civil Revision No. 25 of 1925, Decided on 1st April 1925, from an order of the Small Cause Court Judge of Khurja.

★ (*a*) *Railways Act, S. 72—Railway Company undertaking to carry goods to a station on foreign line is liable for over-charge demanded from consignee.*

Where a Railway Company undertakes to carry goods from a station on its Railway to a station on another Railway there is only one contract for the whole distance and the Company is liable for the over-charge wrongfully demanded from the consignee by the foreign Railway. [P 823, C. 2]

(*b*) *Civil P. C., S. 20—Suit for refund of over-charge demanded by a foreign Railway—Cause of action partly arises at place where goods were consigned.*

Where the suit is for refund of over-charge damanded from a consignee by a foreign Railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has juridiction to try the suit. [P. 823, C. 2]

Panna Lal—for Applicant.

Ladli Prasad Zutshi—for Opposite Party.

Stuart, J.--The decision of the Full Bench in *Channi Lal* v. *Nizam's Guaranteed State Railway Company Limited* (1), is authority for the proposition that there was one contract with the East Indian Railway Company who were liable for the over charge (if any) wrongfully demanded from the consignees.

The next question is as to the interpretation of the words " within the local limits of whose jurisdiction the cause of action wholly or in part arises " [Code of Civil Procedure S. 20 (c)] I adopt the interpretation adopted by Knox, J., in *East Indian Railway Company* v. *Binda* (2). I am of opinion that, if the suit be regarded as a suit for compensation for breach of contract, the cause of action arose in part at Khurja--the place where the contract was made.

The plaintiff has come into Court demanding relief for a breach of contract and such being the case, I consider that the Khurja Small Cause Court has jurisdiction. It will, of course, be open to the defendant Company to repel this plea, if they can, in the course of trial and to establish, if they can that there was no breach of contract and that the cause of action, if any, is based upon an alleged tort committed in Bombay. If they succeed in this plea the question of jurisdiction will be affected. This point does not however, arise at this stage. The plaintiff has chosen to go into Court alleging a cause of action founded upon a breach of contract. He is at perfect liberty to frame his plea in this manner and on a plea framed in this manner the Khurja Court has jurisdiction.

I accordingly set aside the order of the Small Cause Court Judge and direct him to receive the plaint again, restore it to its original number and decide the suit according to law. Costs of this application will abide the result.

Appeal allowed.

(1) [1907] 29 All. 228=2 M. L. T. 42=(1907) A. W. N. 21=4 A. L. J. 80.
(2) [1915] 13 A. L. J. 66=26 I. C. 620.

1925 ALLAHABAD 824

MUKERJI, J.

Lala Birj Lal—Defendant—Appellant

v.

Choudhuri Muhammad Ibrahim—Plaintiff—Respondent.

Second Appeal No. 1500 of 1924, Decided on 23rd December 1924, against a decree of the Dt. J., Budaun, D/- 30th May 1924.

Agra Tenancy Act (2 of 1901), S. 193, Cl. (g)—Sub-tenant of ex-proprietary tenant paying off rent decree against ex-proprietary tenant—Sub-tenant cannot plead payment as set off in suit for rent against himself by ex-proprietary tenant.

Under S. 193, Cl. (g) only an unsatisfied decree held by a defendant can be pleaded by way of a set-off. Hence where a sub-tenant under an ex-proprietary tenant paid off a rent decree against the exproprietary tenant, he (the sub-tenant) cannot plead the payment as a set off in a suit against himself for rent by the ex-proprietary tenant. [P 824 C 2]

Harnandan Prasad—for Appellant.

Judgment.—The appellant in this case has my full sympathy, but I am unable to help him.

It appears that the respondent's father, who was an ex-proprietary tenant, sub-let the holding to the appellant. The respondent brought the suit, out of which this appeal has arisen, for recovery of arrears of rent for three years. The defendant pleaded payment of five items and his plea of payment succeeded in the Court of first instance. On appeal the learned District Judge has allowed only one item and has disallowed the remaining four. So far as the question of fact is involved, viz., whether the appellant has succeeded in proving payment, this Court cannot entertain it. The only question before this Court is whether the two sums of Rs. 75 and Rs. 144-5, which were admittedly expended by the appellant, should have been given credit for.

The above-mentioned two items were paid in this way. The zamindar held decrees for rent against the ex-proprietary tenant. The non-payment of the decrees would have involved the ejectment not only of the ex-proprietary tenant, but also of the appellant. The appellant says that he, having paid these two items in order to satisfy the decree held by the zamindar, was entitled to claim a set off against the rent payable by himself. This would be so but for the provision of S. 193, Cl. (g) of the Tenancy Act. Under that provision of law only an unsatisfied decree held by a defendant can be pleaded by way of a set-off. It has been urged that having satisfied the decree held by the zamindar the defendant was placed in the same position as the zamindar himself and was thereby entitled to claim a set off. In my opinion it was with the idea of simplifying procedure in rent cases that the enactment viz., Cl. (g), S. 193, of the Tenancy Act was drafted. Whatever be the reason for the rule the rule itself is clear, and it is only a decree held by the defendant himself that can be pleaded and not a payment made under the circumstances of this case.

The appeal fails and it is hereby dismissed under O. 41, R. 11, Civil. P. C.

Appeal dismissed.

KASHMIR UNIVERSITY
... 17713 ...
... 14-11-80